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GEO. H. ETHRIDGE.<sup>8</sup>

<sup>1</sup> Died March 5, 1917.

<sup>2</sup> Became Presiding Judge to succeed John Pelham.

<sup>3</sup> Elected January 15, 1917.

<sup>4</sup> Appointed March 24, 1917.

<sup>5</sup> Became Chief Justice January 2, 1917.

<sup>6</sup> Ceased to be Chief Justice January 2, 1917.

<sup>7</sup> Term expired January 1, 1917.

<sup>8</sup> Succeeded Clayton D. Potter January 1, 1917.

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# THE SOUTHERN REPORTER VOLUME 74

(73 Fla. 115)

## THOMAS v. STATE.

(Supreme Court of Florida. Jan. 26, 1917.  
Rehearing Denied Feb. 20, 1917.)

(*Syllabus by the Court.*)

### 1. CRIMINAL LAW $\S$ 80—ACCESSORY—PUNISHMENT—STATUTE.

Section 3178 of the General Statutes of 1906, providing that, "Whoever aids in the commission of a felony, or is accessory thereto, before the fact, by counseling, hiring, or otherwise procuring such felony to be committed, shall be punished in the same manner prescribed for the punishment of the principal felon," is in harmony with the common-law doctrine that the conviction of one charged with the crime of being an accessory before the fact must be of the same grade of offense as that of which the principal felon is convicted, and is in effect declaratory thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 103-111, 1384.]

### 2. HOMICIDE $\S$ 83—ACCESSORY BEFORE THE FACT—MANSLAUGHTER.

There can be an accessory before the fact in the crime of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 109.]

### 3. CRIMINAL LAW $\S$ 971(1)—MOTION IN ARREST—SUFFICIENCY OF EVIDENCE—STATUTE.

Section 4007 of the General Statutes of 1906, providing that, "In all criminal prosecutions hereafter begun in this state, if the defendant be found guilty of an offense lesser in degree, but included within the offense charged in the indictment or information, such verdict shall not be set aside by the court, upon the ground that such verdict is contrary to the evidence, if the evidence produced in such case would have supported a finding, or if such court would have sustained a verdict of guilty of the greater offense," is not applicable upon a motion in arrest of judgment, since such motion will not lie upon the ground that the evidence is not sufficient to support the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2463, 2465-2467.]

### 4. INDICTMENT AND INFORMATION $\S$ 189(8)—CONVICTION—MANSLAUGHTER.

A defendant tried under an indictment charging the crime of murder in the first degree may be convicted of the crime of manslaughter; such lower degree of homicide being embraced within the indictment charging the higher degree of murder.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 593.]

### 5. CRIMINAL LAW $\S$ 80—ACCESSORY BEFORE THE FACT—MANSLAUGHTER—STATUTE.

Under the provisions of section 3991 of the General Statutes of 1906, providing that, "Whenever any person indicted for a felony

shall on trial be acquitted by a verdict of part of the crime charged, and convicted on the residue thereof, such verdict may be received and recorded by the court; and thereupon any person charged shall be adjudged guilty of the crime, if any, which shall appear to the court to be substantially charged by the residue of such indictment or information, and shall be sentenced and punished accordingly," a person charged in an indictment with being an accessory before the fact in the crime of murder in the first degree may be convicted of being an accessory before the fact in the crime of manslaughter, though the principal felon has been convicted of the crime of murder in the first degree.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 103-111, 1384.]

### 6. CRIMINAL LAW $\S$ 1178—MOTION FOR NEW TRIAL—ASSIGNMENTS OF ERROR.

In treating an assignment of error based upon the overruling of a motion for a new trial, an appellate court will consider only such grounds of the motion as are argued before it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013.]

### 7. CRIMINAL LAW $\S$ 1160—APPEAL—MOTION FOR NEW TRIAL—EVIDENCE.

An appellate court should not grant a new trial upon the ground of the insufficiency of the evidence to sustain a verdict of guilty affirmed by the trial court if there is some substantial evidence of all the facts legally essential to support the verdict, and the whole evidence is such that the verdict may fairly have been found on it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084.]

### 8. CRIMINAL LAW $\S$ 1159(2)—APPEAL—CONVICTION—REVERSAL.

Where there is evidence from which all the elements of the crime may legally have been found or inferred, and it does not appear that the jury were not governed by the evidence, the verdict will not be disturbed by the appellate court on the ground of the insufficiency of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075.]

### 9. CRIMINAL LAW $\S$ 1159(4)—APPEAL—QUESTION OF FACT—VERDICT.

A verdict will not be set aside by an appellate court where the propriety of the verdict depends not upon the lack of evidence, but upon the credibility or weight of conflicting competent testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3077.]

### 10. WITNESSES $\S$ 44—COMPETENCY—BELIEF IN SUPREME BEING.

The common-law rule has been changed in this state, and belief neither in a Supreme Be-

$\S$  For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ing nor in divine punishment is requisite to the competency of a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 102, 103.]

**11. APPEAL AND ERROR §971(2)—COMPETENCY OF WITNESSES—PROVINCE OF COURT.**

It is the province and duty of the trial court to determine the competency of a witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3852.]

**12. WITNESSES §45(1)—COMPETENCY—UNDERSTANDING OF NATURE OF OATH.**

The mere fact that a witness states on cross-examination that she does not know the consequences nor how she could be punished if she testifies falsely does not render her incompetent on the ground that she does not understand the nature of an oath, especially when she exhibits as much intelligence on the witness stand as ordinary persons of her class.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 104.]

**13. CRIMINAL LAW §280(1), 1166½(5)—HARMLESS ERROR—SELECTION OF JURORS—PLEA IN ABATEMENT.**

Pleas in abatement setting up mere irregularities in the selection of jurors should be drawn with the greatest accuracy and precision, and must be certain to every intent. They must leave nothing to be supplied by intendment, and no supposable special answer unobviated. When it affirmatively appears that no possible injury could accrue to a defendant by an irregularity not amounting to a substantial departure from the requirements of law in the selection and impaneling of jurors, an objection thereto should not avail.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 645, 646, 3114.]

**Error to Circuit Court, Leon County; E. C. Love, Judge.**

Bertha Thomas was convicted of being an accessory before the fact to the commission of manslaughter, and she brings error. Judgment affirmed.

W. C. Hodges, of Tallahassee, and Fred H. Davis, Jr., of Tallahassee, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

**SHACKLEFORD, J.** An indictment was returned against Robert Hopps and Bertha Thomas, charging the former with the crime of murder in the first degree and the latter with the crime of accessory before the fact. A severance was granted, and Robert Hopps was first put upon trial, found guilty of murder in the first degree with a recommendation to the mercy of the court, and sentenced to confinement at hard labor in the state prison for the period of his natural life. On the following day after the conclusion of the trial of Robert Hopps Bertha Thomas was placed on trial, found guilty of being an "accessory before the fact to the commission of manslaughter," and sentenced to confinement at hard labor in the state prison for the period of 20 years. Bertha seeks relief here by a writ of error and has assigned five errors. We shall follow the course pursued by the counsel for the respective parties and

discuss the assignments in the order in which they are argued before us.

The first assignment so argued before us is the second, which is that "the court erred in overruling defendant's motion in arrest of judgment," which motion is as follows:

"Now comes, by her attorneys, the defendant, Bertha Thomas, who was indicted for being an accessory before the fact to murder in the first degree, and who was convicted of being an accessory before the fact to manslaughter, and moves the court to arrest judgment in said cause:

"First. Because the verdict of the jury is contrary to the law.

"Second. Because the verdict is contrary to the evidence.

"Third. Because no sentence could be imposed on the defendant under the circumstances of this case on such a verdict as was returned by the jury."

The only ground of this motion which is argued is the third. It is earnestly contended that, as the principal, Robert Hopps, had been convicted of the crime of murder in the first degree, Bertha Thomas, who was charged in the same indictment with the crime of being an accessory before the fact, could legally have been convicted only of the particular degree of crime of which her principal had been convicted, which was murder in the first degree. If this contention is well founded, then the motion in arrest of judgment should have been granted, in accordance with the principles announced in *Harris v. State*, 53 Fla. 37, 43 South. 311. It is therefore incumbent upon us to determine whether or not the contention is well founded. It seems to be conceded by the counsel for the state, and, we think, correctly, upon the authority of *Ex parte Bowen*, 25 Fla. 214, 6 South. 65, that Bertha Thomas was not indicted and convicted of substantive felony, as might have been done under section 3179 of the General Statutes of 1906, which is as follows:

"Whoever counsels, hires or otherwise procures a felony to be committed, may be indicted and convicted as an accessory before the fact, either with the principal felon or after his conviction, or may be indicted and convicted of substantive felony, whether the principal has or has not been convicted or is or is not amenable to justice; and in the last-mentioned case may be punished in the same manner as if convicted of being an accessory before the fact."

Also see the discussion in *Bowen v. State*, 25 Fla. 645, 6 South. 459; *Keech v. State*, 15 Fla. 591; *Montague v. State*, 17 Fla. 662.

[1] Having been indicted and tried for the crime of being an accessory before the fact, it is further contended that the common-law principle prevails, and that the defendant could have been convicted only of the crime of accessory before the fact to murder in the first degree, of which her principal had been previously convicted, and that the verdict finding her guilty of the crime of an "accessory before the fact to the commission of manslaughter" was illegal and unwarranted, and that no valid judgment could be entered

thereon. A number of authorities are cited as to this common-law principle, among which is 1 Wharton's Criminal Law (10th Ed.) § 230, wherein we find the following statement:

"At common law, the assumption is that the guilt of the perpetrator (principal) is imputable to the instigator (accessory before the fact), and hence the conviction of the latter is to depend on the conviction of the former, as a condition precedent, and must be of the same grade of offense."

This must be conceded to be a correct statement of the common-law doctrine; therefore there is no occasion to refer to or discuss the other authorities to the same effect which have been cited to us. We might further concede that section 3178 of the General Statutes of 1906 is in harmony with the common-law doctrine and in effect declaratory thereof. Such section is as follows:

"Whoever aids in the commission of a felony, or is accessory thereto, before the fact, by counseling, hiring, or otherwise procuring such felony to be committed, shall be punished in the same manner prescribed for the punishment of the principal felon."

[2] If there is no other statute which controls, it would seem that this contention of the defendant would have to be upheld. Let us look further into the matter. It is conceded, as we held in *Mathis v. State*, 45 Fla. 46, 34 South. 287, that:

"There can be an accessory before the fact in the crime of murder in the third degree, and in manslaughter."

Also see the reasoning in *Hewitt v. State*, 43 Fla. 194, 30 South. 795.

[3, 4] Such a verdict as was returned in the instant case, therefore, can be upheld, provided there is sufficient support therefor in the evidence adduced, and it is not inhibited by the common-law principle discussed above, of which we have just said that section 3178 of the General Statutes of 1906 is declaratory.

It is contended on behalf of the state that section 4007 of the General Statutes of 1906 governs, which statute is as follows:

"In all criminal prosecutions hereafter begun in this state, if the defendant be found guilty of an offense lesser in degree, but included within the offense charged in the indictment or information, such verdict shall not be set aside by the court, upon the ground that such verdict is contrary to the evidence, if the evidence produced in such case would have supported a finding, or if such court would have sustained a verdict of guilty of the greater offense."

We think that this contention has been successfully met by the defendant. The ground of the motion in arrest of judgment which we are considering is not that the verdict rendered "is contrary to the evidence," for which the statute makes provision, but is in effect that such verdict could not have been legally returned in the case; therefore the court was not authorized or warranted in sentencing the defendant upon such verdict. As we have frequently held, a motion in arrest of judgment would not lie upon the

ground that the evidence is not sufficient to support the verdict. See the discussion in *Harris v. State*, 53 Fla. 37, 43 South. 311, and the prior decisions of this court therein cited.

[5] It is also contended on behalf of the state that section 3991 of the General Statutes of 1906 controls, which section is as follows:

"Whenever any person indicted for a felony shall on trial be acquitted by a verdict of part of the crime charged, and convicted on the residue thereof, such verdict may be received and recorded by the court; and thereupon any person charged shall be adjudged guilty of the crime, if any, which shall appear to the court to be substantially charged by the residue of such indictment or information, and shall be sentenced and punished accordingly."

We are of the opinion that there is force in this contention. That a defendant tried under an indictment charging murder in the first degree might be convicted of manslaughter there can be no question. By finding the defendant guilty of the crime of "being accessory before the fact to the commission of manslaughter," the jury thereby acquitted the defendant of the higher offense charged in the indictment, that of being accessory before the fact to the crime of murder in the first degree. See the discussion in *Lindsey v. State*, 53 Fla. 56, 43 South. 87, and *Barker v. State*, 40 Fla. 173, 24 South. 69. We would also refer to 1 Wharton's Criminal Law (10th Ed.) § 236; *Id.* (11th Ed.) § 276; and 1 *Standard Ency. of Proc.* 158. It necessarily follows from what we have said that we are of the opinion that this assignment has not been sustained.

The next assignment which is urged before us is based upon the overruling of the motion for a new trial, which motion is as follows:

"Now comes the defendant, Bertha Thomas, heretofore convicted of being an accessory before the fact of manslaughter, and moves for a new trial for the following reasons, to wit:

"First. The court erred in not sustaining the motion of the defendant to strike the testimony of Robert Hopps on the ground that his admissions showed him incapable of understanding the nature of an oath.

"Second. Because the verdict is contrary to the law.

"Third. Because the verdict is contrary to the evidence.

"Fourth. Because the verdict is contrary to the law and the evidence."

[6-9] We shall follow our established practice and consider only such grounds of this motion as are argued before us. *Smith v. State*, 65 Fla. 56, 61 South. 120. It is contended that the verdict rendered is contrary both to the law and the evidence. It is undoubtedly true, as is urged by the defendant, that in order to warrant the conviction of one as an accessory the conviction of the person charged as principal must be shown. There is no dispute upon this point. We think that the transcript of the record satisfactorily establishes the fact that the prior conviction of the principal was shown upon the trial of the defendant; therefore there is no occasion for

our discussion of this point. As to the further contention of the defendant that the evidence adduced is insufficient to sustain the verdict, it is sufficient to say that we are of the opinion that the evidence is amply sufficient. We refrain from setting out or discussing the evidence for the reason that no useful purpose could be accomplished by so doing. As we have repeatedly held:

"An appellate court should not grant a new trial upon the ground of the insufficiency of the evidence to sustain a verdict of guilty affirmed by the trial court if there is some substantial evidence of all the facts legally essential to support the verdict, and the whole evidence is such that the verdict may fairly have been found on it.

"Where there is evidence from which all the elements of the crime may legally have been found or inferred, and it does not appear that the jury were not governed by the evidence, the verdict will not be disturbed by the appellate court on the ground of the insufficiency of the evidence.

"A verdict will not be set aside by an appellate court where the propriety of the verdict depends not upon the lack of evidence, but upon the credibility or weight of conflicting competent testimony."

Smith v. State, 66 Fla. 135, 63 South. 138.

Next in the order of the argument are the first and fourth assignments, which are argued together and are as follows:

"The court erred in its refusal to strike the testimony of the witness Robert Hopps on the ground that his admissions showed that he was incapable of understanding the nature of an oath."

"The court erred in refusing to strike the testimony of the witness Mary Johnson on the ground that her incompetency to qualify as a witness appeared by her admissions that she did not understand the nature of an oath."

Robert Hopps and Mary Johnson were two of the principal witnesses introduced on behalf of the state. There is no occasion to set forth their testimony. The bill of exceptions discloses the following as to the cross-examination of Robert Hopps:

"On cross-examination this witness admitted that he did not know what would become of him if he swore to a lie in court, or whether he would be punished or not, and did not know what would happen to him if he told a lie and died, or where he would go.

"Whereupon the defendant, by counsel, moved to strike the testimony of Robert Hopps on the ground that his incompetency as a witness appeared from these admissions, which motion was denied by the court, and exception noted."

While the following proceedings are shown as to the cross-examination of Mary Johnson:

"The defendant, by counsel, then asked the witness if she knew what would happen to her or whether she would be punished or not if she told a lie in court, and she said 'No,' and if she knew what would happen to her if she told a lie and died, and she said 'No,' and thereupon moved that the testimony of this witness be taken from the consideration of the jury on the ground that her incompetency to qualify as a witness appeared, but the court denied the motion and exception was noted."

[10] As we held in Clinton v. State, 53 Fla. 98, 43 South. 312, 12 Ann. Cas. 150:

"The common-law rule has been changed in this state, and belief neither in a Supreme

Being nor in divine punishment is requisite to the competency of a witness.

Also see section 1503 of the General Statutes of 1906, which is copied in the opinion, and the authorities therein cited.

[11, 12] The defendant cites and relies upon 1 Wigmore's Evidence, §§ 495 and 506, and Id. vol. 3, § 1823, which we have carefully read. We do not feel called upon to criticize or discuss the statements contained in these paragraphs. Assuming their correctness, it still remains for us to determine whether they support the defendant in her contention. It is well settled that it is the province and duty of the trial court to determine the competency of a witness. Clinton v. State, supra, and 1 Wigmore's Evidence, § 487. We think that it would have been well if the court had proceeded to have the competency of these two witnesses further inquired into, but, even so, we are not prepared to declare that it committed reversible error in overruling the motions to strike out the testimony of such witnesses. It is very evident that these witnesses are ignorant and illiterate, but, considering their entire testimony, it would seem that they exhibit about as much intelligence on the witness stand as ordinary persons of their class. As was held in State v. Langford, 45 La. Ann. 1177, 14 South. 181, 40 Amer. St. Rep. 277:

"The mere fact that a witness states on cross-examination that she does not know the consequences nor how she could be punished if she testifies falsely does not render her incompetent on the ground that she does not understand the nature of an oath, especially when she exhibits as much intelligence on the witness stand as ordinary persons of her class."

Also see Colter v. State, 37 Tex. Cr. R. 284, 39 S. W. 576. We must hold that these two assignments have not been sustained.

[13] We now reach the fifth and last assignment, which is as follows:

"The court erred in sustaining plaintiff's demurrer to defendant Bertha Thomas' plea in abatement to the indictment."

The plea in abatement of the defendant to which this assignment refers is quite lengthy, and we shall not set it out. The defendant in her brief states the purpose and effect of such plea as follows, which would seem to be substantially correct:

"The plea in abatement (Record, page 4), sets up the fact that the court at the preceding term drew from the jury box the names of 36 persons to serve as jurors at the ensuing term; that at the Spring term of 1916 31 of these persons were duly summoned by the sheriff and appeared in court; that the names of these 31 persons were placed in a box by Hon. El. C. Love, judge of the court, and 18 persons were drawn from this number to make up a grand jury; that after the said 18 persons had been drawn from the box it was ascertained that Wm. S. Acklin, one of the said number, was not a citizen of the United States, and was excused; that another one, W. T. Bryan, was excused by the court; that after these 2 men had been withdrawn from the 18 on the grand jury panel there remained 16 men out of the original 18 grand jurors drawn by the court; that subsequent to this the court proceeded to draw 2 more names from the box



in order to have a grand jury composed of 18 men; and that R. W. Vann and M. H. Collins were added to said 16 men, and were sworn as members of the grand jury and participated in the finding of the indictment against the plaintiff in error."

There is no occasion to set forth the demurrer interposed thereto.

As we held in *Young v. State*, 63 Fla. 55, 58 South. 188, wherein we followed prior decisions of this court:

"Pleas in abatement setting up mere irregularities in the selection of jurors should be drawn with the greatest accuracy and precision, and must be certain to every intent. They must leave nothing to be supplied by intendment, and no supposable special answer unobviated. When it affirmatively appears that no possible injury could accrue to a defendant by an irregularity not amounting to a substantial departure from the requirements of law in the selection and impaneling of jurors, an objection thereto should not avail."

Also see *Cannon v. State*, 62 Fla. 20, 57 South. 240. We would also refer to sections 1575, 3852, and 1582 of the General Statutes of 1906. We are clear that no error has been made to appear in this ruling; therefore this assignment must be held to have failed.

It follows that the judgment must be affirmed.

BROWNE, C. J., and TAYLOR, WHITEFIELD, and ELLIS, JJ., concur.

(73 Fla. 80)

STATE BOARD OF CONTROL v. KING LUMBER CO.

(Supreme Court of Florida. Jan. 25, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR  $\S$  173(1), 1176(6)—DEFECTION IN BILL—REMAND AND DISMISSAL.

Where it appears upon the face of a bill of complaint that there is a plain and adequate remedy at law, and no ground for equitable intervention is shown, an appellate court may notice such defect, although it has been ignored in the pleadings, assignments of error, and argument, and the cause may be remanded with directions to dismiss the bill.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig.  $\S$  1079, 1093, 4595, 4596.]

Appeal from Circuit Court, Alachua County; J. T. Wills, Judge.

Suit in equity by the King Lumber Company against the State Board of Control and another. From an order overruling its demurrer, the State Board of Control appeals. Order reversed.

T. F. West, Atty. Gen., for appellant. R. P. Daniel, of Jacksonville, for appellee.

WHITEFIELD, J. The King Lumber Company brought suit in equity against the state board of control and the Lumber Manufacturing Company, and alleged, in effect, that the state board of control entered into a written contract with the complainant for the

erection by complainant of a building; that a balance is due complainant on said contract; that an action at law has been brought by complainant against the state board of control to recover the balance claimed; that materials used under the contract were furnished by the Lumber Manufacturing Company; that the Lumber Manufacturing Company failed to deliver certain portions of the materials at the time when required under the contract with it, thereby delaying the completion of the building in the time specified in the contract with the state board of control; that the state board of control resists payment of the balance claimed on the ground of demurrage allowances for delay in completing the building; that the Lumber Manufacturing Company has brought an action at law for the balance claimed by it from complainant, and claims that the delay charged to it was caused by the architect of the board of control; that complainant cannot properly defend the action by the Lumber Manufacturing Company until the adjudication in complainant's action against the state board of control; that the prosecution of the two actions at law will put complainant to useless expense; that therefore complainant prays that equity take jurisdiction and grant an accounting by both defendants with appropriate restraining orders, and final relief. The state board of control demurred on the ground that the suit is in effect one against the state in violation of law. This demurrer was overruled, and the state board of control appealed.

Where it appears upon the face of a bill of complaint that there is a plain and adequate remedy at law, and no ground for equitable intervention is shown, an appellate court may notice such defect, although it has been ignored in the pleadings, assignments of error and argument, and the cause may be remanded with directions to dismiss the bill. *Williams, Adm'r, v. Peeples*, 48 Fla. 316, 37 South. 572; *City of Jacksonville v. Massey Business College*, 47 Fla. 339, 36 South. 432.

In this case the remedy at law is apparently adequate, and no sufficient ground is alleged for equity cognizance. This being so, the circuit judge should have sustained the demurrer, even though no appropriate ground was stated in the demurrer.

Order reversed.

BROWN, C. J., and TAYLOR, SHACKLEFORD, and ELLIS, JJ., concur.

(73 Fla. 85)

GRAHAM v. HOLMES.

(Supreme Court of Florida. Jan. 25, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR  $\S$  1047(1) — HARMLESS ERROR — ADMISSION OR REJECTION OF EVIDENCE.

Where a verdict is sustained by the evidence, technical, but harmless, errors in rulings on the

admission or rejection of testimony will not cause a reversal of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4146, 4150-4152.]

Error to Circuit Court, Taylor County; M. F. Horne, Judge.

Replevin by J. O. Holmes against Dan Graham. Verdict and judgment for plaintiff, and defendant brings error. Affirmed.

Wm. T. Hendry, of Perry, for plaintiff in error. Davis & Diamond, of Perry, for defendant in error.

**PER CURIAM.** Holmes brought replevin to recover a mule. Defendant pleaded not guilty. Verdict and judgment were for the plaintiff. On writ of error the defendant below, Dan Graham, contends that in the transaction relative to a contemplated sale of the mule by Holmes to Graham the title passed to Graham and replevin was not applicable. The evidence bearing on the trade is conflicting; but the jury was justified in finding for the plaintiff, upon the theory that title had not passed to the defendant. The verdict being warranted by the evidence, technical errors, if any, in rulings on the admission or rejection of testimony are not harmful or material.

The judgment is affirmed.

**BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.**

(73 Fla. 86)

#### ANDERSON v. STATE.

(Supreme Court of Florida. Jan. 25, 1917.)

(Syllabus by the Court.)

#### CRIMINAL LAW § 1090—WRIT OF ERROR—RETURN—TIME.

A writ of error, made returnable in violation of the provision of the statute that it "shall be returnable to a day, \* \* \* more than thirty and not more than ninety days from the date of the writ," will be dismissed by the Supreme Court of its own motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2720, 2721.]

Error to Circuit Court, Lafayette County; M. F. Horne, Judge.

M. L. Anderson on conviction brings error. Writ dismissed.

W. P. Chavous, of Mayo, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

**PER CURIAM.** The writ of error taken herein was dated and issued August 2, 1916, and made returnable August 16, 1916, and must be dismissed as having been taken in violation of the statute requiring that such writ "shall be returnable to a day, either in term time or vacation more than thirty days and not more than ninety days from the date of the writ." Section 1698, Gen. Stats. 1906,

as amended by chapter 5638, Acts 1907 (section 1698, Comp. Laws 1914). See *Browning v. State*, 40 Fla. 466, 25 South. 62. The fact that the Attorney General has not moved to dismiss the writ of error does not make the writ as issued effective.

The writ of error is dismissed.

**BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.**

(73 Fla. 82)

#### CARPENTER-O'BRIEN CO. v. LEACH.

(Supreme Court of Florida. Jan. 25, 1917.)

(Syllabus by the Court.)

#### 1. EVIDENCE § 364 — PERMANENT INJURY — MORTUARY TABLES.

Mortuary tables are admissible where there is evidence of a permanent injury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1520.]

#### 2. APPEAL AND ERROR § 1068(1), 1135 — HARMLESS ERROR—INSTRUCTIONS.

Where the evidence sustains a verdict of liability in accordance with the allegations in an action for damages, and errors, if any, in giving or refusing charges are harmless, and no material error appears in the proceedings, the judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225, 4454, 4455; Trial, Cent. Dig. §§ 475, 525.]

Error to Circuit Court, Duval County; George Couper Gibbs, Judge.

Action by J. P. Leach against the Carpenter-O'Brien Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Carter & McCollum and John T. Crawley, all of Jacksonville, for plaintiff in error. A. H. & Roswell King and Bayard B. Shields, all of Jacksonville, for defendant in error.

**WHITFIELD, J.** Leach brought an action for damages in which it is alleged, in effect, that the defendant lumber company was engaged in the construction and operation of a lumber mill; that plaintiff was employed therein as a millwright; that plaintiff was ordered by the foreman of defendant to assist in raising and securing a certain heavy vat in said mill; that defendant negligently and carelessly furnished for the doing of said work a certain slender, slippery, inadequate, unsuitable, and insufficient prop or stave to hold said vat up after the same had been raised; that said prop, because of the said carelessness and negligence of the defendant, slipped and gave way, and said vat fell down and upon plaintiff with great force and violence, injuring him. A second count adopts the allegations of the first count, and alleges that the foreman of defendant had the power and authority to hire and discharge plaintiff, and ordered and directed plaintiff to do the work in and about which he was injured. A third count differs from

the first count in that it alleges that the defendant negligently and carelessly furnished for the doing of said work only about 10 servants to raise said vat and hold the same up after it had been raised, whereas 20 servants would have been required to raise the vat safely and to hold it securely and safely up; that because of the negligence and carelessness of defendant as aforesaid said vat fell down upon the plaintiff with great force and violence and injured him permanently.

The defendant pleaded not guilty, that the injury was caused by the act of a fellow servant, and assumed risk. There was verdict for the plaintiff on which judgment was rendered for the plaintiff, and the defendant took writ of error. Errors are assigned on denying an instructed verdict for the defendant, giving two charges for the plaintiff, and denying a new trial. Several grounds of the motion for new trial are based on the refusal of requested charges.

[1, 2] There being evidence that the injury was permanent, mortuary tables were properly admitted in evidence. It is not necessary to detail the evidence. It is legally sufficient as a predicate for a verdict of liability upon the allegations to the effect that the defendant was negligent in furnishing facilities for doing the dangerous work stated. The jury could have found that the defendant should have provided more adequate props, and that the prop used for holding the vat was inadequate, and that the plaintiff's injury was a proximate result of the prop negligently provided by the defendant. The risk and danger were not ordinary or so obvious as to bar a recovery on the ground of assumed risk; and no appreciable negligence of the plaintiff appears. Even if the slight reference in the briefs to the charges given and refused on which assertions of error are predicated may be regarded as an argument on the rulings in giving or refusing the charges, there appears to be no harmful if any error therein.

A careful consideration of the entire record discloses no reversible error, and the judgment is affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and ELLIS, JJ., concur.

(73 Fla. 142)

### BASS v. LEE

(Supreme Court of Florida. Jan. 26, 1917.)

(Syllabus by the Court.)

BILLS AND NOTES — PLEA — SUFFICIENCY.

In an action on promissory notes, where a plea avers the delivery of the notes, but does not aver that the plaintiff holder knew of an asserted agreement between the original parties affecting the validity of the notes or that the notes are so incomplete or irregular on their face as to affect their validity or to put the

holder on notice of an agreement affecting the validity of the notes, such plea is subject to demurrer.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1550-1532, 1550-1561.]

Error to Circuit Court, Osceola County; Jas. W. Perkins, Judge.

Action by Charles G. Lee against W. C. Bass. Judgment for plaintiff on sustaining demurrer to pleas, and defendant brings error. Affirmed.

Lewis O'Bryan and Milton Pledger, both of Kissimmee, for plaintiff in error. Kribbs & Steed, of Kissimmee, for defendant in error.

WHITFIELD, J. Charles G. Lee brought an action against W. C. Bass on two promissory notes made payable to M. D. Wilson, R. D. Waring, and T. D. Curtia. Bass filed the following amended pleas:

"That the notes sued on are not the notes of this defendant, in this, that this defendant had heretofore become accommodation surety and indorser for one R. D. Waring, upon certain promissory notes; that said notes had matured and demand had been made upon this defendant for payment of the same; that this defendant in turn made demand upon the said R. D. Waring to make such payment; that the said Waring stated his inability to make such payment at the time, but that he, the said R. D. Waring, procured this defendant to enter into an agreement whereby, if this defendant would sign two other notes to be made payable in the future, he (Waring) could, by the use of said other notes, pay off, discharge, and take up the notes then past due; that, should this defendant sign such additional notes, the proceeds thereof would be used in discharging and paying off said past-due notes by the date on which said new notes would mature, and he, the said Waring, would be able to pay off and discharge said amounts and release this defendant from further liability; that this defendant, relying upon said representations of the said R. D. Waring, believing that should he sign said new notes that they would be used in paying off and discharging said past-due notes, and this defendant not having received any consideration for the signing of said notes, thereby desiring that the said Waring pay off and discharge them, agreed to the same; that in pursuance of said agreement between this defendant and the said R. D. Waring, as aforesaid, the said R. D. Waring sent one M. D. Wilson to this defendant bearing a request that this defendant sign said notes as accommodation maker and to send the same to him by the said M. D. Wilson; that he (Waring) would sign them as principal maker and use them in retiring and discharging the amount due upon said overdue notes, upon which this defendant was liable as indorser, as aforesaid. And this defendant did sign the said notes in blank, and upon the second line for signing, and sent them to the said Waring by the said M. D. Wilson, for the sole purpose that the said Waring should become the principal maker thereon and making use of in settling the past-due indebtedness as aforesaid. This defendant avers that, notwithstanding the agreement between him and the said R. D. Waring, he was signing the notes as accommodation maker with the said R. D. Waring, and for that reason signed on the second line of said notes, and to become surety for him as aforesaid, the said R. D. Waring failed and refused to complete said notes by signing them as principal maker thereof as agreed, but without authority from this defendant, and without his knowledge or consent, wrote, or procured to

have written, into said notes, the name of the said M. D. Wilson, who was the messenger in making the delivery of the partially executed notes from this defendant to the said Waring, and procured a transfer of said notes by the said M. D. Wilson to him, the said R. D. Waring, who transferred the same to the indorser of the plaintiff, and the said R. D. Waring did not pay off and discharge the amount due upon said past-due notes on which this defendant was indorser, and this defendant was compelled to pay the same.

"Wherefore the plaintiff and his assignor took said notes with notice of their incompleteness and of irregularities appearing upon the face thereof.

"Second. And for further plea this defendant says:

"That the plaintiff and his assignor took said notes with notice of incompleteness and irregularities appearing on the face thereof, and that said notes, being incomplete, were attempted to be negotiated without authority from or the consent of this defendant."

A demurrer to the pleas was sustained, and the court ordered final judgment for the plaintiff, which was entered by the clerk, as follows:

"And now on the 15th day of April, A. D. 1916, come the plaintiff by his attorneys, Kribbs & Steed, and moves for a final judgment, and produces the original notes sued upon and mentioned in his declaration; and the clerk having ascertained that there is due the plaintiff for principal \$981.82, and for interest \$45.80, and for attorney's fee \$98.18, and an order of the judge to enter final judgment having been received and duly filed, therefore it is considered by the court that the plaintiff, the said Charles G. Lee, do have and recover of and from the defendant, the said W. C. Bass, the sum of \$1,125.80 damages, and costs which are now here taxed at \$4.02, and that the plaintiff do have execution thereof.

"J. L. Overstreet, Clerk,

"By James M. Johnson, Deputy.

"Recorded in Final Judgment Book No. 1, page 115."

On writ of error taken by the defendant it is contended that there was error in sustaining the demurrer to the amended pleas and in directing the clerk to enter final judgment.

Section 2949, General Statutes of 1906, is as follows:

"Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery."

As the plea expressly refers to "the delivery of the partially executed notes," in stating the circumstances under which the defendant signed the note, the above-quoted statute is not applicable. The plea does not aver that the holder of the notes knew of the circumstances of the execution of the notes as stated in the plea, but, after stating the facts relied on, the first amended plea avers that:

"Wherefore the plaintiff and his assignor took said notes with notice of their incompleteness and of irregularities appearing upon the face thereof."

The second amended plea adds:

"And that said notes, being incomplete, were attempted to be negotiated without authority from or the consent of this defendant."

The plea avers the delivery of the notes by Bass to Waring through M. D. Wilson, the payee, pursuant to an agreement between Bass and Waring, but it does not aver that the plaintiff, holder of the notes, knew of the alleged agreement, and the notes as set out in the transcript do not appear to be so incomplete or irregular on their face as to affect their validity, or to put the holder on notice of an agreement affecting the notes. This being so, the pleas were subject to demurrer.

The entry of the judgment by the clerk pursuant to the order of the judge was in accordance with law. *McGee v. Ancrum*, 33 Fla. 499, 15 South. 231.

The judgment is affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and ELLIS, JJ., concur.

(73 Fla. 130)

WAINRIGHT et al. v. CONNECTICUT FIRE INS. CO.

(Supreme Court of Florida. Jan. 26, 1917.)

(Syllabus by the Court.)

1. INTERPLEADER  $\S$  21, 31—PRACTICE—PROCEEDINGS.

Where a bill of interpleader is filed, the better practice is first to determine whether such bill will lie. If it will not, it is useless to go further. If it will, then upon bringing the property in dispute into court, the complainant is discharged from further liability, with his costs, and the court orders that the defendants interplead and litigate the matter in dispute between themselves, which in effect becomes a new and independent proceeding, as between a complainant and a defendant.

[Ed. Note.—For other cases, see *Interpleader*, Cent. Dig. §§ 43-45, 51, 58-67.]

2. INTERPLEADER  $\S$  31—PROCEEDINGS—DECREE.

Where a bill of interpleader has been filed, if the issues between defendants are ripe for decision, the court may at a single hearing dispose of the whole controversy, including as well the issues between the complainant and defendants as the issues between defendants themselves, and make a final decree settling the rights of all parties at once; and where sufficient appears on the pleadings to enable the court to adjudge between defendants, it will proceed at once. If, however, upon the discharge of the complainant the case is not ripe for hearing between the claimants, the court should order an action or an issue formed between defendants as to their respective rights to the fund, and may order a reference to a master to ascertain and settle their rights, and upon the trial of this issue a final decree as between defendants is rendered.

[Ed. Note.—For other cases, see *Interpleader*, Cent. Dig. §§ 58-67.]

3. INTERPLEADER  $\S$  33, 34—DISCHARGE OF COMPLAINANT—APPEAL—PARTIES.

Where the right of a complainant to file a bill of interpleader is not questioned, but would seem to have been recognized and acquiesced in by the defendants, and the property in question is deposited in court, an order should have been made, dismissing and discharging the complainant from all further liability, with its costs. Where the defendants then proceed to litigate the matters in dispute between themselves, it is

not the proper practice for the losing defendant in appealing from the adverse decree to him to make the complainant appellee, since the complainant has no further interest in the litigation, but the losing defendant should make the winning defendant the appellee.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 68-71, 74, 75.]

#### 4. INTERPLEADER §32—DECREE—EQUITY.

Where a bill of interpleader has been filed, and the court has properly acquired jurisdiction of the cause as between the defendants, it is not bound to award the fund or other thing in dispute wholly to him who has the legal title, but may so shape its decree as to do complete equity between the parties.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 72, 73.]

#### 5. APPEAL AND ERROR §901—SHOWING OF ERROR—PRESUMPTION AS TO RULINGS.

In equity, as well as at law, every presumption is in favor of the correctness of the rulings of the trial judge, and it is the duty of a party resorting to an appellate court to make the errors complained of clearly to appear, if they in truth exist.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1771, 3670.]

Appeal from Circuit Court, Bradford County; Jas. T. Wills, Judge.

Bill of interpleader by the Connecticut Fire Insurance Company against A. A. Wainright and others. Decree of distribution among defendants, and they appeal. Decree affirmed.

A. S. Crews, of Starke, for appellants. D. E. Knight, of Starke, and Cockrell & Cockrell, of Jacksonville, for appellee.

SHACKLEFORD, J. On the 15th day of June, 1915, the Connecticut Fire Insurance Company, a corporation, filed its bill of interpleader against A. A. Wainright, G. W. Wainright, Struble Computing Scale Company, a corporation, Jacob Epstein, Nathan Epstein, Abraham I. Weinberg, A. Ray Katz, and Sidney Lansberg, partners doing business as Baltimore Bargain House, and Lynchburg Shoe Company, a corporation. Very concisely stated, the bill alleges that the complainant had issued a fire insurance policy to the defendant A. A. Wainright on certain property, which property had been damaged by fire, and that it had been ascertained and agreed by the complainant and such defendant that the loss for which the complainant was liable upon such policy was the sum of \$603.88, which amount the complainant stood ready to pay to the party or parties legally entitled thereto; that actions at law had been instituted against the defendant A. A. Wainright which were still pending by all of the other named defendants, in which actions writs of garnishment had been issued and served upon the complainant, by which writs the complainant was required to withhold a sum of money far in excess of \$603.88, whereby the complainant was unable to

determine to whom it was required by law to pay the money so ascertained and agreed to be due from it upon such policy. Wherefore the complainant tenders such amount of money into the registry of the court and prays, among other things, that the defendants be required to interplead amongst themselves as to the disposition of such fund, and that the complainant be relieved of any further responsibility to the several defendants as to such fund, and that it be decreed to be entitled to its costs and a reasonable attorney's fee.

Jacob Epstein and the other members composing the partnership of the Baltimore Bargain House filed their answer to the bill, as did also G. W. Wainright, but, in view of the subsequent proceedings, there would seem to be no occasion to set out such answers or even to give a synopsis thereof. Suffice it to say that the Baltimore Bargain House and G. W. Wainright each claim a prior lien upon such fund for reasons which are set forth in their respective answers. So far as is disclosed by the transcript of the record, the other defendants filed no answers, and no further proceedings of any kind were had until the 17th day of April, 1916, when the following letter, addressed to the circuit judge, designated "an agreed statement of facts," was filed:

"February 21st, 1916.

"Hon. J. T. Wills, Gainesville, Fla.—Dear Judge:

"In re: Baltimore Bargain House v. A. A. Wainright.

"Geo. W. Wainright v. A. A. Wainright.

"Mr. A. S. Crews and myself agree that on the 5th day of April, 1915, G. W. Wainright started suit in circuit court here against A. A. Wainright in assumpsit and had writs of garnishment to issue and be placed in hands of sheriff of this county on said day against Connecticut Fire Insurance Company, which writ was served on the 6th day of April, 1915, on garnishee, and that plaintiff obtained judgment against defendant in assumpsit on the 3d day of May, 1915.

"Also that Baltimore Bargain House started suit in assumpsit in circuit court here against A. A. Wainright on April 3, 1915, and had writ of garnishment issued on said day and placed in hands of sheriff of this county against above named fire insurance company on the said 3d day of April, 1915, and that judgment was obtained against defendant in this suit on the 7th day of February, 1916.

"Judgment of G. W. Wainright is for \$3,185.81, with interest from May 3, 1915, and judgment of Baltimore Bargain House is for \$318.33, with interest since February 7, 1916.

"It is agreed that Baltimore Bargain House started suit two days prior to G. W. Wainright, and that writs of garnishment were issued in suit of Baltimore Bargain House two days prior to issuance of writ in case of G. W. Wainright and was served three days prior to service in G. W. Wainright case, and that G. W. Wainright obtained judgment nine months prior to Baltimore Bargain House.

"We further agree to submit this matter to you without argument and hand you herewith the files in proceedings brought by insurance companies to stay proceedings in these suits so

that you may enter such orders touching the distribution of these funds between these judgment creditors as in your judgment is proper under the law.

"No other parties except the above have filed answers to bill of interpleader filed by this insurance company, and the above parties were first to have writs of garnishment issued and served, and no order made in suit will affect any claim other than the above, unless you were to hold that others who brought suits later and had writs served should share in pro rata in these funds.

"If you will we will be glad you would enter your order and return files at your earliest convenience as these suits have been pending for some time by reason of our misunderstanding the proper practice to follow.

"With best wishes, we are,

"Yours very truly,

A. S. Crews.  
"D. E. Knight."

On the 17th day of March, 1916, the following decree was rendered:

"This cause coming on further to be heard, and it appearing that by an order heretofore made in this cause it has been adjudicated that the defendants do interplead as to their rights to the fund heretofore tendered into the registry of the court, and it appearing to the court that a sufficient showing has been made upon which a decree should be based, and that the following amounts are the just amounts to be paid out of said fund:

"It is thereupon considered that the moneys now remaining in the registry of this court involved in this litigation should be distributed among the defendants herein, to wit, the sum of \$321.93, should be paid to D. E. Knight as attorney of record for the defendants Jacob Epstein, Nathan Epstein, Abraham I. Weinberg, A. Ray Katz, and Sidney Lansberg, partners doing business as Baltimore Bargain House, and that the balance of said moneys for paying all costs of court herein should be paid to A. S. Crews as attorney of record for the defendant G. W. Wainright, and it is hereby ordered by this court that the clerk of this court do forthwith distribute the said moneys among said defendants in the order and amounts as above stated and found by this court. Done and ordered at Gainesville, Fla., this 16th day of March, A. D. 1916."

From this decree an appeal was entered in the names of all the defendants as appellants, and the complainant, the Connecticut Fire Insurance Company, was designated as the sole appellee. The only parties who have appeared here and filed briefs are G. W. Wainright and the Baltimore Bargain House, the latter of whom states that they do not know why they were made appellants, as they have no fault to find with the decree rendered, but are satisfied therewith.

[1] As the writer hereof stated in the opinion which he filed in the case of *Aetna Insurance Co. v. Evans*, 57 Fla. 327, text 334 and 335, 49 South. 57, text 59:

"This court seems never to have had occasion to pass upon and determine the essentials of a bill of interpleader or the practice to be followed therein, except incidentally in *Sammis v. L'Engle*, 19 Fla. 800."

The writer then proceeds to state that:

"Neither have we any statute or rule of court dealing with the subject or regulating the practice, as some jurisdictions have, so we must look elsewhere for guidance."

And he refers to *Fletcher's Equity Pleading and Practice*, c. XLI; 23 Cyc. pp. 1 to 30;

1 *Pomeroy's Equitable Remedies*, c. 2; 11 *Ency. of Pl. & Pr.* pp. 444 to 481; monographic note by Judge Freeman to the case of *Shaw v. Coster*, 35 Am. Dec. pp. 695 to 712; and other authorities. There is no occasion now for any extended discussion of the matter. As is stated in 23 Cyc. 31, with which the other authorities above cited are practically in accord:

"Where a bill of interpleader is filed the better practice is first to determine whether such bill will lie. If it will not, it is useless to go further. If it will, then upon bringing the property in dispute into court the complainant is discharged from further liability, with his costs, and the court orders that the defendants interplead and litigate the matter in dispute between themselves, which in effect becomes a new and independent proceeding, as between a complainant and a defendant."

[3] This is also in accord with the principle enunciated in *Sammis v. L'Engle*, 19 Fla. 800, wherein we held:

"The practice upon answer and replication in an interpleading suit properly brought is to decree the bill to be properly filed, to dismiss the complainant with his costs up to that time upon his placing the fund in the registry of the court, and to direct an action to be brought or an issue or a reference to ascertain and settle the rights of the defendant claimants to the fund as the case may require. In this case there was a reference which was proper."

[2] In the instant case the right of the complainant to file its bill of interpleader was not questioned, but such right would seem to have been recognized and acquiesced in; therefore an order should have been made in accordance with the above statement from Cyc. In any event the complainant had no further interest in the litigation, and should not have been made appellee in this court. As is further said on page 32 of Cyc.:

"If the issues between defendants are ripe for decision, the court may at a single hearing dispose of the whole controversy, including as well the issues between the complainant and defendants as the issues between defendants themselves, and make a final decree settling the rights of all parties at once; and where sufficient appears on the pleadings to enable the court to adjudge between defendants, it will proceed at once. If, however, upon the discharge of the complainant the case is not ripe for hearing between the claimants, the court should order an action or an issue formed between defendants as to their respective rights to the fund, and may order a reference to a master to ascertain and settle their rights, and upon the trial of this issue a final decree as between defendants is rendered."

Also see Judge Freeman's note previously referred to, especially pages 708 and 709 of 35 Am. Dec.

Evidently the defendants who had filed answers considered the issues between them ripe for a decision and requested the circuit judge to proceed to render a final decree upon the pleadings and their "agreed statement of facts," which was done. If the defendant G. W. Wainright was dissatisfied with this decree, as evidently he was, he should have appealed therefrom and made the Baltimore Bargain House the appellee. However, as

these two contending litigants are before this court asking for an adjudication of the points raised by the appeal, we shall proceed to consider and determine the same, regardless of the fact that they appear here jointly as appellants.

There is but one assignment of error, which is to the effect that G. W. Wainright should have been decreed to have had a prior and superior lien or claim upon the fund in the registry of the court to that of the Baltimore Bargain House.

[4] It will be observed that both G. W. Wainright and the Baltimore Bargain House saw fit to submit their respective claims to such fund for adjudication to the circuit judge upon an agreed statement of facts, which we have copied above, without argument. We had occasion to discuss the question to some extent in the three opinions rendered by Mr. Justice Taylor, Mr. Justice Hocker, and the writer hereof in *Etna Insurance Co. v. Evans*, 57 Fla. 327, 49 South. 57, as to whether or not a lien upon property in the hands of a garnishee is created thereon from the time of the service of the writ of garnishment, but no decision was rendered upon such point; therefore it is still an open question in this court. We do not consider that such point is properly before us for determination now. No testimony was taken by these defendants as to conflicting statements made by them in their respective answers, but the entire matter was submitted by them as to certain facts only upon which they had agreed. The law would seem to be correctly stated in 11 Ency. of Pl. & Pr. p. 475, as follows:

"Where the court has properly acquired jurisdiction of the cause as between the defendants, it is not bound to award the fund or other thing in dispute wholly to him who has the legal title, but may so shape its decree as to do complete equity between the parties."

[5] This being so, the mere fact that G. W. Wainright obtained his judgment first in an action of assumpsit against A. A. Wainright, the insured, while his writ of garnishment was served upon the insurance company subsequently to the service of the writ of garnishment by the Baltimore Bargain House, would not necessarily give G. W. Wainright a superior claim upon the fund in the registry of the court. The circuit judge has found otherwise, and we must refuse to disturb his ruling. As we have repeatedly held:

"In equity, as well as at law, every presumption is in favor of the correctness of the rulings of the trial judge, and it is the duty of a party resorting to an appellate court to make the errors complained of clearly to appear, if they in truth exist." *McMillan v. Warren*, 59 Fla. 578, 52 South. 825.

The decree will be affirmed, at the cost of G. W. Wainright.

BROWNE, C. J., and TAYLOR, WHITFIELD, and ELLIS, JJ., concur.

(73 Fla. 139)

## DONEGAN v. DEKLE INV. CO.

(Supreme Court of Florida. Jan. 26, 1917.)

. (Syllabus by the Court.)

BILLS AND NOTES ~~§~~462(1)—ACTION—DECLARATION.

Where a declaration alleges that the maker signed and delivered a promissory note, as the same is set out in the declaration, a cause of action is stated.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1444, 1445.]

Error to Circuit Court, Osceola County; Jas. W. Perkins, Judge.

Action by the Dekle Investment Company against Arthur E. Donegan. Judgment for plaintiff, and defendant brings error. Affirmed.

Johnston & Garrett, of Kissimmee, for plaintiff in error. Whitaker, Himes & Whitaker, of Tampa, for defendant in error.

WHITFIELD, J. The Dekle Investment Company brought an action on a promissory note and alleged in effect that R. D. Waring, joined by Mary E. Waring, his wife, for value received, signed and delivered to South Florida Lumber Company, a corporation, a promissory note as follows:

"1,000.00. Kissimmee, Fla., June 5, 1914.

"One year after date we promise to pay to the order of South Florida Lumber Company, \$1,000.00, one thousand no/100 dollars at the Citizens' Bank of Kissimmee, Kissimmee, Florida, for value received, with interest at the rate of ten per cent. per annum, after date, until fully paid. Interest payable quarterly.

"The maker and indorsers of this note severally waive presentment for payment and notice of dishonor hereof; and should it become necessary to collect this note through an attorney, either of us, whether maker, security or indorser on this note, hereby agrees to pay all costs of such collection, including an attorney's fee of ten per cent. hereof.

"R. D. Waring.

"Mary E. Waring."

It is further alleged that, after the making and delivery of the note, the defendant, Arthur E. Donegan, indorsed the note, and afterwards said South Florida Lumber Company, the payee, indorsed the note to the plaintiff, who became and is the holder thereof; that neither R. D. Waring nor the South Florida Lumber Company nor the defendant nor any other person has paid the note or any part thereof, and it remains wholly due and unpaid, with interest, except that interest to March 5, 1915, has been paid; that a reasonable attorney's fee is due, etc. A second count declared on a similar note. A demurrer to the declaration was overruled. There was judgment for the plaintiff, and the defendant took writ of error.

It is argued that the declaration does not contain necessary positive allegations that Waring promised to pay to the order of the South Florida Lumber Company \$1,000 one year after date; that Waring agreed to pay interest or attorney fees; that the South

Florida Lumber Company or defendant agreed to pay an attorney's fee.

The allegation that Waring signed and delivered the note set out in the declaration is a sufficient allegation that Waring promised to pay as stated in the note, and that he agreed to pay interest and a reasonable attorney fee as stipulated in the note.

As it is alleged that the South Florida Lumber Company and the defendant indorsed the note, their liability on the note as indorsers "according to its tenor" under the statute sufficiently appears. Section 2999, Gen. Stats. of 1906 (Compiled Laws of 1914).

All the "vital averments" are "positively alleged," since the allegations of the signing and delivery and of the indorsement of the note as set out in the pleading are sufficient allegations of the obligations of the defendant as an indorser.

Judgment affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and ELLIS, JJ., concur.

(73 Fla. 129)

**SOUTH FLORIDA LUMBER CO. v. DEKLE INV. CO.**

(Supreme Court of Florida. Jan. 26, 1917.)

Error to Circuit Court, Osceola County; Jas. W. Perkins, Judge.

Action between the South Florida Lumber Company and the Dekle Investment Company. Judgment for the latter, and the former brings error. Affirmed.

Johnston & Garrett, of Kissimmee, for plaintiff in error. Whitaker, Himes & Whitaker, of Tampa, for defendant in error.

PER CURIAM. The judgment herein is affirmed on the authority of *Donegan v. Dekle Investment Co.*, 74 South. 11, filed this day.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITEFIELD, and ELLIS, JJ., concur.

(73 Fla. 37)

**JACKSON COUNTY COM'RS v. STATE ex rel. McALILEY.**

(Supreme Court of Florida. Jan. 25, 1917.)

(Syllabus by the Court.)

COURTS ~~§~~ 57(2) — REPORTER — ATTENDANCE AND FEES—CERTIFICATE—STATUTE.

Under the provisions of sections 1844 to 1847, inclusive, of the General Statutes of 1906, it is the duty of the circuit judge, within his discretion, to determine when the official reporter shall attend the sessions of the court for the purpose of reporting the testimony in criminal cases, and to certify the account of such official reporter. Such certificate is conclusive, and there is no auditing for the county commissioners to do, but it becomes their duty to cause a warrant to be issued to the reporter upon the fine and forfeiture fund of the county in payment of the account so certified to be true and correct.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 200.]

Error to Circuit Court, Jackson County; Cephas L. Wilson, Judge.

Mandamus by the State of Florida, on relation of Nan E. McAliley, against the County Commissioners of Jackson County, Fla. Alternative writ made peremptory, and defendants bring error. Affirmed.

On the 12th day of April, 1916, upon the relation of Nan E. McAliley, an alternative writ of mandamus was issued against the board of county commissioners of Jackson county, Fla., which, omitting the caption, is as follows:

"Whereas, Nan E. McAliley, relator in the above styled and entitled cause, has on this day presented before me her sworn petition, wherein and whereby she alleges:

"That she, the said Nan E. McAliley, is the court reporter for the Fourteenth judicial circuit of the state of Florida, and that she was, heretofore, to wit: on the 23d day of August, 1915, by the Governor of said state appointed as such reporter, and commissioned as such, and since the date of said appointment that she has been and still is the official reporter of said circuit, and that the said respondents, T. W. Conely, is chairman of the board of county commissioners of Jackson county, Fla., and that the other respondents hereinabove named are members of said board and that the said respondents compose the board of county commissioners of the county aforesaid; and further alleges, in and by the petition aforesaid,

"That under the laws of the state of Florida it is the duty of the relator as such court reporter of the circuit aforesaid, when directed so to do by the judge of said court, to report all criminal causes pending in said court in the counties comprising the said Fourteenth judicial circuit, and also to be present during the time that the courts are in session to await the orders of the judge of said court as to reporting such cases, or to discharge any other duties appertaining to the said office; and further alleges in and by said petition,

"That the circuit court in and for Jackson county, Fla., convened at the courthouse at Marianna in said county on the 7th day of February, A. D. 1916, the same being the first Monday in said month, and continued in session for and during the month of February, and until the 4th day of March, and that the said relator, as reporter of said circuit, was required by the judge thereof to be present in attendance of said court during each and every day of said term, and to report such criminal cases as might arise for trial, and to do and perform the orders of the court with reference thereto; that during said term of court the relator, being so required to attend the convening of said court as the reporter thereof, attended the said term of court, exclusive of the days on which civil cases were reported, for the period of 25 days, and for which services, under the laws of the state of Florida, she was and is entitled to the sum of \$5 per day, and that for the services so rendered by her as aforesaid, the county of Jackson, in the state of Florida, became and was indebted to the relator in the sum of \$125; that the said relator duly presented her accounts for her attendance at said court as the reporter thereof to the respective judges who presided over said term of court, and which said accounts so presented were duly approved by the said judges, copies of which said accounts so presented are hereto attached and made part of this writ, the originals of which are attached to the said petition so presented to me, and are asked to be taken and considered as part thereof; and that, whereas, the said petitioner further avers in and by said petition that it then and there became and was the duty of



the said board of county commissioners of Jackson county, Fla., to pay said accounts, when so approved by the said judges, so due to the relator as aforesaid, upon the fine and forfeiture fund of said county, or to issue its warrant for the payment of said account against said fund; and whereas, the relator further avers that in accordance with law she duly presented her said account so approved by the judges as aforesaid to the respondents, the said board of county commissioners of Jackson county, Fla., for audit and payment, and that it then and there became and was the duty of the said board of county commissioners to pay said accounts upon an audit thereof by its warrant drawn upon the fine and forfeiture fund of said county as aforesaid, but that notwithstanding it was the duty of the said respondents to so pay said accounts, that the said respondents as the board of county commissioners of Jackson county, Florida, after auditing the same, refused to pay said accounts so due to the relator as aforesaid, or any part thereof, and that the said accounts so refused to be paid by the said respondents were returned by them to the relator without payment:

"These are, therefore, to command you, the said T. W. Conely as chairman, and the said Frank Peacock, J. R. McCrary, W. W. Wester, and W. H. Harrison, as members of and composing the board of county commissioners of Jackson county, Fla., upon the service of this writ upon you, to at once assemble and pay the said accounts so presented by the said relator, and so refused to be paid as in and by the said petition averred, said payment to be made by issuing a warrant for the said sums of money so due the relator as averred in and by said petition, said warrant to be drawn and signed by the clerk of the circuit court of Jackson county, Fla., and your chairman, upon the order and direction of the said respondents as the board of county commissioners of said county; and that in default of so convening and paying said accounts so alleged to be due the relator as hereinabove set forth, that you, and each of you, do be and appear before me at Marianna, Fla., on the 21st day of April, A. D. 1916, and that you then and there show cause, if any you have, why you have not complied with the terms and conditions of this writ.

"Done and ordered at Marianna, Fla., on this the 12th day of April, A. D. 1916.

"Cephas L. Wilson, Judge."

Attached to the writ of mandamus:

"In the Circuit Court of Jackson County, Fourteenth Judicial Circuit of Florida.

"Jackson County to Nan E. McAlliley, Dr.

To nineteen (19) days' attendance at court @ \$5.00 per day..... \$95.00

"I, Cephas L. Wilson, judge of the above-named court, do hereby certify that the above account is true and correct.

"Cephas L. Wilson, Judge."

"In the Circuit Court of Jackson County, Fourteenth Judicial Circuit of Florida.

"Jackson County to Nan E. McAlliley, Dr.

To six days' per diem for attendance at court @ \$5.00 per day..... \$30.00

"I, A. G. Campbell, acting judge for the Fourteenth judicial circuit of Florida, do hereby certify that the above and foregoing account is true and correct. A. G. Campbell, Judge."

To this writ the respondents made the following return:

"We, the undersigned chairman and members of the board of county commissioners of Jackson county, within mentioned, do humbly certify to the Hon. Cephas L. Wilson, judge of the said circuit court, at Marianna on this the 21st day of April, A. D. 1916, as by said alternative writ of mandamus we are commanded, that we

have not assembled and paid the said account of the relator exhibited in and by said alternative writ, for the reason, as respondents humbly submit, that these respondents have no power or authority under the law to pay said account as presented, nor is the said county of Jackson liable therefor, nor is the said relator, Nan E. McAlliley, lawfully entitled to receive pay for same out of the public funds of said Jackson county. And in this behalf, these respondents do humbly represent and contend:

"(1) That the relator is, and was at the filing of the petition for mandamus herein, the official reporter of testimony and proceedings in trials at law, for the Fourteenth judicial circuit of Florida, composed of the counties of Jackson and Calhoun; that her duties and compensation, are fixed by chapter 5122, Acts of 1903, sections 1844 to 1851, inclusive, General Statutes 1906. That the said county of Jackson is the county in which the relator did, at the time of attending the court as claimed, and does now, reside; that the regular term of the circuit court of said county convened on the 7th day of February, A. D. 1916, and continued until the 4th day of March, A. D. 1916, 30 days, excluding Sundays. That the attendance claimed by relator is for 25, days of said term, being every day thereof, except 5 days in which relator was engaged in reporting testimony and proceedings in civil cases, and in which her per diem and other fees were taxed as costs in the respective causes.

"(2) Respondents further represent and submit unto your honor as cause why they have not assembled and paid said account that they are advised and believe that their powers and liabilities are limited by the statute law of the state, and except as is provided in said chapter 5122, Acts of 1903, they are without power or authority to pay out the public funds of the county for per diem and fees of the court stenographer; that by the terms of said act they are not authorized to incur or assume any liability for court stenographer's fees except in criminal cases in which she reported the testimony and proceedings in the trial, and such criminal cases only as the defendants were insolvent upon conviction, or discharged upon acquittal. That the accounts so made out and presented to respondents, and attached to the alternative writ, were not made out and presented within said limitations, but were made upon the basis per diem for every day of said term not consumed in reporting testimony and proceedings in civil cases, whether relator was engaged in reporting testimony and proceedings in criminal cases or not. And respondents aver that relator was not engaged in reporting testimony and proceedings in criminal cases more than 7 days during said term, the exact number of days being unknown to respondent, and the total amount of per diem for which the county is liable will not exceed the sum of \$35.

"(3) Respondents would further represent and submit unto your honor that they did not prior to the institution of these proceedings, and do not now, decline to pay the relator a per diem of \$5 for each day or fraction of a day in which she was engaged in said county, in reporting testimony and proceedings in criminal cases, but did, and do now, express a willingness and readiness to so pay her, upon presentation by her to respondents of an itemized account; but relator insisted upon the payment of the full sum of \$125 as demanded by said accounts, and refused to accept a settlement upon a per diem basis for the days in which she was engaged in reporting testimony and proceedings in criminal cases where the defendants were not convicted, or were insolvent upon conviction. Respondents humbly submit that they will, and hereby offer, upon presentation to them of an account or claim made out in accordance with the compensation allowed by sections 3 and 4 of said act of 1903, accompanied by a statement of the services rendered, the title of the case in which

rendered, and the facts which make the fees charged a good claim against the county, as required by section 970, General Statutes of 1906, so that respondents may determine the justness and correctness of said account, and that no unnecessary or illegal item is contained therein, to proceed at once to approve same and to cause a warrant upon the appropriate funds of the county to be drawn in favor of relator for same.

"(4) Further answering said alternative writ, respondents humbly represent and admit that relator is the duly qualified reporter of testimony and proceedings of the said circuit court as alleged in the alternative writ, but deny that it is her duty as such reporter to be present during the time said court is in session to await the orders of the judge of said court in response to cases not begun on trial, in the county of her residence, and deny that the county is liable for her per diem while so in waiting. Respondents deny that relator has presented to them an account in such form and substance as would enable respondents to prove it, and certify thereon that the same is just, correct, and reasonable, and that no unnecessary or illegal item is contained therein, as the law requires of them; and respondents deny that it was their duty as county commissioners to pay said account until said board is able to so approve it, and certify thereon that no unnecessary or illegal item is contained in same.

"(5) Respondents, further answering, humbly represent that they stand ready and willing, and will be able to do and abide by and perform your honor's order herein, but submit that the said relator has not, in and by her said petition, made or stated such a case as entitles her to the relief sought, or any other relief by mandamus; and respondents reserve this point of demurrer, and pray advantage of same as fully as to the same effect as if they had formally demurred to said petition.

"And having fully answered, respondents pray to hence be dismissed, with their reasonable costs."

The relator filed a motion to make the alternative writ peremptory upon the following grounds:

"(1) That the return to said alternative writ is vague, indefinite, and uncertain, and sets forth no reason why the claim of the relator should not be paid.

"(2) That the said return does not deny the performance of the service by the relator as in and by the alternative writ set forth and contained.

"(3) That the said return does not set forth any good and sufficient reason why the said board of county commissioners should fail and refuse to pay the relator the said sum of money mentioned and described in said alternative writ, nor does it deny that the relator had performed the services for and on behalf of the county as in and by the alternative writ set forth and alleged.

"(4) That it is not denied that the account of the relator has not been examined and approved by the circuit judge of the Fourteenth Circuit, and the same is not res adjudicata."

The circuit judge rendered a judgment, granting this motion and making the alternative writ peremptory.

The assignment of error is that the circuit court erred in granting this motion and awarding the peremptory writ.

John H. Carter, of Marianna, for plaintiffs in error. Will H. Price, of Marianna, for defendant in error.

SHACKLEFORD, J. (after stating the facts as above). The plaintiffs in error state in their brief their contention as follows:

"Plaintiffs in error contend that the position of court stenographer is an office of fees, and payable only for services actually rendered; that no per diem is allowable, in the home county of the reporter, for attendance upon the court unless actually engaged in reporting a case. The appointment, duties, and compensation of the court stenographer are covered in chapter 7, §§ 1844 to 1851, inclusive, General Statutes 1906."

The only sections with which we are concerned in this case are sections 1844, 1845, 1846, and 1847, which read as follows:

"1844. *Official Reporter, Qualifications, and Appointment.*—There shall be in each judicial circuit of this state a reporter of testimony and proceedings in trials at law in the circuit court. He shall be an expert stenographer and typewriter, and shall be appointed by the Governor, upon the recommendation of the circuit judge, and hold during the pleasure of the Governor.

"1845. *His Duties.*—He shall, upon the discretion of the said judge, report the testimony and proceedings in the trial of any criminal case in the circuit court, and shall report the testimony and proceedings in the trial of any civil case in said court upon the demand, in writing, filed in the cause, of the attorney for either party. He shall not, however, be required to attend at any trial out of the county in which he may reside, upon the demand of any attorney, unless such attorney shall deposit or secure his mileage and at least one day's per diem as hereinafter fixed.

"1846. *Compensation.*—He shall be entitled to receive for each day or fraction of a day in which he shall be engaged in the county in which he resides, in reporting such testimony and proceedings, a per diem of five dollars, and for each day or fraction of a day in which he shall be engaged in any county other than that in which he resides, in reporting such testimony and proceedings or in waiting upon the order of the judge or demand of an attorney to the cause, the beginning of the trial, a per diem of six dollars, and mileage at the rate of five cents each way, going and returning from his residence; and for each typewritten transcript of his notes of such testimony and proceedings taken on such trial and furnished on demand as hereinafter provided, the sum of twelve and one-half cents per folio of 100 words, and for each carbon copy thereof, six cents per folio.

"1847. (1899.) *How Paid in Criminal Cases.*—His account for his per diem and mileage for attendance in criminal cases shall be certified to by the judge, and paid as other criminal costs are paid in the county in which the trial is had; his account for attendance and mileage in civil cases shall be taxed as costs in the cause. Upon the demand of the state attorney, or the defendant in any criminal case, or upon demand of either party in any civil case, he shall, upon payment of his fees therefor, as hereinbefore fixed, furnish with reasonable diligence a typewritten transcript of such testimony and proceedings, and his fees therefor shall be taxed as costs in the cause."

We are of the opinion that this contention of the plaintiffs in error cannot be sustained. Under the quoted sections, we think that the circuit judge, within his discretion, is to determine when the official reporter shall attend the sessions of the court for the purpose of reporting the testimony in criminal cases, and, as the two respective circuit judges have certified that the two accounts of the relator are true and correct, that the

board of county commissioners\* cannot be permitted to question the validity of such certificates. See the reasoning in *Gill v. State*, 72 Ind. 266, and *Wauashara County v. Portage County*, 83 Wis. 5, 52 N. W. 1135, which would seem to support the conclusion which we have reached. As to whether or not the relator was actually engaged in reporting the testimony and proceedings in criminal cases for the number of days claimed is not for the county commissioners to determine, but is beyond their province, as section 1847, quoted above, especially provides that the account of the official reporter "for his per diem and mileage for attendance in criminal cases shall be certified to by the judge, and paid as other criminal costs are paid in the county in which the trial is had." The certificate of the judge is conclusive, and there is no auditing for the county commissioners to do, but it becomes their duty to cause a warrant to be issued to the reporter upon the fine and forfeiture fund of the county in payment of the bills so certified to be true and correct. We fail to see wherein sections 970, 971, 972, and 973 of the General Statutes of 1906, cited and relied upon by the plaintiffs in error, have any applicability. We have examined all the authorities cited to us by the plaintiffs in error, and are of the opinion that they do not support their contention.

The judgment will be affirmed.

BROWNE, C. J., and TAYLOR, WHITFIELD, and ELLIS, JJ., concur.

(73 Fla. 128)

CLARK et al. v. STRINGER.

(Supreme Court of Florida. Jan. 26, 1917.)

Error to Circuit Court, Duval County; George Cooper Gibbs, Judge.

Action between Charles A. Clark and others and John Stringer. Judgment for the latter, and the former bring error. Writ of error dismissed.

Francis P. L'Engle, of Jacksonville, for plaintiffs in error. Johnson & McIlvaine, of Jacksonville, for defendant in error.

PER CURIAM. This cause having been submitted to the court at a former term thereof, upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and it appearing to the court that the transcript of the record filed herein does not show that any final judgment has been entered in this cause, but merely recites the entry of a judgment, which should appear in full in the transcript, it seems to the court that the writ of error in said cause should be dismissed. It is therefore considered, ordered, and adjudged by the court that the writ of error in the said cause be and the same is hereby dismissed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

(73 Fla. 129)

CENTRAL GUARANTEE CO. v. BARNETT NAT. BANK.

(Supreme Court of Florida. Jan. 26, 1917.)

Error to Circuit Court, Duval County; Daniel A. Simmons, Judge.

Action between the Central Guarantee Company and the Barnett National Bank. Judgment for the latter, and the former brings error. Affirmed.

Butler & Boyer, of Jacksonville, for plaintiff in error. Fleming & Fleming, of Jacksonville, for defendant in error.

PER CURIAM. This cause having been submitted to the court at a former term thereof, upon the transcript of the record of the judgment aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be, and the same is hereby, affirmed.

(73 Fla. 42)

ROGERS v. STATE.

(Supreme Court of Florida. Jan. 18, 1917.)

(Syllabus by the Court.)

1. HOMICIDE  $\S$  127—INDICTMENT—CONSTRUCTION OF ALLEGATION.

An allegation in an indictment that the accused with a knife "did strike, cut, stab and wound, giving to L. then and there with the knife aforesaid, in and upon the body of the said L., one mortal wound," considered alone or with other allegations, is not a charge that the accused wounded himself, but that he wounded L.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig.  $\S$  192-194; Dec. Dig.  $\S$  127.]

2. CRIMINAL LAW  $\S$  970(7)—MOTION IN ARREST OF JUDGMENT—DEFECT IN INDICTMENT.

Where it is alleged in an indictment for murder in the first degree filed May 20, 1916, that a mortal wound was inflicted on March 10, 1916, and that "of which mortal wound the said" decedent "died," and the trial and conviction is had in July, 1916, and a motion in arrest of judgment is made and denied in October, 1916, a contention, in such motion in arrest, that the indictment is fatally defective because it does not allege the date of the decedent's death, is untenable.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig.  $\S$  2454; Dec. Dig.  $\S$  970(7).]

Error to Circuit Court, Duval County; George Couper Gibbs, Judge.

Louis Rogers was convicted of murder in the second degree, and he brings error. Affirmed.

A. Otto Kanner and E. J. Smith, Jr., both of Jacksonville, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

PER CURIAM. On May 20, 1916, Louis Rogers was indicted for murder in the first degree. In the indictment it is charged:

"That the said Louis Rogers, with a certain knife which he the said Louis Rogers then and there held in his hand, feloniously, willfully and

of his malice aforethought and from a premeditated design to effect the death of the said Estell Little, the said Louis Rogers with the knife aforesaid, did strike, cut, stab and wound, giving to the said Estell Little then and there with the knife aforesaid, in and upon the body of the said Estell Little, one mortal wound, \* \* \* of which mortal wound, the said Estell Little died."

A verdict of murder in the second degree was rendered July 5, 1916. On October 6, 1916, a motion in arrest of judgment was made upon grounds, among others, that the indictment is fatally defective in that it does not allege that the defendant wounded the deceased and does show that the defendant wounded himself; (2) that it is not alleged when or where the decedent died. The motion in arrest of judgment was denied. On writ of error the only contentions are that the indictment is fatally defective in that it charges that the defendant wounded himself and not the deceased, and does not allege that the decedent died within a year and a day after the infliction of the mortal wound.

[1] The words, "the said Louis Rogers with the knife aforesaid, did strike, cut, stab and wound, giving to the said Estell Little then and there with the knife aforesaid, in and upon the body of the said Estell Little, one mortal wound," considered alone or with the other allegations, allege, not that Louis Rogers wounded himself, but that he wounded Estell Little. See *Ruth Smith v. State*, 72 Fla. —, 73 South 354.

[2] Where it is alleged in an indictment for murder in the first degree filed May 20, 1916, that a mortal wound was inflicted on March 10, 1916, and that "of which mortal wound the said" decedent "died," and the trial and conviction is had in July, 1916, and a motion in arrest of judgment is made and denied in October, 1916, a contention, in such motion in arrest, that the indictment is fatally defective because it does not allege the date of the decedent's death, is untenable. *Ruth Smith v. State*, 72 Fla. —, 73 South. 354.

Judgment affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

(73 Fla. 36)

STATE ex rel. DAVIS et al. v. BAGGETT et al.

(Supreme Court of Florida. Jan. 18, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR — 807 — REINSTATEMENT OF CASE—DISCRETION OF COURT.

The matter of reinstating a case which has been dismissed for failure of plaintiff in error or appellant to file his brief within the time required by the rules of this court is addressed to the sound discretion of the court, and in exercising such discretion, it will be influenced, to

some extent, by the nature of the case and the remedy sought by the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3177-3188; Dec. Dig. — 807.]

2. APPEAL AND ERROR — 807 — MOTION TO REINSTATE CASE—DENIAL.

Where mandamus is sought solely to require an official act to be performed before a certain time, and by reason of delays on the part of plaintiff in error the act, if ordered by this court, could not be performed on or before such time, and the cause has been dismissed by this court for failure of plaintiff in error to file his brief, an application to have the cause reinstated will be denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3177-3188; Dec. Dig. — 807.]

Error to Circuit Court, Okaloosa County; A. G. Campbell, Judge.

Mandamus by the State, on relation of W. J. Davis and another, against J. W. Baggett and others, members of the Board of County Commissioners of Okaloosa County, and James L. Clary, Clerk of the Board. Application denied, and complainants bring error, and, after dismissal of case, plaintiffs in error move to have case reinstated. Motion denied.

W. W. Flournoy, of De Funiak Springs, for plaintiffs in error. T. R. James, of Laurel Hill, and Daniel Campbell & Son, of De Funiak Springs, for defendants in error.

BROWNE, C. J. [1] The matter of reinstating a case which has been dismissed for failure of plaintiff in error or appellant to file his brief within the time required by the rules of this court is addressed to the sound discretion of the court, and in the exercise of such discretion it will be influenced, to some extent, by the nature of the case and the remedy sought by the appeal.

The record discloses that on the 13th of June, 1916, a petition was presented to the county commissioners of Okaloosa county, praying that an election be called to determine the location of the county site, and that after two postponements, the county commissioners, by a vote of three to two, on August 2, 1916, called an election for this purpose, to be held March 6, 1917. On August 21, 1916, W. J. Davis and B. P. Edge, the two commissioners who voted in the negative, filed a petition for mandamus to require the board of county commissioners of Okaloosa county—

"to assemble at 10 o'clock a. m. on the 24th day of August, A. D. 1916, at the courthouse at Miligan, Okaloosa county, Fla., and then and there, with your petitioners W. J. Davis and B. P. Edge, jointly acting as the said board of county commissioners of Okaloosa county, Fla., rescind their former action, whereby said board called the election to change the county seat of said county, to be held March 6, 1917, and then and there call said election and set the date when it shall be held to be Tuesday, October 10, A. D. 1916, or such other date as to this court shall seem reasonable, and then and there to appoint inspectors," etc.

The sole purpose of the petition as disclosed in the prayer was to have the election called for an earlier date than March 6, 1917.

The court below denied the application for a peremptory writ of mandamus, and the complainants took writ of error.

[2] The transcript of the record was filed in this court on September 30, 1916, and the brief of counsel for plaintiffs in error was due to be filed on November 2, 1916. On November 14th, on application of counsel for plaintiffs in error, he was given until November 26th to file his brief. On December 19th, the case was dismissed on motion of defendants in error for the failure of counsel for plaintiffs in error to file his brief. On December 22, 1916, plaintiffs in error moved to have the cause reinstated, but, owing to delays caused by acts of omission on his part, the matter was not heard until January 18, 1917.

If the cause should be reinstated, the attorney for defendants in error would have until February 5th in which to file his brief, and before the case can be heard and determined the election will have been held.

It is apparent from the foregoing that it is impossible for plaintiffs in error to obtain the relief they seek, to wit, to have the election called for a date earlier than March 6, 1917, and there is therefore nothing to be gained by reinstating the cause, and the application of counsel for plaintiffs in error is therefore denied.

TAYLOR, SHACKLEFORD, WHITFIELD,  
and ELLIS, JJ., concur.

(73 Fla. 29)

GOODE v. NELSON, Sheriff.

(Supreme Court of Florida. Jan. 18, 1917.)

*(Syllabus by the Court.)*

1. CONSTITUTIONAL LAW §83(2)—PERSONAL RIGHTS—INVOLUNTARY SERVITUDE.

As "involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted," is forbidden "within the United States" by the federal Constitution (Const. U. S. Amend. 13), a crime to be punished by imprisonment cannot lawfully be predicated upon the breach of a promise to perform labor or service.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 151; Dec. Dig. §83(2).]

2. CONSTITUTIONAL LAW §83(2)—PERSONAL RIGHTS—INVOLUNTARY SERVITUDE—REFUSAL TO PERFORM LABOR UNDER CONTRACT.

Chapter 6528, Acts 1913 (Comp. Laws 1914, § 3320a), in effect provides punishment for failure or refusal, without just cause, to perform labor or service under a contract, thereby violating the federal law which is the supreme law of the land within its sphere of operation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 151; Dec. Dig. §83(2).]

*(Additional Syllabus by Editorial Staff.)*

3. CONSTITUTIONAL LAW §83(2)—PERSONAL RIGHTS—"INVOLUNTARY SERVITUDE"—"PEONAGE."

"Peonage" is a status or condition of compulsory service based upon the indebtedness of the peon to the master. The service is enforced unless the debt be paid, and, however created, it is "involuntary servitude" within the prohibition of the Thirteenth Amendment of the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 151; Dec. Dig. §83(2).]

For other definitions, see Words and Phrases, First and Second Series, Involuntary Servitude; Peonage.]

Error to Circuit Court, Bay County; D. J. Jones, Judge.

Habeas corpus by Harry Goode against F. M. Nelson, Sheriff. Petitioner remanded to custody under a commitment, and he brings error. Reversed, with directions to discharge petitioner.

S. K. Gillis, of De Funiak Springs, and J. Ed. Stokes, of Graceville, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for defendant in error.

PER CURIAM. Harry Goode, having been convicted in the county court for Bay county and sentenced and committed to imprisonment upon a charge that he did contract with one J. B. T. to work and perform labor for him by reason of such contract and with the intent to injure and defraud him, obtained from him money to the amount and value of \$37 as a credit and advancement, and without just cause failed to perform said labor as contracted, and, demand being made for the payment of said money, failed to pay said money contrary to the following statute:

"Any person in this state who shall contract with another to perform any labor or service and who shall, by reason of such contract and with the intent to injure and defraud, obtain or procure money or other thing of value as a credit or advances from the person so contracted with and who shall, without just cause, fail or refuse to perform such labor or service or fail or refuse to pay for the money or other thing of value so received upon demand, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars or by imprisonment for a period not exceeding six months." Section 1, c. 6528, Acts of 1913 (Comp. Laws 1914, § 3320a).

On habeas corpus before the circuit judge, the petitioner was remanded to custody under the commitment, and a writ of error was allowed and taken. The contention is that the state statute violates the federal organic law. *Bailey v. State of Alabama*, 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191.

The circuit judge expressed the view that:

"If one procures the money or other thing of value upon the contract to perform service in good faith, and afterwards fails and refuses to perform the service or to pay for the money or other thing of value so received upon demand, he is not guilty of any crime under this statute.

If one obtains money or other thing of value under a contract to perform service with the intent, at the time of procuring the money or other thing of value, to defraud and injure, and makes effective such intention by refusing to perform the service or to pay for the money or other thing of value upon demand, it cannot be said that upon conviction he is imprisoned for debt, because the relation of debtor and creditor never existed by reason of the contract any more than if he had gained possession of the money or property by embezzlement or larceny; neither can it be said that the statute enforces involuntary servitude, because if one obtains from another money or property under a contract to perform service, with intent at the time not to perform the service but with intent to defraud and carries out his intention to defraud by a refusal to perform the service or to pay for the money or property on demand without just cause, he is undoubtedly guilty of a fraud and should be convicted; but, on the other hand, if no fraud was intended in obtaining the money or property, although he may refuse to perform the service or pay for the money or property, he cannot be subjected to involuntary servitude, neither can he be convicted under this statute. I think the primary purpose of the statute is to punish fraud, and not a breach of contract."

[1] Article 13 of the Amendments to the federal Constitution ratified December 18, 1865, is as follows:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Sec. 2. Congress shall have power to enforce this article by appropriate legislation."

Acting within the power conferred by this amendment, Congress enacted that:

"The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the Territory of New Mexico, or in any other territory or state of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the territory of New Mexico, or of any other territory or state, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void." Section 1990, U. S. Rev. Stats. 1878 (2d Ed. [U. S. Comp. St. 1913, § 3944]).

[3] "Peonage" is a status or condition of compulsory service based upon the indebtedness of the peon to the master. The service is enforced unless the debt be paid, and, however created, it is "involuntary servitude" within the prohibition of the Thirteenth Amendment to the federal Constitution. *Clyatt v. United States*, 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726; *Bailey v. State of Alabama*, 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191.

As "involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted," is forbidden "within the United States" by the federal Constitution, a crime to be punished by im-

prisonment cannot lawfully be predicated upon the breach of a promise to perform labor or service. And as "all \* \* \* laws \* \* \* of any \* \* \* state \* \* \* which \* \* \* shall \* \* \* be made to \* \* \* enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void," the quoted statute of the state making the failure or refusal, without just cause, to perform labor or service pursuant to a promise, a criminal offense, is "null and void," as its effect is to enforce, "directly or indirectly, the voluntary or involuntary service or labor of \* \* \* persons as peons, in liquidation of any debt or obligation," in violation of the quoted federal statutes, which, with Amendment 13 of the federal Constitution, comprise the supreme law of the land on the subject. See article 6 of the federal Constitution; *Bailey v. State of Alabama*, supra.

The conviction sustained in *Butler v. Perry*, 67 Fla. 405, 66 South. 150, and affirmed in 240 U. S. 328, 36 Sup. Ct. 258, 60 L. Ed. 672, was for a crime based upon a failure to perform a public service upon state roads as required by statute, not by contract. In *Freeman v. United States*, 217 U. S. 539, 30 Sup. Ct. 592, 54 L. Ed. 874, 19 Ann. Cas. 755, the conviction was predicated upon an embezzlement, not upon the breach of a contract to perform labor or service.

[2] The statute of the state here assailed by its terms provides punishment, not for obtaining money or other thing of value with intent to injure and defraud, but for failure or refusal, without just cause, to perform labor or service under the contract, or for failure or refusal to pay for the money or other thing of value so received upon demand. By making the failure to perform labor or service under a contract a cause for imprisonment, the statute violates the organic law in a manner that is quite similar to, and not distinguishable from, that condemned in *Bailey v. State of Alabama*, 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191. The Alabama statute provided that the failure or refusal to perform the service must be "with intent to injure or defraud." The Florida statute does not contain this element with reference to the failure to perform labor, and is therefore at least as clearly a violation of the federal law, though the Florida act does not contain other provisions found in the Alabama law that were condemned in the *Bailey Case*.

The judgment is reversed, with directions to discharge the petitioner.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

(78 Fla. 12)

## LOUISVILLE &amp; N. R. CO. v. RHODA.

(Supreme Court of Florida. Jan. 18, 1917.)

*(Syllabus by the Court.)*

## 1. COMMERCE §8(6)—MASTER'S LIABILITY—STATE AND FEDERAL LAW.

Section 3148, Gen. St. 1906, defines the liabilities of railroad companies in certain cases, and in so far as such statute in effect creates a presumption of negligence from "damage done to persons" "by the running of the locomotives or cars or other machinery of" "a railroad company," such provision is a matter of substance affecting the liability of railroad companies, and, being in conflict with the provisions of the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), it is superseded by the federal act which is paramount and exclusive in cases to which the latter is applicable.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. §8(6).]

## 2. MASTER AND SERVANT §285(6)—FEDERAL EMPLOYERS' LIABILITY ACT—NEGLIGENCE—PRESUMPTION AND BURDEN OF PROOF.

Under the federal Employers' Liability Act, the burden is upon the plaintiff to prove negligence of the defendant that proximately caused the injury alleged; and while the circumstances of the injury, under the doctrine of *res ipsa loquitur*, may warrant an inference or presumption of negligence, such inference or presumption merely requires the defendant to produce evidence in explanation or rebuttal; and the inference or presumption is to be weighed against the evidence in explanation or rebuttal, observing the rule that the burden of proof is upon the plaintiff; and, if the probative force of the circumstances and facts in evidence do not preponderate in favor of the presumption and against the defendant's proofs, the plaintiff fails to make out his case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 898, 955; Dec. Dig. §285(6).]

## 3. MASTER AND SERVANT §85—PLEADING AND PROOF—RECOVERY.

Even where contributory negligence and assumed risk are rightly pleaded but are not proven, the plaintiff may not recover where the evidence shows without contradiction that the defendant was not negligent as alleged.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 138, 139, 140; Dec. Dig. §85.]

Error to Circuit Court, Santa Rosa County; A. G. Campbell, Judge.

Action by L. M. Rhoda, as administrator, against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Blount & Blount & Carter, of Pensacola, for plaintiff in error. McGeachy & Lewis, of Milton, and Watson & Pasco, of Pensacola, for defendant in error.

WHITFIELD, J. A former judgment herein obtained in the circuit court and affirmed by this court (71 South. 369) was by the Supreme Court of the United States "reversed upon the authority of Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; American R. Co. of Porto Rico v. Did-

ricksen, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785; Garrett v. Louisville & N. R. Co., 235 U. S. 308" (35 Sup. Ct. 32, 59 L. Ed. 242; Louisville & N. R. Co. v. Rhoda, 238 U. S. 608, 35 Sup. Ct. 662, 59 L. Ed. 1487).

The amended declaration on which the last trial was had alleges:

That the railroad company "so carelessly and negligently ran and operated its \* \* \* engine; that the same was run against, over, and upon \* \* \* Clarence Rhoda, the plaintiff's intestate, thereby so greatly wounding and injuring the said Clarence Rhoda that he died from and as a result of the said injuries immediately upon their infliction; that at the time of the injury and death of the said Clarence Rhoda he was employed by the defendant in interstate commerce, and the said injury and death were inflicted upon him while he was performing the duties of such employment; that the plaintiff has been duly appointed as administrator of the estate of the said Clarence Rhoda; that the said Clarence Rhoda left no widow or children surviving him, but did leave surviving him, who still survive him, parents, to wit, Annie Patterson Rhoda, his mother, and L. M. Rhoda, his father; that the said Annie Patterson Rhoda and the said L. M. Rhoda, parents as aforesaid of said Clarence Rhoda, sustained pecuniary damage by the death of the said Clarence Rhoda, in this, to wit, that they lost the pecuniary contributions which they had the reasonable expectation of receiving from the said Clarence Rhoda if he had lived, and were thereby damaged; and the plaintiff, by reason of the death of the said Clarence Rhoda as herein alleged, alleges that the said parents of the said Clarence Rhoda have sustained damages which accrue to the plaintiff for the benefit of said parents, and for which he here sues for their benefit in the sum of \$10,000."

The pleas were not guilty, contributory negligence, and assumed risk. Verdict and judgment were rendered for the plaintiff, and the defendant took writ of error.

At the trial the court gave the following charges which were duly excepted to by the defendant:

"It devolves upon the plaintiff to prove by a preponderance of the evidence that the deceased, Clarence Rhoda, was killed by the locomotive of the Louisville & Nashville Railroad Company. Then it would devolve upon the Louisville & Nashville Railroad Company to prove by a preponderance of the evidence that it was not negligent in its acts.

"Where the plaintiff shows by the evidence that he has sustained damage and injury by the running of an engine of a railroad company, he is entitled to recover therefor, unless the company makes it appear, or it does not appear by a preponderance of the evidence either that he assumed the risk, or that the injury was not due to the negligence of the agents of the company in charge of such engine.

"If you find, after a consideration of the whole of the evidence, that the plaintiff's intestate, Clarence Rhoda, was killed by an engine of the defendant on its tracks, and you do not find from a preponderance of the evidence that he assumed the risk of injury, but the evidence is equally balanced in your minds between negligence and freedom from negligence on the part of the defendant's servants on said engine, your verdict must be for the plaintiff."



The court also refused to give the following charge requested by the defendant to which refusal the defendant duly excepted:

"This case arises under the federal Employers' Liability Act, and under that act the burden of proof is upon this plaintiff to show that the deceased, Clarence Rhoda, came to his death in the manner set forth in the declaration, and that his death was the result of the negligence of the defendant."

[1, 2] The questions necessary to be determined are whether the state statute quoted below conflicts with the federal act; and, if it does not so conflict, then whether the defendant has sustained the burden placed upon it by the state statute. If there is substantial conflict, the federal act is paramount, and whether the defendant successfully carried the statutory burden imposed by the local law is quite immaterial.

The federal act is entitled "An act relating to the liability of common carriers by railroad to their employes in certain cases." The act provides:

"That every common carrier by railroad while engaging in commerce between any of the several states \* \* \* shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment." 35 Stat. 65.

The state statute as originally enacted in 1891 is entitled "An act defining the liabilities of railroad companies in certain cases." As re-enacted and brought forward in the General Statutes of 1906, the pertinent sections of the law are as follows:

"A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

"If any person is injured by a railroad company by the running of the locomotives or cars, or other machinery of such company, he being at the time of such injury an employe of the company, and the damage was caused by negligence of another employe, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to a recovery. No contract which restricts such liability shall be legal or binding." Sections 3148, 3150, Gen. Stats. 1906, Comp. Laws 1914.

Sections 3145 and 3146, General Statutes of 1906, provide for a recovery of damages for the death of a person caused by the negligence of another where the party killed could have recovered had he lived.

The federal act was intended to be paramount and uniform in its operation upon the

matters within its purview. This supremacy and uniformity can be attained only by excluding all local laws affecting the substantial rights of the parties that conflict with the federal act. The state law is intended to enforce a local state policy substantially different from that disclosed by the terms of the federal act. The state law is long prior in date and cannot be regarded as an aid to the federal act, but it is apparently in positive and material conflict therewith. The local statute was not intended to cover subjects that are controlled by paramount federal regulations.

Until Congress acted on the subject, the laws of the several states determined the liability of interstate carriers for injuries to their employes while engaged in such commerce; but, Congress having acted, its action supersedes that of the states so far as it covers the same subject. That which is not supreme must yield to that which is. Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

A federal statute upon a subject exclusively under federal control must be construed by itself and cannot be pieced out by state legislation. If a liability does not exist under the Employers' Liability Act of 1908, it does not exist by virtue of any state legislation on the same subject. Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176. In view of this principle announced in one of the cases on the authority of which the former judgment was reversed by the United States Supreme Court, it cannot be said that the questions now considered have been adjudicated and remain the law of the case as announced in the former opinion. This is particularly so when the Supreme Court of the United States, the final arbiter herein, has since announced principles contrary to the state ruling. See Zerulla v. Supreme Lodge Order of Mutual Protection, 223 Ill. 518, 79 N. E. 160.

The decisions of the Supreme Court have conclusively established the exclusive operation of the Employers' Liability Act over the subject with which it deals to the exclusion of all state statutes relating thereto. Chicago, R. I. & P. Ry. Co. v. Devine, 239 U. S. 52, 36 Sup. Ct. 27, 60 L. Ed. 140.

The federal Employers' Liability Act is the supreme and paramount law of the land with respect to the liability of interstate carriers by rail for injuries to or the death of employes while engaged in interstate commerce. Flanders v. Georgia S. & F. R. Co., 68 Fla. 479, 67 South. 68; 1 Fed. Ry. Digest, 19.

Both the federal acts and the state statutes above quoted define the liability of a railroad company in the cases of negligence covered by the enactments; and in so far as the state law in effect creates a liability by virtue of a presumption of negligence from "damage done," "unless the company shall



make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company," the local statute conflicts with the federal act in matters of substance affecting liability. The federal act contains no provision creating a rebuttable presumption of negligence that substantially affects the liability of defendant in this class of cases. It is not a question of whether the statutory presumption denies due process or equal protection of the laws as in *Moblie, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463, but whether there is a material conflict between the local statute and the paramount federal act affecting the liability imposed by the federal act. See *Central Vermont Ry. Co. v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252. The state statute is not so similar to the federal act as to make it immaterial which law is applied. *Kansas City Western Ry. Co. v. McAdow*, 240 U. S. 51, 36 Sup. Ct. 51, 60 L. Ed. 520. Nor is the difference in the acts a mere rule of evidence or a matter of procedure not affecting the substance of the liability. See *Central Vermont Ry. Co. v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252. The provision in the quoted state statute that is not contained in the federal act does not relate to the jurisdiction of the state court, but relates to matters of substance affecting the liability of the defendant, in that under the state statute negligence and consequent liability is presumed from proof of an injury unless overcome by the defendant, whereas under the federal act, considered in the light of prior federal decisions, negligence of the defendant must appear from the evidence. *Patton v. Texas & P. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Louisville & N. R. Co. v. Kemp*, 140 Ga. 657, 79 S. E. 558; *Central Vermont Ry. Co. v. White*, supra. The provision of the state statute does not define the next of kin who are to participate in the recovery, as in *Seaboard Air Line v. Kenney*, 240 U. S. 489, 36 Sup. Ct. 458, 60 L. Ed. 762. Nor does the state statute regulate the jury to try the action, as in *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U. S. 211, 36 Sup. Ct. 595, 60 L. Ed. 961, Ann. Cas. 1916E, 505. Rights and obligations under the federal Employers' Liability Act depend upon that act and applicable principles of common law as interpreted and applied in federal courts. In an action under the federal Employers' Liability Act, negligence by the employer is essential to a recovery. *Southern Ry. Co. v. Gray*, 241 U. S. 333, 36 Sup. Ct. 558, 60 L. Ed. 1030. As to the burden of proving negligence, see *Southern Ry. Co. v. Prescott*, 240 U. S. 632, text 641, 36 Sup. Ct. 469, 60 L. Ed. 836. A matter of substance in an action for negligence under the federal Employers' Liability

Act caused a reversal in *Chesapeake & O. Ry. Co. v. De Atley*, 241 U. S. 310, 36 Sup. Ct. 564, 60 L. Ed. 1016.

[3] If the doctrine of *res ipsa loquitur* is applicable to this case, such principle, when applied to the facts and circumstances of the injury, merely called for evidence in explanation or rebuttal, and uncontradicted evidence of the absence of negligence on its part was produced by the defendant. The Supreme Court of the United States holds that:

"*Res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff." *Sweeney v. Erving*, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905.

*Kay v. Metropolitan St. Ry. Co.*, 163 N. Y. 447, 453, 57 N. E. 751, 752, was an action by a passenger against carrier, and the New York Court of Appeals said:

"In the case at bar the plaintiff made out her cause of action *prima facie* by the aid of a legal presumption (referring to *res ipsa loquitur*); but when the proof was all in the burden of proof had not shifted, but was still upon the plaintiff. \* \* \* If the defendant's proof operated to rebut the presumption upon which the plaintiff relied, or if it left the essential fact of negligence in doubt and uncertainty, the party who made that allegation should suffer, and not her adversary. The jury were bound to put the facts and circumstances proved by the defendant into the scale against presumption upon which the plaintiff relied, and in determining the weight to be given to the former as against the latter, they are bound to apply the rule that the burden of proof was upon the plaintiff. If, on the whole, the scale did not preponderate in favor of the presumption and against defendant's proof, the plaintiff had not made out her case, since she had failed to meet and overcome the burden of proof."

The rule thus declared has since been adhered to in the courts of New York. *Hollahan v. Metropolitan St. Ry. Co.*, 73 App. Div. 164, 169, 76 N. Y. Supp. 751; *Adams v. Union Ry. Co.*, 80 App. Div. 136, 139, 80 N. Y. Supp. 264; *Dean v. Tarrytown, etc., R. Co.*, 113 App. Div. 437, 439, 99 N. Y. Supp. 250. A similar view appears to be entertained in New Hampshire. *Hart v. Lockwood*, 66 N. H. 541, 23 Atl. 367; *Boston & Maine R. Co. v. Sargent*, 72 N. H. 455, 466, 57 Atl. 688. The same rule has been followed in a recent series of cases in the North Carolina Supreme Court. *Womble v. Grocery Co.*, 135 N. C. 474, 481, 485, 47 S. E. 493; *Stewart v. Carpet Co.*, 138 N. C. 60, 66, 50 S. E. 562; *Lyles v. Carbonating Co.*, 140 N. C. 25, 27, 52 S. E. 233; *Ross v. Cotton Mills*, 140 N. C. 115, 120, 52 S. E. 121, 1 L. R. A. (N. S.) 298,

301. In the Stewart Case the court said (138 N. C. 66, 50 S. E. 565):

"The rule of *res ipsa loquitur* does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor. Whether the defendant introduces evidence or not, the plaintiff in this case will not be entitled to a verdict unless he satisfies the jury by the preponderance of the evidence that his injuries were caused by a defect in the elevator attributable to the defendant's negligence. The law attaches no special weight, as proof, to the fact of an accident, but simply holds it to be sufficient for the consideration of the jury even in the absence of any additional evidence." *Sweeney v. Erving*, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 906.

An interesting discussion of the application of the doctrine of *res ipsa loquitur* appears in *Ridge v. Norfolk Southern R. Co.*, 167 N. C. 510, 83 S. E. 762, where there was "ample evidence of culpable negligence, apart from the application of the doctrine" of *res ipsa loquitur*. See *Cincinnati Traction Co. v. Holzenkamp*, 74 Ohio St. 379, 78 N. E. 529, 6 L. R. A. (N. S.) 800, 113 Am. St. Rep. 980, and extensive notes. See *Great Northern Railway Co. v. Wiles*, 240 U. S. 444, 36 Sup. Ct. 406, 60 L. Ed. 732, where the doctrine of *res ipsa loquitur* did not show liability. See, also, *Jacobs v. So. Ry.*, 241 U. S. 229, 36 Sup. Ct. 588, 60 L. Ed. 970; 84 Central Law Journal, 67.

It appears that the decedent was a flagman employed in interstate commerce on a train that was run between Pensacola, Fla., and Flomaton, Ala., by the defendant railroad company; that the train arrived at Flomaton, Ala., from Pensacola, Fla., at about 11:40 p. m. on February 8, 1912; that about 20 minutes thereafter the conductor sent the decedent as flagman "to the yard to see the yardmaster to find out what time we could get out" of the depot yard on the return trip to Pensacola, Fla. In going to find the yardmaster the decedent flagman "had to cross the tracks." The decedent "went off in the direction of the yardmaster." About 15 minutes, or perhaps a little longer time, after receiving from the conductor the order to see the yardmaster, the decedent's dead body was found on track No. 3. As stated by different witnesses: "The head was cut off lying across the rails." "The body was lying straight up and down the track, about in the center of the track." A switch engine had passed over this track a few moments before and was standing near when the body was found. The engineer and switchman on the switch engine each testified that he was on the lookout when the switch engine passed over the track where the decedent's body was found, and did not see any one on or at the track, and did not know decedent was killed, and did not feel the engine run over anything. No blood was found on the engine. The engineer was at his post on the right looking out with a bright headlight burning; the

fireman was looking out on his side of the engine with a lantern. It seems that no one saw the accident, and it is suggested that the evidence indicates that the decedent unobserved by the train crew and perhaps coming from behind may have attempted to board the tender of the engine which was going in the direction where the yardmaster was, and that in attempting to board the tender the decedent fell under the tender and was killed without being seen by the engine crew, though the decedent may have had a lighted lantern in his hand at the time he was killed. The switch engine was moving forward, and naturally and properly all the crew were doubtless looking forward. If the decedent did not approach the engine and tender within the range of the vision of the crew who should have been looking forward, there was apparently no negligence in not seeing the decedent before the accident if he in fact approached from towards the rear of the engine.

Certainly the defendant by positive evidence made it appear that its servants "exercised all ordinary and reasonable care and diligence" in running the switch engine at the time when the decedent must have been killed, and there is no evidence tending to show negligence of the defendant's servants. Therefore, even if the state statute is applicable and negligence as alleged was legally presumed from the fact of injury, the defendant has successfully carried the burden which the statute imposes to show nonliability. See *Seaboard Air Line R. Co. v. Thompson*, 57 Fla. 155, 48 South. 750; *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, 43 South. 318.

Even if the pleas of contributory negligence and of assumed risk were not duly proven, yet on the plea of not guilty, after the fact of injury by the running of the locomotive was shown, the issue under the statute, in the absence of proof of defendant's negligence, was: Did the defendant "make it appear that their (its) agents \* \* \* exercised all ordinary and reasonable care and diligence"? There being uncontradicted evidence that the defendant was not negligent, and no evidence tending to show negligence of the defendant as alleged, there was no basis in the evidence for the charge that, if the evidence "is equally balanced in your minds between the negligence and freedom from negligence on the part of the defendant's servants on said engine, your verdict must be for the plaintiff." This charge was harmful error under the circumstances.

As the judgment was reversed and as the evidence is not shown to be precisely the same as on the former trial, the holding by the court on the former writ of error that the evidence was sufficient to support the verdict is not the law of the case on this writ of error, particularly in view of the

qualified approval of the verdict in the former opinion. 71 South. 369.

The judgment is reversed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and ELLIS, JJ., concur.

(73 Fla. 54)

BANNING et al. v. BROWN et al.

In re DANIEL.

(Supreme Court of Florida. Jan. 19, 1917.)

(Syllabus by the Court.)

1. EQUITY  $\hookrightarrow$  395—MASTER IN CHANCERY—JURISDICTION.

A master in chancery has no authority to pass upon and determine any question affecting the propriety or competence of an order of a circuit judge fixing the amount and conditions of a bond for supersedeas, or the sufficiency of the bond filed in pursuance of such order.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 854-856; Dec. Dig.  $\hookrightarrow$  395.]

2. APPEAL AND ERROR  $\hookrightarrow$  492 — MASTER IN CHANCERY — DISREGARDING SUPERSEDEAS BOND.

If there is the semblance of a supersedeas bond on file within 30 days of the date of entry of the decree or order appealed from, the master cannot disregard it, and for him to do so is contempt of court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2231; Dec. Dig.  $\hookrightarrow$  492.]

3. APPEAL AND ERROR  $\hookrightarrow$  441—SUPERSEDEAS—JURISDICTION OF CIRCUIT COURT.

The entry of appeal, the order fixing the amount and conditions of the bond, and its execution, approval, and filing within 30 days of the entry of the decree or order appealed from, are all that is necessary to set the statutory supersedeas in operation, and when that is done the power of the circuit judge is ended, except that he may correct the record to make it speak the truth.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2202; Dec. Dig.  $\hookrightarrow$  441.]

Proceeding by H. D. Brown and others against E. P. Banning and others. Final decree of foreclosure against defendants, and they appeal.

On January 4, 1917, a rule nisi was issued by this court, on the petition of E. P. Banning and others, against W. A. Daniel, to show cause why he should not be adjudged in contempt for disregarding a supersedeas obtained upon the appeal herein.

On January 11, 1917, W. A. Daniel filed his answer, and the petitioners moved to make the rule nisi absolute. Respondent adjudged in contempt, but rule discharged on his payment of costs.

O. O. McCollum, M. H. Long, and John T. Crawley, all of Jacksonville, for petitioners. W. A. Daniel, of Jacksonville, pro se.

BROWNE, C. J. On the 24th of November, 1916, a final decree of foreclosure was entered in the circuit court of Duval county against E. P. Banning, Anna Mae Banning, and Andrew Bysheim, and W. A. Daniel was appointed special master in chancery to execute the decree and sell the lands and tene-

ments described therein, in default of the payment of several sums of money decreed to be payable to complainants.

On the 18th day of December, 1916, an appeal to this court was entered by E. P. Banning, Anna Mae Banning, and Andrew Bysheim, and on the 22d day of December, 1916, application was made to the judge of the circuit court of Duval county for an order fixing the amount and conditions of the supersedeas bond, and on the same day the circuit judge made an order fixing the amount and conditions of the bond, and on December 23d the bond was executed, approved by the clerk, and filed in the cause.

On January 1, 1917, the appellants filed a petition before Circuit Judge Gibbs, alleging that the cross-complainants intended to sell the property on that day, and praying that an order be granted restraining the special master from making the sale, which petition was denied; and on the same day the respondent, W. A. Daniel, as special master in chancery, offered for sale and sold the property described in the decree.

The respondent in his answer admits that he sold the property, and says he ought not to be adjudged in contempt therefor, for the following reasons:

(1) Because the circuit judge fixed the amount and conditions of the bond four days after the entry of the appeal.

(2) Because the bond filed and approved by the clerk of the circuit court was not in compliance with the order of the circuit judge fixing the amount and conditions of the bond.

(3) Because the names of two strangers to the record are written in the bond with the principals, and signed the same.

(4) Because the circuit judge in one place in his order used the words "cross-defendants," where "cross-complainants" should have been used.

(5) Because the bond omitted the words "during the pendency of the appeal," which were contained in the order.

(6) Because the bond omitted the words "if the judgment or decree of this court on November 24, 1916, be affirmed."

(7) Because the order did not sufficiently identify the judgment or decree appealed from.

(8) Because the bond did not sufficiently identify the judgment or decree appealed from.

(9) Because the bond filed and approved by the clerk of the circuit court was not a statutory, but a common-law, obligation.

(10) Because the bond is payable to H. D. Brown, A. M. Ives, J. H. Patterson, and De Berniere Hough, and not to "the order of" H. D. Brown, etc., as required by the order.

(11) Because it was reported to him that the circuit judge who denied the petition for a restraining order said that he did not require any further delay.

[1] Each of these propositions the respondent, as special master, proceeded to consider and determine, and he resolved them against the appellants, and ignored the supersedeas, and in his answer to the rule says he was justified in so doing. In effect his contention is that if an appeal is taken, and an order made by a circuit judge fixing the amount and conditions of a supersedeas bond, and the bond is approved by the clerk and filed, all within 30 days from the entry of the decree appealed from, the master in chancery may consider and determine the sufficiency or legality of the order; whether or not the circuit judge had authority to make an order determining the amount and conditions of the bond, after the entry of the appeal; whether or not the bond conformed to the terms and conditions of the order; whether or not the order and bond sufficiently identified the judgment intended to be superseded; whether or not a palpable clerical error in the circuit judge's order fixing the amount and condition of the bond rendered the former of no effect. If this contention is sound, a special master may adjudicate any and all questions which may arise on an appeal, on which a supersedeas may be attacked. Respondent bases his right to so determine these questions on the decision in *Mitchell v. Mason*, 63 Fla. 538, 57 South. 604.

The case does not support his contention. In that case the decree was entered and recorded on December 1, 1911. The sale took place on January 1, 1912, the day after the expiration of the 30 days within which the order of the judge fixing the amount and conditions of the bond must be made and the bond executed, approved, and filed. The point decided in that case was that there was no order, or semblance of an order, of the circuit judge fixing the amount and condition of the bond, and there was no bond, or semblance of a bond, executed, approved, and filed within the 30 days provided by the statute, and consequently there was no supersedeas, and the master had a right to sell the property. There is a wide distinction between the right of a master to determine the physical fact of the total absence of a supersedeas order or bond filed within the time required by law, and the right to determine whether the order or bond on file was defective, erroneous, or improper. The one involves only the ascertainment of a fact; the other involves a legal proposition requiring judicial determination. No supersedeas order by the circuit judge is required. The entry of appeal, the order fixing the amount and conditions of the bond, its execution, approval, and filing, within 30 days of the entry of the decree or order appealed from, are all that is requisite to set the statutory supersedeas in operation; and, when this is done, the power of the circuit judge is ended, except that he may correct the record to make it speak the truth.

In *Continental Nat. Building & Loan Ass'n v. Scott*, 41 Fla. 421, 26 South. 726, this court said:

"The statute simply authorizes the circuit judge by his order to set the supersedeas in motion, and when this is done his power over the supersedeas becomes functus officio. He cannot vacate or disturb it, but any application for its discharge or vacation must be addressed to this court, whose process it is."

One of the grounds urged by respondent, justifying his ignoring the supersedeas, is that it was reported to him that Circuit Judge Gibbs said he did not require any further delay. In *Mitchell v. Mason*, supra, the respondent sought to justify his conduct by a letter from the circuit judge telling him, "Do not deliver any papers without the order of the court," and this court said:

"That phase of the answer that sets up the instruction by letter from the circuit judge to the respondent not to deliver the property cannot excuse him. The appeal removed the case to this court. The power of the circuit judge was suspended by the supersedeas, and after it was perfected the circuit judge had no power to make any further order relative to the property in the receiver's hands, until after this court had acted in the premises."

In *State v. Johnson*, 13 Fla. 33, Chief Justice Randall said:

"That it be made the plaything of whosoever may choose to deride its judgments or its process, and ignore its existence and its acts, because the opinions of the judges and the judgments of the court may not meet the approval of counsel upon the one side or the other of a controversy, or may not be in accordance with the opinions or the wishes of subordinate officers, cannot be allowed without surrendering the judicial character and confessing the impotency of this department of the government. Courts commit errors, and parties may suffer from the improvidence or corruption of their judges, yet the remedy for these is not in individual resistance or in a resort to private judgment. Every court will hear the appeals of those who conceive themselves to be wronged or threatened with injustice by the execution of its decrees. If its errors be made apparent, it will do justice to itself by dealing justice to parties without fear and without hesitation. There is no excuse for resistance of the orders of the courts in this country, where their doors are wide open, and where every human being may be heard in the presence of the whole people."

[2, 3] When the appeal is entered, and the circuit judge has determined the amount and conditions of the bond, and the bond is executed, approved, and filed, all within 30 days from the entry of the decree appealed from, the supersedeas begins to run, and neither the circuit judge, nor the master, nor any other person, may ignore it without being amenable to this court for contempt. This court alone has jurisdiction to determine all questions arising out of the manner of taking the appeal, the sufficiency or character of the order of the circuit judge, or the form and sufficiency of the bond; and application for relief from anything connected with the attempted appeal must be made to this court alone.

The Supreme Court of West Virginia thus lays down the rule:

"In order to justify any punishment in such a case, the process of the court disobeyed must have been its lawful process.

"By its lawful process is meant such process as the court has jurisdiction to issue. If such jurisdiction exists, its process is lawful, though it be improvidently awarded, or though on the merits of the case it ought not to have been awarded.

"If a supersedeas, which this court has the power to issue, be improvidently awarded, the defendant should move to have it quashed; and he cannot, while it is in force, disobey it with impunity." State ex rel. Mason v. Green, 16 W. Va. 864.

In Deming Inv. Co. v. Fariss, an Oklahoma case, the court said:

"The Deming Investment Company, in a suit against Fariss and others upon a note and mortgage, obtained a judgment for a sum of money, and a decree directing the sale of the mortgaged premises to satisfy the judgment; that Fariss appealed from the judgment, and undertook to supersede the same by giving a bond in a sum double the amount of the judgment and costs. The bond was approved by the clerk of the court, and the appeal filed in the Supreme Court. Notwithstanding such supersedeas bond, the Deming Investment Company asked for and obtained from the clerk of the district court an order of sale, and were proceeding to sell the property to satisfy their judgment, when, upon application of Fariss to the district court, the sale was enjoined pending the appeal in the Supreme Court. To vacate such order the Deming Investment Company brings the case here, and assigns numerous errors. It will not be necessary to consider all of these, as we think the entire question may be disposed of without such consideration. Under the law governing appeals (section 4447, St. Okl.) authority is granted to supersede judgments and it is provided that the clerk of the court in which any judgment is rendered may take and approve the bond. In the case under consideration the clerk had accepted and approved the bond before the order of sale issued. The fact that the bond may not have conformed in all particulars to the statute did not make the instrument a nullity, but, if defective, the remedy was by motion to the court below for additional security, or for a correction of the bond. As we view this matter, the approval of the bond by the clerk in a case where in the statute directs him to accept and approve a bond, as is the case under our statute, is tantamount to an order of the court, and supercedes the judgment. The only way by which supersedeas may be set aside is by direct attack. It cannot be ignored, or an execution issued, as long as it remains on record, until its effect has been tested in this manner. In this case it was sought to disregard the bond because one of the conditions required by the statute was not inserted therein. The bond was for double the amount of the judgment and costs, but did not provide that while the possession of the property was in the appellant he would not commit or suffer to be committed any waste thereon, and that, if the judgment complained of should be affirmed, he would pay the value of the use and occupation of the premises, etc. Whether or not such provision should have been in the bond, it is unnecessary to decide. The bond, as it was drawn, was accepted and approved. The clerk had the right, under the law, to act in the matter, and, having such jurisdiction, his action must stand until set aside; and if, upon motion to the court, relief such as the parties deem themselves entitled to cannot be obtained, an appeal will lie to this court; but until the bond as accepted is held insufficient, or the action of the clerk in approving the same be vacated, the judgment is superseded." Deming Investment Co. v. Fariss (Okla.) 50 Pac. 130.

See, also, Smith v. Caldwell, Ky. Dec. (Sneed, 1801-05) 341.

When an appeal bond has been approved its sufficiency is thereby determined until further order of some competent court. State ex rel. Heckel v. Klein, 137 Mo. 673, 39 S. W. 272.

The jurisdiction of this court has frequently been invoked to adjudicate the question of the sufficiency of the several steps necessary to put in operation the provisions of the statute governing a supersedeas, and to vacate it if improperly taken. Warner v. Watson, 27 Fla. 518, 8 South. 842; Dell v. Marvin, 31 Fla. 152, 12 South. 216; Wheeler & Wilson Manufg Co. v. Johns, 37 Fla. 262, 20 South. 236; Palmer v. Palmer, 41 Fla. 184, 26 South. 640; Hathcock v. Société Anonyme La Floridienne, 54 Fla. 522, 45 South. 22.

In Howell v. Commercial Bank, 51 Fla. 460, 40 South. 76, the question of a condition imposed by the circuit judge in an application to fix the conditions of a supersedeas bond, was attacked on appeal, and this court said:

"This is not a matter for an assignment of error on an appeal from the final decree; but if the court upon whom the statute casts the duty of fixing the conditions violates its discretion therein, a different procedure is called for."

The "procedure" which this court meant was such as was had in the cases cited above, and not the judgment by a master in chancery.

To permit a master in chancery to pass upon and determine any question which may arise affecting the propriety or competence of an order of a circuit judge fixing the amount and conditions of a bond for supersedeas, or of the sufficiency of the bond, would be to create an intermediate appellate tribunal to decide these questions before the case reaches this court for decision on its merits. The Constitution, however, has not created such a tribunal, and any action or proceeding in disregard and defiance of the force and effect of a supersedeas or stay is a contempt of the authority and jurisdiction of this court.

The making of a conveyance in pursuit of said sale, held herein to have been made in contemptuous disregard of the supersedeas of this court, will be but a continuation of the disregard of the supersedeas. The respondent is hereby adjudged to be in contempt for his disregard of the supersedeas of the decree appealed from, but as the purpose of the rule is accomplished by the adjudication of the question involved, there is no necessity to impose a severe penalty on the respondent, either as punitive of him, or as a deterrent to others likewise inclined, and there being no wilful contumacy in the action of the respondent in the premises, the rule will be discharged upon the payment by respondent herein of the costs of this proceeding.

TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

(73 Fla. 64)

**ORMOND v. JACKSON COUNTY.**

(Supreme Court of Florida. Jan. 19, 1917.)

*(Syllabus by the Court.)***COUNTIES**  $\Rightarrow$  131—**CONTRACT—RECOVERY.**

In an action by an individual against a county for indexing records, if no valid contract for the work is shown, there can be no recovery.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 199; Dec. Dig.  $\Rightarrow$  131.]

Error to Circuit Court, Jackson County; E. C. Love, Judge.

Action by J. A. Ormond against the County of Jackson. Judgment for defendant, and plaintiff brings error. Affirmed.

Smith & Davis, of Marianna, for plaintiff in error. John H. Carter, of Marianna, for defendant in error.

**PER CURIAM.** The plaintiff in error brought an action against the county of Jackson to recover a stated sum for indexing certain books kept in the clerk's office of the county, wherein instruments were recorded. The court directed a verdict for the defendant and rendered judgment thereon. Plaintiff took writ of error. No express contract with the plaintiff was shown to have been made or ratified by the county commissioners with the plaintiff for the service alleged to have been rendered. The plaintiff's own testimony fails to show a contract made by or for him with the county commissioners under statutory authority; and the county commissioners can bind the county only when and as authorized by law. The statute of 1893 (section 1833, Gen. Stats.), under which the plaintiff seeks recovery, gives no authority for a quantum meruit payment, on the showing of service rendered by the plaintiff; he not being the clerk.

Affirmed.

**BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITEFIELD, and ELLIS, JJ., concur.**

(113 Miss. 322)

**HOBBS & BUCK v. HERMAN GROCER CO.**  
(No. 17573.)

(Supreme Court of Mississippi, Division B.  
Dec. 23, 1916.)

**SALES**  $\Rightarrow$  88 — **DISCLOSURE OF CONTRACTING PARTIES—DIRECTED VERDICT—STATUTE.**

Where the jury would have been warranted in believing that defendant purchased peas from "Hobbs & Buck," plaintiff, and not from "Buck Bros. Co.," the plaintiff Buck belonging to both firms, a directed verdict for defendant on the ground that "Buck Bros. Co." had not disclosed that the other firm had any interest in it as required by Code 1906, § 4784, was erroneous.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 248-250.]

Appeal from Circuit Court, Holmes County; Monroe McClurg, Judge.

Action by Hobbs & Buck against the Herman Grocer Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Appellants, a firm composed of D. H. Hobbs and De Witt Buck, sold appellees a large quantity of peas, the price of which was \$616.38. About the time of this transaction, Buck Bros. Co., a firm in which De Witt Buck was a partner, owed appellee \$172.29. The mercantile stock of Buck Bros. Company was destroyed by fire. Appellee refused to settle the account of Hobbs & Buck unless allowed to apply as a credit thereon to balance due appellee by Buck Bros. Company. Appellants thereafter brought suit to recover the balance, \$172.79. The circuit judge gave a peremptory instruction for the defendant upon the theory that section 4784 of the Code of 1906 applied. This section provides as follows:

"If a person shall transact business as a trader or otherwise with the addition of the words 'agent,' 'factor,' 'and company,' or '& Co.,' or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name without any such addition, all the property, stock, money, and choses in action used or acquired in such business shall, as to the creditors of any such person, be liable for his debts, and be in all respects treated in favor of his creditors as his property."

The firm of Hobbs & Buck had procured a loan from a bank of which Hobbs was president, and with the funds so furnished had purchased the peas sold to appellee. They had been stored in a warehouse on property owned by Buck Bros. Company, who were country merchants running a crossroads store. Buck Bros. Company had posted notices at several places in the county to the effect that they wanted to purchase 1,000 bushels of peas and other country produce, and had also advertised in papers in large cities that they had peas for sale. The peas were sold to appellee by De Witt Buck, who was a member of both firms.

At the close of the testimony, the defendant made the following motion, which was sustained by the court:

"Now comes the defendant and moves the court to exclude the evidence and direct the jury to find a verdict for the defendant because it was shown that peas were acquired by Buck Bros. Company without any sign disclosing Hobbs & Buck had any interest in it."

Boothe & Pepper and P. P. Lindholm, all of Lexington, for appellant. Elmore & Ruff, of Lexington, for appellee.

**COOK, P. J.** We think that the jury would have been warranted in believing that the Herman Grocer Company bought the peas from Hobbs & Buck. If that be true, the Herman Grocer Company became the debtor of Hobbs & Buck. It selected its creditor,

and the creditor accepted its debtor. In this state of the case, section 4784, Code of 1906, has no application, and the trial court erred in directing a verdict for defendant.

Reversed and remanded.

**WELLS LUMBER CO. v. LEE.** (No. 18842.)  
(Supreme Court of Mississippi. Feb. 26, 1917.)

Appeal from Circuit Court, Lamar County; A. E. Weathersby, Judge.

Action between the Wells Lumber Company and Mrs. Rebecca Lee. Judgment for the latter, and the former appeals. Affirmed.

W. A. Shimpan, of Poplarville, for appellant. Salter & Hathorn, of Purvis, for appellee.

PER CURIAM. Affirmed.

**SCHAFER v. ALABAMA & V. RY. CO.**  
(No. 18787.)

(Supreme Court of Mississippi. Feb. 26, 1917.)

Appeal from Circuit Court, Warren County; E. L. Brien, Judge.

Action between George Schaffer and the Alabama & Vicksburg Railway Company. Judgment for the latter, and the former appeals. Affirmed.

Brunini, Hirsch & Griffith, of Vicksburg, for appellant. R. H. & J. H. Thompson and Fulton Thompson, all of Jackson, for appellee.

PER CURIAM. Affirmed.

**ILLINOIS CENT. R. CO. v. CLARK.**  
(No. 18846.)

(Supreme Court of Mississippi. Feb. 26, 1917.)

Appeal from Circuit Court, Attala County; H. H. Rodgers, Judge.

Action between the Illinois Central Railroad Company and Malinda Clark. Judgment for the latter, and the former appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. T. P. Guyton, of Kosciusko, and J. D. Guyton, of Durant, for appellee.

PER CURIAM. Affirmed.

(199 Ala. 105)

**SPEAR v. WARD et al.** (6 Div. 415.)

(Supreme Court of Alabama. Jan. 11, 1917.)

**1. MUNICIPAL CORPORATIONS**  $\S$  64—ORDINANCES—LEGISLATIVE AUTHORITY.

The Legislature has authority to authorize municipalities and cities to pass ordinances relating to any of the subjects of municipal regulation, except such as may be inhibited by the Constitution or the municipal form of government.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig.  $\S$  156, 157.]

**2. MUNICIPAL CORPORATIONS**  $\S$  597—POLICE POWER—SEWER SYSTEM.

The preservation of the public health by the installation and maintenance of sanitary systems of sewers and closets is within the police powers of government, subject to which

the inhabitant of a municipality holds his individual rights to property and liberty.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig.  $\S$  1325, 1354.]

**3. CONSTITUTIONAL LAW**  $\S$  48—MUNICIPAL CORPORATIONS  $\S$  63(1)—POLICE POWERS—ORDINANCES—VALIDITY—PRESUMPTIONS IN FAVOR OF.

Statutes and ordinances dealing with and relating to the preservation of the public health by the installation and maintenance of sanitary systems of sewers and closets, together with provisions for their enforcement, will be indulged by the courts with the presumptions in their favor, as to their necessity, propriety, and validity, in the absence of showing that they are unreasonable, arbitrary, unduly oppressive, or inconsistent with the legislative policy of the state, and it must be made to appear to the courts that this police power has been manifestly transcended or abused, before they will be set aside or declared void; the special provisions and the extent of such ordinances being matters left in large measure to the discretion and judgment of the municipal authorities.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig.  $\S$  46; Statutes, Cent. Dig.  $\S$  56; Municipal Corporations, Cent. Dig.  $\S$  155, 1384, 1879.]

**4. MUNICIPAL CORPORATIONS**  $\S$  63(1)—POLICE ORDINANCE—VALIDITY—QUESTION FOR COURTS.

Though the necessity and propriety of a particular city ordinance, exercising the police power, is primarily a legislative question, whether a given one is reasonable and not arbitrary, and is consistent with the state's policy of municipal government, is often a question for the courts.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig.  $\S$  155, 1384, 1879.]

**5. MUNICIPAL CORPORATIONS**  $\S$  605, 623(1)—POWER TO ABATE NUISANCE.

Municipal authorities have power to prevent and abate a nuisance, but they cannot, in the exercise of such power, declare a perfectly lawful business or trade to be a nuisance, and abate it, when the business, trade, or thing is not in law or fact a nuisance, or is not carried on or operated in such manner as to be likely to become a nuisance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig.  $\S$  1338, 1340, 1371.]

**6. MUNICIPAL CORPORATIONS**  $\S$  623(1)—DUTY OF MUNICIPAL AUTHORITIES—ABATEMENT OF NUISANCES INJURIOUS TO HEALTH.

Municipal authorities not only may exercise the police power of the state to preserve the public health, but the law enjoins the duty on them to promptly abate or remove all nuisances by which the public health may be affected.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig.  $\S$  1371.]

**7. MUNICIPAL CORPORATIONS**  $\S$  589—POLICE POWER—DESTRUCTION ON CONFISCATION OF PROPERTY.

Private property must be held subordinate to the police regulations of a city; yet lawful property cannot be destroyed or confiscated under the mere guise of police regulation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig.  $\S$  1308, 1319.]

**8. MUNICIPAL CORPORATIONS**  $\S$  597—POLICE ORDINANCE—VALIDITY—STATUTES.

Under Code 1907,  $\S$  1292, 1293, authorizing cities to extend or alter their systems of sewerage, and to extend the mains whenever, in the opinion of the city or town council, it may be necessary or expedient to do so, and to regulate water closets and the construction thereof, and to compel their installation and connection with

sewer systems, an ordinance compelling residents of the city to abandon dry closets and install sanitary ones, and to connect their premises with the sewer system of the city, and providing that if an owner fails for a reasonable time after notice to make connections with the sewer system, and to install sanitary closets, the city shall do so, and the cost of the work shall constitute a lien on the property of the owner, further providing for the enforcement of the lien, was an authorized police regulation, and not void as amounting to an unwarranted taking or confiscation of an owner's property under the pretext of exercising a police regulation; the amendment of section 1293, by Laws 1909, p. 175, not taking away any of the city's power in the premises.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1325, 1354.]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Suit by J. H. Spear against George B. Ward and others. From an order denying temporary injunction, complainant appeals. Affirmed.

The following is the ordinance referred to in the opinion:

Section 1. Be it ordained by the city commission of the city of Birmingham, that whenever in the judgment of the city commission it shall be deemed necessary or expedient for the protection of the public health to require the owner of any property in the city of Birmingham to install and connect water closets with the sewerage system of said city, the city commission may in addition to the present regulations in lieu thereof adopt a resolution declaring that in the opinion of the city commission it is necessary and expedient that said work be done, which resolution shall give the name of the owner or owners of the lot, the lot and block number, and the survey in which the same is situated, and shall describe the location at which said water closet shall be installed, and shall describe the character of the work and the quality of the closet, including necessary water pipe lines, to be installed, and shall set forth the estimated cost of providing and installing same. The resolution shall also fix a day for the hearing of the property owner, which day shall not be less than twenty days after the adoption of said resolution.

Sec. 2. Be it further ordained, that upon the adoption of said resolution the city clerk shall issue a notice to the property owner named in said resolution, which notice shall set forth the resolution so adopted, and shall notify the property owner to appear, either in person or by counsel, before the city commission on the day named in said resolution, to show cause, if any there be, why he should not be peremptorily required to forthwith construct said water closet at the place mentioned in said resolution at his own expense, which notice shall be served upon the property owner by the chief of police or by any police officer by leaving a copy of said notice with said property owner, and it shall be the duty of said police officer making said service to make return in writing upon the notice to the city clerk, which notice shall be served at least ten days before the day fixed, in said resolution for hearing the same.

Sec. 3. Be it further ordained, that upon the day fixed in said resolution for hearing the property owner's objections, the city commission shall proceed to hear any objections or defenses which the property owner may make in writing, and hear all evidence which the property owner may offer in support of any protest or objection so made: Provided that if said property owner shall fail to protest in writing, which protest shall be filed with the city, the city clerk, or with the commission, on the hearing of said

resolution, he shall be held to have consented to the making of the connections in the manner hereinafter provided.

Sec. 4. Be it further ordained, that upon hearing said resolution the city commission shall have power to peremptorily order by resolution the said property owner to make such connections within ten days thereafter.

Sec. 5. Be it further ordained, that in case of a failure to install or connect the said water closet with the sewerage system of the city of Birmingham, within ten days after the peremptory resolution ordering the same shall have been adopted, it shall be the duty of the plumbing inspector of the city of Birmingham to install on said premises of said property owner a proper water closet, with necessary water supply line and connect the same with the sewerage system of said city at the expense of the owner, the cost thereof to be a lien upon the property in favor of the city of Birmingham, to be collected as other debts are collected or liens enforced: Provided, however, that the closets and water pipe line installed shall be of the kind designated in the original resolution, provided for in section 1 hereof, and the costs of such installation shall not exceed the sum estimated in said original resolution: And provided, further, that the amount of such costs shall bear interest at the rate of 8 per cent. from the day of the completion and installation as certified by the president of the city commission, as hereinafter provided.

Sec. 6. Be it further ordained, that upon the completion of the installation and connection of such water closet and water pipe line under the provisions of this ordinance, the president of the city commission shall prepare, or cause to be prepared, a statement in writing setting forth the name of the owner of such property and a description of the property on which such improvement has been made, together with the cost of such sanitary connection and installation of such closet and water pipe line, which statement shall be signed by the president of the city commission in his official capacity and shall be filed with the probate judge of Jefferson county for record in the mortgage records of said county. The filing of such statement shall operate as notice of the existence of the lien from the date of its filing.

Sec. 7. Be it further ordained, that any person whose property shall have been assessed under the provisions of this ordinance shall have the right to pay said assessment in cash at any time within thirty days after the amount of such assessment shall have been ascertained by resolution adopted by the city commission, notice of which shall be given to the property owner by registered mail at his last-known address: Provided, however, that the property owner shall also have the right in lieu of paying said assessment in cash, as hereinabove provided, to pay the same in monthly installments, each installment to equal one-twentieth of the principal amount of the assessment, and at the time of paying such monthly installment the property owner shall also pay the interest on the unpaid balance from the date of the last preceding payment to the date upon which the monthly installment is paid: Provided, further, that if such property owner shall fail to pay the principal in cash within thirty days after such notice that said assessment has been ascertained and fixed, or shall fail to pay any monthly installments when due, and the same shall remain in default for thirty days, then at the option of the city the entire amount shall become due and payable, and it shall be the duty of the city comptroller to proceed to collect the same and to enforce the payment in any court having jurisdiction, or by sale as provided by law, for foreclosing street improvement assessment liens.

Sec. 8. Be it further ordained, that the notice of lien provided for in section 6 of this ordinance shall be filed for record in the office



of the probate judge of Jefferson county until the property owner shall have been given notice by registered mail, addressed to his last-known address, of the fact of the completion of such installation and the amount of the assessment as provided in section 7 of this ordinance. At any time within five days after said notice shall have been deposited in the post office at Birmingham, Ala., in accordance with the provisions of this section, such property owner shall have the right to file in writing with the city clerk any protest or objection against the material used, the manner in which the work is constructed, or the cost of such assessment, and it shall be the duty of the city commission at its next regular meeting, after the filing of such protest, to hear said protest and any evidence which the property owner may offer, and it may either confirm, modify or repeal the resolution fixing the assessment.

Sec. 9. Be it further ordained, that if such property owner fails to protest within the time and manner hereinabove stated, he shall be held to have consented to such assessment.

Sec. 10. Be it further ordained, that any property owner feeling himself aggrieved by the action of the commission in overruling any protest so filed, either in whole or in part, may within two days after such assessment shall have been finally fixed, appeal to the circuit court of Jefferson county, Ala., or such other inferior court as may hereafter be created, upon giving bond in twice the amount of the assessment with two good and sufficient sureties, conditioned to prosecute such appeal to effect, and to pay to the city of Birmingham such judgment as the court may render upon the hearing of such appeal.

Sec. 11. Be it further ordained, that upon said appeal being taken it shall be the duty of the city clerk to forthwith send to the court to which the appeal is taken a transcript of the proceedings, including the protest and bond, and said cause shall thereupon be set down for immediate hearing by said court, said court shall thereupon hear the same on the merits and render judgment accordingly.

Sec. 12. Be it further ordained, that in the event such property owner shall not protest, as hereinabove provided, the statement in writing provided in section 6 shall thereupon immediately be filed in the office of the probate judge.

Sec. 13. Be it further ordained, that the provisions of this ordinance shall not apply to any property unless the same is located within two hundred feet of a sanitary sewer.

The suit is to test the validity of an ordinance (No. 370-C), which is intended to compel residents of the city to abandon dry closets and install sanitary ones, and to connect their premises with the sewer system of the city; and which provides that if the owner of the premises fails for a reasonable time after notice to make the connections with the sewer system and to install sanitary closets, then the city shall do so, and the cost of the work shall constitute a lien upon the property of the owner; and further provides for the enforcement of the lien.

The ordinance in question was passed pursuant to an act of the Legislature approved July 25, 1909, entitled "An act to amend section 1293 of the Code, relating to municipal corporations."

Appellant, as a resident and property owner of the city, by his bill seeks to enjoin the authorities of the city from enforcing the ordinance as to certain property of his, situated within the city.

On the hearing of the bill and the answer

of respondents the chancellor denied the temporary injunction, and from this order of the chancellor the complainant appeals.

Gibson & Davis, of Birmingham, for appellant. M. M. Ullman and W. A. Jenkins, both of Birmingham, for appellees.

MAYFIELD, J. It has been decided often by this court that a municipal corporation possesses and can exercise such powers, and such only, as (1) those which are granted in express words; (2) those necessarily and fairly implied by, or incident to, the powers so expressly granted; and (3) those powers which are essential to the declared objects and purposes of the municipality, which latter class does not include those powers which are convenient, but not indispensable. *Wetumpka v. Wetumpka Wharf Co.*, 63 Ala. 611; *Eufaula v. McNab*, 67 Ala. 590, 42 Am. Rep. 118; *New Decatur v. Berry*, 90 Ala. 432, 7 South. 838, 24 Am. St. Rep. 827.

[1, 2] The Legislature has the undoubted authority to authorize municipalities and cities to pass ordinances relating to any of the subjects of municipal regulation, except such as may be inhibited by the Constitution or our municipal form of government. The preservation of the public health by the installation and maintenance of sanitary systems of sewers and closets is well recognized as one of the most important duties of municipal governments, and falls clearly within the police powers of government, subject to which the inhabitant and citizen of the municipality holds his individual rights to property and to liberty.

[3] Consequently, statutes and ordinances dealing with and relating to such subjects, together with provisions for the enforcement thereof, will be indulged by the courts, with the presumptions in their favor, as to their necessity, propriety, and validity, in the absence of a showing to the effect that they are unreasonable, arbitrary, unduly oppressive, or inconsistent with the legislative policy of the state. It must be made to appear to the courts that this police power has been manifestly transcended or abused, before courts will set aside or declare void ordinances which are intended to promote the public health. The special provisions and the extent of such ordinances are matters usually, and almost of necessity, left in a large measure to the discretion and judgment of the municipal authorities. They have, of course, no absolute power to pass any arbitrary ordinance which their caprice or whim might desire; but the law does of necessity vest in them judicial discretion to be exercised reasonably, with regard to the circumstances of each particular case, the objects to be accomplished, and the existing necessity of the occasion.

[4] The necessity and propriety of a particular ordinance is primarily a legislative question; but whether a given one (though

one of its kind is authorized) is reasonable and not arbitrary, and is consistent with the state's policy of municipal government, is often a question for the courts. *Marion (Town of) v. Chandler*, 6 Ala. 899; *Greensboro v. Ehrenreich*, 80 Ala. 579, 2 South. 725, 60 Am. Rep. 130.

[5] Municipal authorities are given the power in this state to prevent and to abate nuisances, but they cannot, in the exercise of this power, declare a perfectly lawful business or trade to be a nuisance, and abate it, when the business, trade, or thing is not in law or in fact a nuisance, or is not carried on or operated in such manner as to be likely to become a nuisance. In other words, such municipal authorities cannot, by their mere ipse dixit, make that a nuisance which is not in fact or in law such, nor can they arbitrarily destroy the property of a citizen, under the pretext of preventing or abating a nuisance. Of course that which is per se a nuisance may be declared a nuisance by municipal authorities, and as such abated as provided by law; but that which is not per se a nuisance may, under certain conditions, become such, because of its location or of the mode or manner in which it is carried on, and then it may be declared such and abated.

[6] As before stated, one of the most important objects of municipal government is the preservation of the public health; and science has demonstrated that nothing contributes more to secure the end than a sanitary system of sewerage and water-closets connected therewith; and the benefits of such a system are largely lost unless the inhabitants of the city can be compelled to connect their premises with the system, and to abandon dry closets and install water-closets. To this end the Legislature has clothed municipalities with the power and authority to pass ordinances, by-laws, etc. The municipal authorities to this extent exercise the police power of the state; and they not only have the power, but the law enjoins the duty and obligation on them, to promptly abate or remove all nuisances by which the public health may be affected, and to thus provide for the safety, comfort, and convenience of the inhabitants. All the inhabitants therefore have an interest in seeing that proper ordinances are passed, as well as that, when passed, such ordinances are enforced against all, as the failure to conform thereto by a few may inflict injury and ill health upon the many. There are times when the public health is the object of paramount concern, and the law wisely lodges in municipal bodies discretion and power adequate to such emergencies. Such an emergency is shown by the answer of respondents in this case.

[7] Private property must be held subordinate to reasonable police regulations; yet lawful property cannot be destroyed or con-

fiscated under the mere guise of police regulations for its protection. It does not appear to us that in this case there is shown anything which amounts to an unwarranted taking or confiscation of appellant's property, under the pretext of exercising a police regulation, such as was held to be shown in the cases relied upon by appellant. See *Durgin v. Minot*, 203 Mass. 26, 89 N. E. 144, 24 L. R. A. (N. S.) 241, 133 Am. St. Rep. 276; *Phila. v. Prov. L. Ins. Co.*, 132 Pa. 224, 18 Atl. 1114; *State v. Asbury Park*, 61 N. J. Law, 386, 39 Atl. 706; *Eckhardt v. City of Buffalo*, 19 App. Div. 1, 46 N. Y. Supp. 204.

In some of the above cases the municipal authorities had exceeded the powers given by the statute, and in others there was an unreasonable or arbitrary exercise of the power conferred. Neither of these facts is involved in the instant case. It is not contended in this case that the owner did not have notice of the proceedings had against his property, such as was provided for in the ordinance and the statute.

[8] Sections 1292 and 1293 of the Code provide as follows:

1292: "To extend or alter the system of sewerage, and extend the mains wherever, in the opinion of the city or town council, it may be necessary or expedient to do so, and to extend the mains to any point in the county in which it is situated, and for these purposes, the said city or town council shall have and exercise the full rights of eminent domain, and may acquire such lands or easements therein and the uses of such waterways as may be necessary, by the proceedings provided by law for acquiring private property for public uses."

1293: "To regulate water-closets and the construction thereof, and to compel the installation of the same and connection with the sewerage systems of the city or town, and in case of a failure to install or connect, after reasonable notice, then the city or town shall install proper water-closets and connect the same with the sewerage system of the city or town, at the expense of the owner, the cost thereof to be a lien upon the property, to be collected as other debts are collected or liens enforced."

The amendment of section 1293 by the act of 1909 does not take away any of this power or authority, and is of no particular importance in this case. This we hold to be ample authority to the municipality to pass the ordinance in question (which the reporter will set out), and we are not shown by this record that there has been, or that there is threatened, any arbitrary, unreasonable, or unwarranted, exercise of the power and authority so conferred, in this particular case.

It results, therefore, that the chancellor did not err in declining to enjoin the municipal authorities from enforcing the ordinance in question.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

(199 Ala. 89)

LEEK et al. v. MEEKS et al. (7 Div. 800.)

(Supreme Court of Alabama. June 30, 1916.  
Rehearing Denied Jan. 18, 1917.)**1. EVIDENCE**  $\Leftrightarrow$  372(12)—**DOCUMENTARY EVIDENCE—TRANSCRIPT FROM RECORD.**

In view of Code 1907, § 3382, providing that when a valid executed instrument not properly acknowledged and recorded has for 20 years been of record in what would have been a proper court of record of such instrument had it been properly acknowledged and proven, a duly certified transcript thereof shall have the same force and effect as evidence as such transcript would have had had such instrument been duly acknowledged and recorded and section 3355, providing that when a party cannot write, his signature to a conveyance of land must be attested by two witnesses who can write, and when the party does write his signature it must be attested by one witness, in a suit to enjoin the use of a party wall, an instrument properly certified as the transcript from a record of an agreement between the predecessors in title of the parties containing a covenant for the payment by the then owner of defendant's lot of a portion of the cost of a party wall at such time as he should exercise the right granted to use it, purporting to be signed by defendant's predecessor in the title attested in writing by a witness, was properly admitted in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1623, 1627; Dec. Dig.  $\Leftrightarrow$  372 (12).]

**2. PARTY WALLS**  $\Leftrightarrow$  9(5)—**COVENANTS—COVENANTS RUNNING WITH LAND.**

A covenant in writing by the owner of land in behalf of himself and heirs and assigns to pay to the owner of an adjoining lot and his heirs and assigns, a portion of the cost of a party wall at such time as he should exercise the right granted to him by the same instrument to build to and use said wall, was a covenant not only binding upon the original parties, but also on purchasers with notice, and created an equitable easement in land of the grantee of such right.

[Ed. Note.—For other cases, see Party Walls, Cent. Dig. § 49; Dec. Dig.  $\Leftrightarrow$  9(5).]

**3. PARTY WALLS**  $\Leftrightarrow$  9(4)—**COVENANTS—CONSTRUCTION—RULE.**

In solving the question whether a covenant as to the use of a party wall and payment therefor is enforceable against subsequent owners of the property, the language of the instrument and all attending facts and circumstances surrounding the parties at the time of its execution are to be considered.

[Ed. Note.—For other cases, see Party Walls, Cent. Dig. § 48; Dec. Dig.  $\Leftrightarrow$  9(4).]

**4. COVENANTS**  $\Leftrightarrow$  69(1) — **CONSTRUCTION — RULE.**

If a restriction imposed by a grantor or proprietor upon granted premises would naturally operate to enhance the value of his adjacent premises whether retained by him or another, it is a strong circumstance that the restriction was not for the mere use of the grantor, but a permanent servitude appendant to the premises.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 67, 69; Dec. Dig.  $\Leftrightarrow$  69(1).]

**5. PARTY WALLS**  $\Leftrightarrow$  9(7) — **COVENANTS—CONSTRUCTIVE NOTICE.**

The purchasers of land were charged with constructive notice by the recordation of an agreement by which their predecessors in title covenanted to pay a portion of the cost of a party wall upon exercising the right granted in such agreement to use the wall, also by the recital of such agreement in each deed of their

chain of title, and also with notice that this lien is not barred under 20 years.

[Ed. Note.—For other cases, see Party Walls, Cent. Dig. § 51; Dec. Dig.  $\Leftrightarrow$  9(7).]

**6. PARTY WALLS**  $\Leftrightarrow$  9(7)—**COVENANTS.**

Where defendant's building was torn down and disconnected from a party wall, in rebuilding and using the wall with actual notice of a covenant on the part of their predecessors in title to pay a portion of the cost of the wall when it was used, a new right of action was created on behalf of the plaintiff under the original promise, although the statute of limitation might have perfected a bar before defendant's building was originally attached to plaintiff's wall.

[Ed. Note.—For other cases, see Party Walls, Cent. Dig. § 51; Dec. Dig.  $\Leftrightarrow$  9(7).]

Appeal from City Court of Gadsden; John H. Disque, Chancellor.

Bill by J. L. Meeks and another against J. T. Leek and another to restrain and enjoin respondents from building to or attaching to the western wall of a certain building, and to restrain the use of the wall. Decree for complainants and respondents appeal. Affirmed.

The chancellor's opinion, directed to be reported, is as follows:

The facts and evidence in this case may be briefly stated as follows:

J. R. Nowlin in the year 1892, and from whom, by mesne conveyances, complainants derive their title, was the owner of the west half of lot No. 70 in fee simple, and that B. M. and J. L. Pogue were the owners in fee simple of the east half of lot No. 70, said lots being located on Broad street in the city of Gadsden, in the business section of said city. The respondents derive their title by mesne conveyances from the Pogues. The Pogues erected a one-story building on their lot, and later J. R. Nowlin built a two-story brick building on his lot, using the western wall of the one-story Pogue building as the eastern wall of his two-story brick building as a party wall, using the Pogue wall in height and depth, two stories, making said western wall, which was located on the Pogue lot, a two-story wall in height and depth. At the time of the extension of the Nowlin two-story wall and its erection, on August 22, 1892, there was recorded in the office of the judge of probate of Etowah county an agreement between the Pogues and Nowlin, the then owners of lot No. 27, which had a frontage of 100 feet, reciting substantially the facts set out in this opinion, and in addition thereto the following: Now, therefore, in consideration of the premises above and below recited, and the further consideration of \$1 to them paid Mrs. B. M. Pogue and J. L. Pogue, do hereby agree and covenant with said Nowlin, his heirs and assigns, that the said Nowlin, his heirs and assigns, shall have the right to use said wall to the extent of the western half thereof, its entire width and height as it now stands in connection with the said building, and so long as said building stands, with full right to preserve and repair the same, having cost the sum of \$824.35, of which amount Mrs. B. M. Pogue has paid \$190 and said Nowlin has paid the balance. It is agreed that upon the payment to said Nowlin, his heirs and assigns, by said Mrs. B. M. Pogue, her heirs and assigns, of the sum of \$224.47, without interest, she or they shall have the right to build to and use said wall, as extended by said Nowlin in height and depth; and we hereby agree and covenant with said Nowlin that in the event of its alienation by us before said use, we will stip-

ulate in the conveyance we will make for a like covenant on the part of our alienee in favor of said Nowlin.

Subsequent to the execution of the foregoing instrument Beaty became the purchaser of the Pogue lot, and on May 5, 1899, he sold said lot to Hagin & Proctor, and in the deed from Beaty to Hagin & Proctor, in the warranty clause in said deed appears the following exception: "Except as to any liability on the contract entered into by J. L. and B. M. Pogue on the one part, and J. R. Nowlin on the other part, in regard to the wall on the west side of said lot." Proctor purchased Hagin's interest in the lot, and in the latter part of 1902 or early in 1903, made his single story brick building into a two-story brick building, using the second story of the Nowlin wall as the second story of his building, and attaching same, and thus making his building a two-story building, using said Nowlin wall as a wall for his building, and used said Nowlin wall, without the consent of Nowlin or the then owner of the said Nowlin lot. Proctor thereafter sold and conveyed to Mrs. Nancy O. Leek, testator of respondent. At the time Proctor used the Nowlin wall for a two-story building on his lot, Mrs. Abercrombie had become the owner of the Nowlin wall and lot, and was then in possession thereof, and in the year 1910 or 1911, complainants here became the purchasers of the Nowlin lot through mesne conveyance. In the year 1915, and just before the filing of this bill, respondent Leek tore down the front of the building on the Pogue lot which he had purchased, and which was attached to the Nowlin wall, for the reason that said wall had become dangerous by the city authorities, as being unsafe, and in addition was pulling out the wall of complainant's building. Respondents, in building a new front to their building, joined and attached a new front to complainant's wall. At the time of the filing of the injunction, the entire front of respondent's building was torn out, and in rebuilding and replacing the front to the building they used new iron and new holds in complainant's wall, and had to join complainant's wall in making said repairs. That the steel beams used in the front part of the building and in repairing it were set on projections in the Nowlin wall, and in repairing and rebuilding the front of respondent's building, they attached the materials to complainant's wall.

[1] It is argued by counsel for respondent that the instrument in writing, the basis of this suit, executed by J. L. and B. M. Pogue, parts of which are above set out, has not been proven as to execution, and is incompetent evidence. This contention is not sound in view of section 3382, Code 1907. The instrument offered in evidence is properly certified as the transcript from a record, and purports to be signed by J. L. Pogue and his wife, B. M. Pogue, and is attested in writing by a witness, who wrote his name as a witness to the signature of the parties executing the instrument. Section 3355, Code 1907, provides that when a party cannot write, his signature must be attested by two witnesses who can write; when, however, the party can and does write his signature, his signature must be attested by one witness. The parties to the instrument, and the attesting witnesses, all wrote their names thereto, and therefore the paper was properly admitted in evidence. *O'Neal v. Tenn. C., I. & R. R. Co.*, 140 Ala. 387, 37 South. 275, 1 Ann. Cas. 319.

[2] One of the main propositions submitted for decision involves the construction of the language of the contract which is above set out. The instrument on its face shows in unmistakable language that the Pagues not only covenanted for themselves, but for their heirs and assigns, to pay \$224.47, when they or their heirs or assigns used the wall built by Nowlin. There is no subject that is as difficult as that of determining when a covenant is personal and when not, or when it runs with the land, and it re-

quires much technical learning in the law in the solution of this proposition. In the first place, the Pagues agreed in writing to subject their lot to the servitude of the second story brick wall of Nowlin, coupled with the condition that before they or their assigns could use the wall they agreed to pay the sum of money set forth in the contract, and thus attaching an equity to her property. This they had the right to do, and to subject her lot to this servitude, and transmit this servitude to others. They not only covenanted for themselves, but for their heirs and assigns, and also for the heirs and assigns of Nowlin. Under the contract there was privity of estate created between the parties, the covenants were not merely neutral, but embraced their heirs and assigns, thus creating a privity of estate binding both upon the original parties to the covenant, and also on subpurchasers with notice. If an equity is attached to the property of an owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased. *Webb v. Robbins*, 77 Ala. 176; *McMahon v. Williams*, 79 Ala. 290.

In the case of *Cole v. Hughes*, 54 N. Y. 444, 13 Am. Rep. 611, Justice Earl says: There is a wide difference between the transfer of the burden of a covenant running with the land, and the benefits of the covenant, or, in other words, of the liability to fulfill the covenant, and the right to exact its fulfillment. The benefit will pass with the land to which it is incident, but the burden or liability will be confined to the original covenantor, unless the relation or privity of the estate or tenure exists, or is created between the covenantor and covenantee.

Again, in the case of *Trustees v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615, Justice Allen, speaking for the court, says: The language of the court and the judges have been very uniform and very decided upon this subject, and all agree that whoever purchases the land upon which the owner has imposed an easement of any kind, or created a charge which could be enforced in equity against him, takes the title subject to all easements, equities, and charges, however created of which he has notice. This language is quoted approvingly by Judge Somerville in *McMahon v. Williams*, supra. This same principle is announced in *Webb v. Robbins*, supra, with the further holding that the covenant runs with the land into whose hands soever it may fall, and this does not require the insolvency of defendant to uphold it. In *Gilmer v. M. & M. R. R. Co.*, 79 Ala. 569, 58 Am. Rep. 623, Judge Somerville cites *Van Rensselaer v. Read*, 26 N. Y. 574, and quotes Judge Selden as saying: It has often been held that covenants both in their benefits and burdens run with the land where no tenure in its strictest sense exists between the parties. However, he left the question undecided.

"If the owner of land enters into a covenant concerning land, concerning its use, subjecting it to easements or personal servitude and the like, and the land aforesaid is conveyed or sold to one who has notice of the covenant, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity, either to specifically execute it, or will be restrained from violating it, and it makes no difference whatever with respect to this liability whether the covenant is or is not one within the law running with the land." Section 689, 2 Pom. (3d Ed.).

In the case of *Sharp v. Cheatham*, 88 Mo. 498, 57 Am. Rep. 433, we have the case in hand, save and except that the written instrument construed in that case is not as full in its conditions as the written instrument involved in this case. The instrument in the *Sharp* Case did not have the word "assigns," nor the word "covenant" in it, while the instrument before us has. There is a very exhaustive opinion in that case, and a great many authorities are cited. The court finally concluded that the contract before

It created an equitable easement in the land, and that a purchaser with notice would take it subject to the agreement. There is a very learned discussion of this subject in the case of *Trustees v. Lynch*, supra, 70 N. Y. 440, 26 Am. Rep. 615.

[3, 4] In solving the proposition as to whether the agreement is a personal one, and only enforceable against the original parties, or against the party who first infringed the rights of complainant, the language of the instrument and all attending facts and circumstances surrounding the parties at the time of his execution are to be considered. In *McMahon v. Williams* supra, the court says that one of the most practical tests supported by common sense and common business experience is whether the restriction imposed on a grantor or proprietor upon the granted premises would naturally operate to enhance the value of his adjacent premises, whether retained by him or by another. If this be so, it is a strong circumstance that the restriction was not for the mere use of the grantor, but as a permanent servitude, beneficial to the owner of the land, whoever he may be, and appendant to the premises. In applying this rule of law to the instant case, we find that the Pogues had erected a one-story brick building on their lot, and it is apparent to any reasonable sensible business man that the erection of a two-story brick building placing a two-story wall on top of the single story wall of the Pogues, and thereby enabling future purchasers of the Pogue lot to erect a two-story building on said lot having the western wall completed, that it would take less money to change a one-story building into a two-story building by reason of having this wall already built, and that it would materially enhance the value of the property, and operate as an inducement to purchasers to buy.

[5, 6] In 79 Ala. 291, Judge Somerville further says that a rule of controlling importance, especially in doubtful cases, is that such easement is never presumed to be personal or gross when it can fairly be construed to be appurtenant to some other estate. The evidence is without conflict that Pogue, the covenantor, and his assigns down to respondents in this case, had notice of the agreement between the Pogues and the Nowlins, and the equities growing out of it, and took their title to the lot, subject to it, and impliedly agreed to comply with it. It is just and equitable to require respondent to do that which the Pogues covenanted to do. It would be inequitable to allow these respondents to disregard the covenant entered into by the Pogues of which they had notice when they became purchasers of the lot. Authorities supra, and *Jebbes & Colias Confec. Co. v. Brown*, 147 Ala. 593, 41 South. 626, 11 Ann. Cas. 525; *Weil v. Hill*, 193 Ala. 407, 69 South. 439. The evidence showed a chain of conveyances as above set out, and the law not only charged them with constructive notice of the recordation of the agreement, but in respondent's very chain of title they were informed as to the agreement. These facts were sufficient to put them on notice, which, if they had followed up, they would have ascertained that the agreement had not been complied with. The law charges them with notice of the equities which complainants had in this wall, and that this special equity created an equitable lien on the property, upon which the wall is erected, and that this lien is not barred under 20 years; and it follows that no presumption of payment can be indulged until the lapse of 20 years. *Ware v. Curry*, 67 Ala. 274; *Taylor v. Duggar*, 66 Ala. 446. The evidence is without conflict that the whole of the front of the brick building on respondent's lot, which was attached to complainant's wall, was torn down and disconnected from said wall, and in rebuilding their wall they again attached the front of the building to complainant's wall, with actual notice of the original agreement, and a

demand for the payment of the amount specified in this agreement, which demand respondents failed to comply with. In view of the evidence a new right of action was created in behalf of complainant under the original promise to pay when the wall was used, although the statute of limitation might have perfected a bar before the front of respondent's building was originally attached to complainant's wall. When the land is charged at any time, the charge ought to be equal, and one should not bear all the burden, and the law on this point is founded in great equity, and falls within the reason and equity of the doctrine of distribution, which is fixed and bottomed on general principles of justice. *Sharp v. Cheatham*, supra. This principle is not in conflict with that announced in the case of *Bisquay v. Jeunelot*, 10 Ala. 245, 44 Am. Dec. 483, for it is clearly intimated by the court that if there had been a written contract to pay for the wall when used, the conclusion of the court would be in line with the principles above announced. *Preiss v. Parker*, 67 Ala. 500. A proper application of these principles leads to the conclusion that by virtue of the written agreement entered into by J. L. and B. M. Pogue and J. R. Nowlin, and their assigns, to pay the sum of \$224.47 whenever the Nowlin wall was used, created a special equity in the premises of respondent, and incumbered them with this equity, and respondents having notice both actual and constructive, they are as fully bound by the written agreement as if they had signed it. This equity carries with it an equitable lien on the premises equal to the amount agreed to be paid by the original covenantors in the written instrument, but without interest. Decree was entered accordingly.

Culli & Martin, of Gadsden, for appellants.  
Inzer & Inzer, of Gadsden, for appellees.

THOMAS, J. We have carefully considered the several assignments of error, and, without indulging any presumption in favor of the correctness of the decree of the chancellor, are of the opinion that the correct conclusion was reached. The opinion of the chancellor, made a part of his final decree in the cause, has carefully stated the principles involved; and no good end would be subserved by a further discussion of the same. The reporter is directed to set out this well-considered opinion of the chancellor, as authority for the conclusion reached in this court.

There being no error in the record, the decree is affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(199 Ala. 21)

HERSHEY CHOCOLATE CO. v. SHARPE,  
Judge. (6 Div. 372.)

(Supreme Court of Alabama. Feb. 1, 1917.)

1. RECEIVERS  $\S$  174(1)—SUITS AGAINST RECEIVER AND SURETIES—STATUTES.

Code 1907,  $\S$  5730, authorizing a suit against any receiver appointed by any court in respect to any act or transaction of his in carrying on the business connected with the property in the state without previous leave of the court appointing him, does not apply to a suit against a receiver and sureties on his bond, in which case

leave of the court to sue must first be obtained.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 333-335; Dec. Dig. ¶174(1).]

## 2. RECEIVERS ¶215—LIABILITY OF SURETIES—CONDITIONS PRECEDENT.

The sureties on a receiver's bond are not liable until all remedies available against the receiver are exhausted, and their liability cannot be enforced until the default has been ascertained on the final settlement of the receiver's account and a decree has established the receiver's inability to pay.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 424; Dec. Dig. ¶215.]

Petition by the Hershey Chocolate Company for mandamus to compel H. A. Sharpe, as Judge of the City Court of Birmingham, to vacate and annul an order granted by him setting aside a judgment obtained by petitioner against Joseph A. Yates as receiver, and others. Denied.

The cause as it originally stood was a suit by the Hershey Chocolate Company against Joseph A. Yates, as receiver of the Wiley Candy Company, and the sureties on his official bond, and claimed certain damages for the breach of a bond given by said Yates as such receiver of the Wiley Candy Company; the breaches alleged being that he had broken the conditions of his bond, in that he had failed to pay petitioner certain sums of money for goods which said petitioner did bargain, sell, and convey to said Yates, as such receiver, all of which are still due and unpaid. Judgment was entered nll dicit on November 2, 1914, against the receiver and his official bond, which judgment was on December 1, 1914, set aside.

Sterling A. Wood, of Birmingham, for appellant. George E. Bush, of Birmingham, for appellee.

SOMERVILLE, J. The petitioner herein recovered a judgment by nll dicit against one Yates, as receiver of the Wiley Candy Company, and the surety on his receiver's bond; and within 30 days thereafter the defendants filed and presented to the trial court their motion to set aside and vacate the judgment. This motion was granted, and the judgment accordingly set aside. One ground of the motion—the one upon which the court seems to have based its action—was that the complaint did not state a cause of action.

On the theory that the action of the trial court was unauthorized and void, the plaintiff now seeks by mandamus to compel the vacation of the order setting aside the judgment, and the reinstatement of the judgment.

[1] Section 5730 of the Code authorizes a suit against any receiver or manager of property, appointed by any court, "in respect to any act or transaction of his in carrying on the business connected with such property in this state, without the previous leave of the court in which such receiver or manager was appointed. A judgment thus obtained

becomes an ascertained charge upon the property in gremio legis, subject to the orders and decrees of the court to which the receivership is attached. 34 Cyc. 447(B).

But a suit against a receiver and the sureties on his bond is a wholly different matter, and the right to maintain such a suit is not within the purview of the statute referred to.

[2] "Before any resort can be had to the sureties on a receiver's bond, all the remedies available against the receiver must be exhausted. Therefore as a rule the liability of the sureties on a receiver's bond cannot be enforced until a default has been ascertained, on the final settlement of the receiver's accounts, and there has been a decree establishing the receiver's inability to pay." 34 Cyc. 508, 2, and cases cited. The case is analogous to that of an administrator, upon whose bond no action lies until there has been a final decree in the probate court. *State v. Germania Bank*, 103 Minn. 129, 114 N. W. 651. "The regular course of procedure \* \* \* is to proceed against the receiver in the first instance, and, if he shall fail in the proper discharge of his duty within the scope of his bond, then to obtain leave of the court to sue upon his bond." *State v. Gibson*, 21 Ark. 140; *Atkinson v. Smith*, 89 N. C. 72; *Black v. Gentry*, 119 N. C. 502, 28 S. E. 43.

Tested by these well-settled rules, the complaint in question did not exhibit any cause of action on the bond; for it does not allege that there has been any settlement of the receiver's accounts, nor any order or decree ascertaining his liability in the premises, nor does it show any authority from the receiver's court to sue upon the bond.

We hold therefore that the action complained of was proper, and that the petitioner is not entitled to the relief here sought.

Petition dismissed.

ANDERSON, O. J., and MAYFIELD and THOMAS, JJ., concur.

(199 Ala. 23)

THOMPSON v. STRONG, BAGLEY & BAGLEY. (8 Div. 920.)

(Supreme Court of Alabama. April 13, 1916.  
On Application for Rehearing,  
Dec. 30, 1916.)

## 1. SALES ¶1(4) — BUYER'S ACTION FOR BREACH OF CONTRACT — DEFINITENESS OF CONTRACT.

In action by buyer for breach of contract of sale of "three cars" of cotton seed, where the evidence was undisputed that a carload of cotton seed, ranges from 15 to 32 tons and verdict for plaintiff disclosed that it was calculated upon the basis of a minimum capacity of a car, defendant could not complain that the contract was uncertain for failure to specify the exact amount of seed sold.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 5; Dec. Dig. ¶1(4).]

## On Application for Rehearing.

2. EVIDENCE  $\S$ 20(2)—JUDICIAL NOTICE.

Courts do not take judicial knowledge as to the maximum and minimum weight of a "carload" of cotton seed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig.  $\S$  24; Dec. Dig.  $\S$ 20(2).]

3. EVIDENCE  $\S$ 20(2)—JUDICIAL NOTICE.

The courts take judicial notice of the fact that a contract, calling for sale of three carloads of cotton seed, carries with it the knowledge of the fact that such a carload necessarily has a maximum and minimum rate.

[Ed. Note.—For other cases, see Evidence, Cent. Dig.  $\S$  24; Dec. Dig.  $\S$ 20(2).]

4. SALES  $\S$ 1(4)—CONTRACT OF SALES—INDEFINITENESS.

A contract calling for sale of three carloads of cotton seed cannot be said to be invalid for indefiniteness.

[Ed. Note.—For other cases, see Sales, Cent. Dig.  $\S$  5; Dec. Dig.  $\S$ 1(4).]

5. APPEAL AND ERROR  $\S$ 835(2)—REHEARING.

Matters not presented in the original brief of appellant will not be considered on rehearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig.  $\S$  3242; Dec. Dig.  $\S$ 835(2).]

Anderson, O. J., and McClellan and Sayre, JJ., dissenting in part.

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

Action by Strong, Bagley & Bagley against J. R. N. Thompson. From judgment for plaintiffs, defendant appeals. Transferred from Court of Appeals under Acts 1911, p. 450,  $\S$  6. Affirmed.

John A. Lusk & Son, of Guntersville, for appellant. McCord & Orr, of Albertville, for appellees.

GARDNER, J. [1] Suit by appellees against appellant for damages growing out of a breach of contract wherein appellees purchased from appellant three cars of cotton seed at the price of \$25 a ton, to be delivered on the cars at Guntersville, Ala. The contract was made on or about January 21, 1915, and appellees were given notice by the appellant on February 18th that he declined to deliver the seed. The jury found the issues in favor of the plaintiffs and assessed damages at \$180. The only point presented in brief of counsel for appellant goes to the validity of the contract, in that it is insisted that the contract of purchase was uncertain for a failure to specify the exact amount of seed agreed to be sold; that a contract calling for the sale of a carload of cotton seed is too indefinite unless it also specifies the quantity of seed to be contained in the car. We have a similar question presented in the recent case of Ward v. Cotton Seed Products Co., 193 Ala. 101, 69 South. 514, wherein appear the following quotations from 35 Cyc. 210, 639:

"If no fixed quantity of goods is contracted for, but the purchase is of a 'carload,' damages should be computed on the amount usually contained in an ordinary car." Page 639.

"Where the goods are sold by the 'carload,' the term may be construed by the custom of

trade; but in the absence of any agreement, or particular custom, it will ordinarily be held to mean the capacity of a car used for transporting the particular kind of goods sold. So, too, a sale of a 'cargo' of goods means ordinarily the entire load of the vessel, and is limited only by the capacity of the vessel." Page 210.

The evidence is without dispute that the parties did agree on a sale of cotton seed at \$25 per ton, for three carloads f. o. b. Guntersville, and that the defendant failed and refused to deliver it; that on February 18th the defendant sold several tons of seed to another party at Guntersville for \$29 per ton. Testimony for the plaintiffs showed that immediately after the breach of his contract by the defendant they went into the open market at Guntersville and purchased three cars of cotton seed at \$30 a ton. The evidence is further without dispute that a carload of cotton seed ranges from 15 to 32 tons; that the maximum car is 32, and the minimum 15 tons.

The verdict of the jury in this case (\$180) discloses clearly that they fixed their calculation of damages upon the basis of \$4 per ton in the price of the seed, and 15 tons as the minimum amount for a carload of seed under the undisputed evidence in the case, a calculation of \$4 a ton damages on 45 tons of seed. It clearly appears, therefore, that the jury based their calculations upon the minimum capacity of a car. There is nothing here of which the appellant can complain. Notwithstanding any uncertainty, appellant was bound at least to deliver as much as three cars of the smallest capacity. Ind. Co. v. Herrman, 7 Ind. App. 462, 34 N. E. 579.

We, therefore, find no error in the record of which this appellant can complain, and the judgment of the court below is accordingly affirmed.

Affirmed.

ANDERSON, O. J., and McCLELLAN and SAYRE, JJ., concur.

## On Application for Rehearing.

GARDNER, J. Upon the original submission of this cause counsel for appellant argued, as we understand their brief, but one point, namely, the invalidity of the contract on account of indefiniteness, and this was the question treated in the opinion.

It is urged on application for rehearing that the ruling here is in conflict with the case of Elmore v. Parrish, 170 Ala. 499, 54 South. 203, and that both cannot be permitted to stand. These cases, in our opinion, are easily distinguished. In the Elmore-Parrish Case the court was unwilling to declare as a matter of common knowledge that by a "bale" of cotton was meant cotton of a certain weight, to wit, 500 pounds, and for that reason the contract, as alleged, was insufficient because of uncertainty.

[2] Counsel, therefore, argue that this



court, in upholding the contract in this case, has taken judicial knowledge of the fact that a "carload" of cotton seed ranges from 15 to 32 tons. In this counsel are in error. We have not so assumed. Proof was offered in the cause to establish this as a fact without dispute. We do not take judicial knowledge as to the maximum and minimum weight of a "carload" of cotton seed, and the original opinion in this cause did not so indicate. What is to be accepted as a matter of judicial knowledge has given rise to much discussion in the cases, many of which may be found cited in the note to 16 Cyc. pp. 876-879. Reference may also be made to Jones on Evidence, § 123. A review of the cases is unnecessary, but a few may be noted.

[3, 4] Courts have judicially noticed the system of checking baggage (Isaacson v. New York C. & H. R. R. Co., 94 N. Y. 278, 46 Am. Rep. 142), and the transfer of loaded cars from one line to another for continuous transportation (Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. Rep. 477); the method of transportation (Mich. S. & N. I. R. Co. v. McDonough, 21 Mich. 194, 4 Am. Rep. 466); that the owner of logs furnishes the car for shipping (Lowe v. Ring, 123 Wis. 372, 101 N. W. 698, 3 Ann. Cas. 731). See, also, 35 Cyc. 210, note 94, citing Bullock v. Finley (C. C.) 28 Fed. 514; Ind. Cabinet Co. v. Herrman, 7 Ind. App. 462, 34 N. E. 579. And in the case of Elliott v. Howison, 146 Ala. 568, 40 South. 1018, this court held that under a contract for the delivery of lumber f. o. b. cars there was imposed upon the seller the duty of procuring the cars, stating that the courts take judicial knowledge of the fact that the phrase "f. o. b. cars" means free on board the cars, and that this means free of expense to the buyer, and the contract, therefore, means that the seller is to procure the cars. The following quotation, found in note 89 to 16 Cyc. p. 876, is here pertinent:

"We apprehend that it is the duty of courts judicially to know what is the general course of the transactions of business life. \* \* \* We cannot close our eyes to the well-known course of business in the country."

While we may not be able to judicially know the exact maximum and minimum weight of a "carload" of cotton seed when that term is used in a contract of sale, yet we would be closing our eyes to the well-known course of business in this country, particularly in this great agricultural section, if we did not judicially know that the designation of such a term carries with it the knowledge of the fact that such a carload necessarily has a maximum and a minimum weight. In a contract calling for a sale of three carloads of cotton seed, therefore, it cannot be said that the contract is invalid for indefiniteness.

In Ward v. Cotton Seed Co., 193 Ala. 101, 69 South. 514, we quoted with approval the following from 35 Cyc. 210:

"Where the goods are sold by the 'carload,' the term may be construed by the custom of trade; but in the absence of any agreement, or particular custom, it will ordinarily be held to mean the capacity of a car used for transporting the particular kind of goods sold."

Thus it is to be seen that the court does not take judicial knowledge of the maximum and minimum weight of a carload of seed, but we do take judicial knowledge of the fact that by the use of the term "a carload of seed" is meant a carload with a maximum and a minimum weight, and in the instant case the seller was held liable for the minimum capacity.

As previously stated, the question of the validity of the contract was the only point counsel appeared to argue in their original brief, as is indicated by the following language used therein:

"The question as to the sufficiency of the contract is raised by demurrers, by motions to exclude the evidence, and by charges requested."

Some of the assignments of demurrer to the complaint are to the effect "that the contract is void for uncertainty and indefiniteness." The proof showed that the maximum weight of a carload of cotton seed is 32 tons and the minimum weight 15 tons. At the conclusion of all the evidence the defendant "renewed his motion to exclude all the evidence of a purchase of three cars of cotton seed, because it is too indefinite and uncertain as to the amount of seed to be sold." Among the charges refused (another method by which appellant's counsel insisted the sufficiency of the contract was presented for review) are the following requested by defendant:

"The court charges the jury that before you can find for the plaintiffs in this case you must be reasonably satisfied from the evidence that all cars of cotton seed are of the same weight."

Also, the following:

"The court charges the jury that before you can find for the plaintiffs in this case you must be reasonably satisfied from the evidence that every car of cotton seed contains a certain or definite amount of tons or pounds of cotton seed."

And the following, marked No. 9:

"The court charges the jury that a contract for the sale and delivery of three cars of cotton seed at a named price per ton is unenforceable for uncertainty as to the amount of cotton seed sold."

Numerous other charges refused defendant raised in varying language the same question, that, under all the evidence the defendant was entitled to the affirmative charge on account of the indefiniteness of the contract sought to be enforced.

We have referred to the manner in which the question was presented for the purpose of demonstrating that the original opinion in this cause treated—and properly so—the question presented in appellant's brief on the original submission, that is, the question as to the invalidity of the contract for indefiniteness. It is suggested on this application, however, that the complaint was insufficient



in failing to allege as to the question of minimum and maximum weight.

[5] We need not enter into a consideration of this, as the sufficiency of the complaint in this particular was not pressed upon us in the original brief. We take judicial knowledge of the fact that by the terms used was meant carloads having a maximum and minimum capacity, and that therefore such contract is not void for uncertainty. The proof shows without conflict what this maximum and minimum capacity is, and the jury gave the defendant the advantage of minimum capacity.

The application for rehearing is denied.

MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur. ANDERSON, C. J., and McCLELLAN and SAYRE, JJ., dissent.

(199 Ala. 67)

THOMPSON v. BANK OF TUSKEGEE et al.  
(5 Div. 628.)

(Supreme Court of Alabama. Feb. 1, 1917.)

1. WILLS  $\Leftrightarrow$  820(2)—CONSTRUCTION—ANNUITY—LIEN ON REAL ESTATE.

Where a testator provides by codicil for payment of an annuity without designating property out of which it shall be paid, the will providing that life insurance, etc., be invested in real estate, and it appearing that personal property is insufficient to meet annuity, real estate, title to which is in name of testator, as well as personal property, is subject to annuity; annuities being chargeable upon real estate if intention to so charge can be fairly gathered from all provisions of will and surrounding circumstances.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2116-2119; Dec. Dig.  $\Leftrightarrow$  820(2).]

2. WILLS  $\Leftrightarrow$  6—PROPERTY OF CORPORATION—POWER TO DEVISE.

A testator, although he owns all but one or two shares of stock in a corporation, cannot by will provide for payment of an annuity out of lands standing in name of corporation; he and corporation being separate entities, and shares of stock alone being subject to testamentary disposition.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 5-10; Dec. Dig.  $\Leftrightarrow$  6.]

3. WILLS  $\Leftrightarrow$  825—AGREEMENT TO PAY ANNUITY—OPERATION AND EFFECT.

An agreement by two heirs in the division of real estate acquired under a will that one should assume a life annuity provided for mother of deceased by codicil, and a later release by the mother of property of the one not assuming annuity from liability therefor, is effective as to his property, but does not release property acquired by the other; he not having signed agreement by mother nor personally assumed the obligation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2124-2127; Dec. Dig.  $\Leftrightarrow$  825.]

Appeal from Chancery Court, Macon County; W. W. Whiteside, Chancellor.

Bill by Mary W. Thompson against the Bank of Tuskegee and others to enforce the payment of a monthly annuity upon real estate left by the testator. Decree sustaining demurrer to the bill, and plaintiff appeals.

Affirmed in part, and in part reversed and remanded.

The averments of the bill, stated briefly, are that Charles W. Thompson, the son of oratrix, died in Macon county, Ala., on March 20, 1904, leaving a last will and testament, and a codicil, which will was duly admitted to probate, and W. W. Thompson and J. O. Thompson are named as executors and qualified as such, and also engaged in the performance of the trust imposed by the terms of the will and the codicil, while the other persons named as trustees never qualified or acted thereunder; that by the terms of the codicil to the last will and testament of said C. W. Thompson, oratrix was bequeathed an annuity of \$150 per month, to be paid on the first day of each month by the executors and trustees, and to continue during the natural life of oratrix, but that by a decree of the chancery court entered on June 20, 1906, said annuity was reduced to \$100 per month; that the trustees and executors of said last will and testament of said C. W. Thompson made a final settlement of their administration, and on August 14, 1906, the probate court of Macon county made and entered a final decree passing the accounts and vouchers of the said executors and trustees, and directing that they turn over and surrender to Ernest W. Thompson and Charles W. Thompson, Jr., the beneficiaries named in the said last will and testament, and the only heirs at law of said Charles W. Thompson, all of the real and personal estate of the said C. W. Thompson on hand and undisposed of, but subject to the charge of the life annuity in favor of your orator as provided in said will and codicil. During all the time that the trustees and executors administered the estate of said C. W. Thompson they paid your oratrix said annuity, and after said E. W. and C. W. Thompson, Jr., were surrendered the real and personal property of the estate of said Charles W. Thompson by said executors, they continued to pay your orator said annuity until about the month of January 1, 1916, when they failed and ceased to pay said annuity, and your orator is now and has been ever since the last payment made to her without said annuity, and she is in dire need thereof for maintenance and support.

Oratrix avers that at the time of the death of said C. W. Thompson, he was the owner and in possession of quite a large amount of real and personal property situated in Macon county, Ala., and at the time was the owner of all the stock of a corporation known as the Tuskegee Land & Security Company, except one or two shares, and these shares were held by others for the benefit of said Thompson; that said Tuskegee Land & Security Company had and owned at said time a large quantity of land in Macon county; that after the death of said Thompson,

the trustees and executors under his will treated and considered all of the assets of said Tuskegee Land & Security Company as the property of said Charles W. Thompson, and in the execution of the trust imposed by the will instead of selling and disposing of the stock in said corporation, and investing the money in real estate, as directed by the will, treated the real estate in the name of said corporation as realty of the estate of said Thompson, and upon the final decree and settlement surrendered to said E. W. and C. W. Thompson, Jr., all of the real estate standing in the name of the Tuskegee Land & Security Company, together with the other real estate owned and possessed by said Thompson. Oratrix further shows that said E. W. and C. W. Thompson, Jr., had disposed of, or permitted to be disposed of, all of the property surrendered to them by said executors of said last will and testament of said Charles W. Thompson, and neither the said E. W. nor the said C. W., Jr., have any assets out of which oratrix could collect or enforce the payment of the annuity to which she is entitled. Oratrix further shows that at the time of the disposition of some of the property belonging to the estate of said C. W. Thompson, and which was subject to the payment of the annuity in her favor, she relinquished and released to the purchaser her right to an annuity therein, but she avers that the following described real estate now owned and possessed by the different persons, and the corporations mentioned, is still subject to the payment of the annuity. (Here follows description of certain property now owned by J. H. Thompson; other property owned by D. E. Laslie and the Bank of Tuskegee; other property owned by Walter Breedlove and W. E. Huddleston; other property now owned by F. M. Johnston; other property now owned by E. W. Thompson; other property now owned by W. W. Thompson, and other property owned by other individuals who are not made parties.)

Oratrix avers that of the real estate herein described, the title to the following described parcels thereof stood in the name of said C. W. Thompson at the time of his death. (Here follows description.) Oratrix further avers that of the real estate hereinabove particularly described, the title to all the remaining parcels other than those as just averred as standing in the name of said C. W. Thompson at the time of his death stood at that time in the name of Tuskegee Land & Security Company, all of which property, being treated by the trustees and executors as real estate. It is then averred that the executors and trustees exhausted all of the personal property in the payment of the debts of the estate of said Charles W. Thompson, and the only personal property remaining in their hands at the time of the final decree discharging them was the sum of \$521.66, and the interest held and owned by said Thompson in the Tuskegee Land &

Security Company. It is averred and shown that the several pieces of property described are subject to the payment of annuity in her favor of \$100 per month during her natural life. By an amendment it was shown that by mutual agreement and the passing of deeds E. W. and C. W. Thompson, Jr., divided the estate, each receiving his part, and that by the agreement, E. W. Thompson assumed all unpaid indebtedness against such estate, consisting of mortgages, and also he assumed the life annuity of \$100 per month, payable to your oratrix, it being understood that oratrix would release all of the property received in the division of said estate by said C. W. Thompson, Jr., from liability for the payment of her said life annuity, and in pursuance thereto she entered into writing releasing said property. Other amendments were made to the bill showing that at the time the various persons acquired title to the realty which stood in the name of the Tuskegee Land & Security Company, they severally had notice or knowledge that the real estate acquired by them had been treated as a part of the estate of C. W. Thompson, as real estate, and that in the division between the beneficiaries, such estate had been treated as real estate. It is further alleged that the title acquired by Laslie and the Bank of Tuskegee was required by the foreclosure sale under the mortgage, and that the auctioneer crying the sale, and that the agent of oratrix who was present at the sale, each gave notice that the sale was subject to the payment of the annuity, which was monthly to be paid to oratrix.

The codicil referred to is as follows:

Having heretofore executed a will disposing of my worldly estate, I hereby desire to add the following codicil: First, it is my will and desire that my beloved mother, Mary W. Thompson, shall receive out of my estate an annuity of \$150 per month, to be paid to her on the first day of every month; that is to say, that the amount I now allow her for her support and maintenance may be increased to the sum of \$150 per month to be paid to her by my executors named in my will, as a monthly annuity during the term of her natural life.

Steiner, Crum & Well, of Montgomery, for appellant. H. P. Merritt, A. B. Paine, W. P. Cobb, and R. H. Powell, all of Tuskegee, for appellees.

ANDERSON, O. J. [1] The general rule is that pecuniary legacies are not chargeable upon lands unless the intention to so charge them is manifested by express words or by fair implication. *Taylor v. Harwell*, 65 Ala. 1; *Newsom v. Thornton*, 82 Ala. 402, 8 South. 261, 60 Am. Rep. 743. Legacies may be charged upon real estate without express direction, if the intention of the testator so to do can be fairly gathered from all the provisions of the will; and extraneous circumstances may be considered in aid of the terms of the will. *Hoyt v. Hoyt*, 85 N. Y. 142; *Jackson v. Billinger*, 18 Johns. (N. Y.) 368; *Gorman v. McDonnell*, 127 Ala.

549, 28 South. 964. While it is true that ordinarily lands are not chargeable with the payment of general pecuniary legacies, still this rule is not one of universal application, and is not so unbending as it will not yield to another rule of equal dignity and force which allows a testator to blend or mix his realty and personalty in the creation of a source or fund for the payment of his general pecuniary legacies. *Carter v. Balfour*, 19 Ala. 814; *Maybury v. Grady*, 67 Ala. 147. The legacy to this complainant consisted of an annuity to be paid during her life, and while the payment of same was not made an express charge upon the testator's land, no provision was made for the payment of same out of the personalty. It was just provided for generally, and the testator not only contemplated a blending of the personalty and real estate, in so far as this annuity was concerned, but specifically required that his personalty, that is, life insurance, etc., be invested in real estate after the payment of his debts. The bill shows that there was little or no personal property left after the payment of debts, and it was evident that the testator did not intend to provide his mother with an annuity and at the same time confine its payment from a source which he knew would be inadequate to meet same. It may be that the holdings in the Tuskegee Land Company should have been treated as personalty by the executors instead of as realty, but there is nothing to indicate that the testator intended that the annuity provided for his mother should be paid entirely from the stock held by him in said land company. On the other hand, if the testator supposed that his holdings in said land company were to be regarded as land instead of personal property, this is a strong circumstance tending to show that the annuity should be a charge upon his estate generally, including the land, as he was bound to know that it was a continuous charge and that his personalty exclusive of the stock in the land company was greatly inadequate to meet said annuity. We therefore hold that the complainant's annuity was a charge and lien upon all property owned by the testator C. W. Thompson at the time of his death, subject to the payment of his debts and the cash legacies provided by said will. This is not only true, but this seems to be the construction placed upon same by the parties in the settlement of the chancery case between this complainant and the children of the testator, wherein the annuity was reduced from \$1,800 to \$1,200. We therefore hold that the chancery court erred in holding that the bill was without equity, upon the idea that there could be no charge upon the land without averment and proof that there was not sufficient personal property to provide for the payment of the annuity of this complainant.

[2] We are of the opinion, however, that

the complainant has no lien on the lands which stood in the name of the corporation land company. It may be true that the testator owned practically all stock in said company, but he and it were separate entities, and the will operated to dispose of the testator's stock, instead of the property of the corporation, and those of the respondents who purchased lands belonging to the land company got the same free from any lien or claim that the complainant may have had upon the estate of Chas. W. Thompson for her annuity. Moreover, if this was not the case, those of the respondents who purchased any of the land at mortgage sale under mortgage given by the land company acquired the protection accorded the mortgagee, regardless of any notice that may have been given at the sale as to the complainant's claim of a lien upon same.

[3] The agreement executed by the complainant on the 16th day of September, 1908, did not operate to establish or enlarge a lien, as it was not signed by E. W. Thompson, but was intended as a mere release or waiver of any claim or lien that she had to any property received by C. W. Thompson, and that she was to look solely to the property then held by E. W. Thompson under the division with his brother, but which excluded lands in the name of the land company. In other words, this agreement operated to narrow, rather than extend, the complainant's lien so as to confine it to so much of the property then acquired by E. W. Thompson upon the division with his brother as was previously subject to her annuity and to release her claim as to all other property. Neither of the Thompsons (sons) was personally liable for this annuity, as it was a mere charge upon the property left by the testator, and we do not think that the instrument of September 16, 1908, was intended to release the lien upon the property and to look only to E. W. Thompson personally for the payment of the annuity, as the instrument negatives all idea of a release of her lien upon the property allotted to E. W. Thompson. We therefore hold that all property acquired by E. W. Thompson under the division with his brother and the title to which stood in the name of the testator at the time of his death is subject to the complainant's claim, and the bill is not wanting in equity in so far as it seeks to subject it to the payment of the complainant's annuity. The bill, however, is without equity in so far as it seeks to fasten a lien upon any lands held by those respondents that belonged to the land company at the time of the testator's death, or which they may have purchased from C. W. Thompson, Jr., or E. W. Thompson prior to September 16, 1908, and as to these, their demurrer to the bill was properly sustained. The bill does contain equity, however, as to those respondents who hold the property under conveyances from E. W. Thompson sub-

sequent to September 16, 1908, and the title to which stood in the name of the testator at the time of his death as distinguished from the land company.

Affirmed in part, and reversed and remanded, with no cost to respondents of the first class, and cost of this appeal to be equally divided between the appellant, one half, and the other half between the respondents of the second class.

Affirmed in part and reversed and remanded.

**MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur.**

(199 Ala. 51)

**HARRIS v. WALKER**, Superintendent of Banks. (6 Div. 496.)

(Supreme Court of Alabama. Feb. 1, 1917.)

**1. CONSTITUTIONAL LAW** **§9(3)—AMENDMENTS—ADOPTION.**

Const. 1901, § 284, which supplanted Const. 1875, art. 17, § 1, provides that, if it shall appear a majority of the qualified voters who voted at election upon proposed amendments voted in favor of the same, such amendments shall become part of the Constitution. Code 1907, § 1, declarative of the general rule, provides that singular and plural forms are interchangeable. A number of amendments were submitted at the same election. *Held*, that a constitutional amendment was adopted where a majority of the votes cast concerning it were in favor of adoption, though such majority did not constitute a majority of the highest number of votes cast on other amendments.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 5, 7; Dec. Dig. **§9(3).**]

**2. CONSTITUTIONAL LAW** **§9(3)—AMENDMENTS—ADOPTION.**

As Const. 1901, § 285, providing for the form of the ballot for the submission of constitutional amendments, and that no amendment shall be adopted unless it receives the affirmative vote of a majority of all the qualified voters who vote at such election, must be construed with reference to the prior section, a constitutional amendment submitted at a general election which receives a majority of the votes cast on the question of its adoption is adopted, though such majority did not constitute a majority of the votes cast at the general election.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 5, 7; Dec. Dig. **§9(3).**]

**3. CONSTITUTIONAL LAW** **§29—AMENDMENT—ACTION BY LEGISLATURE.**

Where there is nothing to indicate that legislative action is necessary to render effective a constitutional amendment, such action is unnecessary, and hence an amendment eliminating a section from the Constitution goes into effect without legislative action.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 32; Dec. Dig. **§29.**]

**4. BANKS AND BANKING** **§80(4)—CONSTITUTIONAL LAW** **§182—INSOLVENCY—CLAIMS OF CREDITORS—OBLIGATIONS OF CONTRACTS.**

Where after the insolvency of a bank Const. 1901, § 250, giving holders of bank notes and depositors who had not stipulated for interest preference in payment, was eliminated, the elimination does not affect the rights of the depositors, for constitutional provisions and statutes always operate prospectively, and not retro-

spectively, unless the words used clearly indicate that a retrospective operation was intended, and to construe the elimination as having a retrospective effect would violate Const. U. S. art. 1, § 10, prohibiting the passage by a state of any law impairing the obligation of contracts.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 187, 188; Dec. Dig. **§80(4)**; Constitutional Law, Cent. Dig. §§ 471, 493; Dec. Dig. **§182.**]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Petition by T. H. Harris against A. E. Walker, as Superintendent of Banks, for mandamus to said Walker requiring him in the payment of the dividend to pay petitioner a dividend equal in proportion to that paid depositors who had not stipulated for interest. Decree for respondent, and complainant appeals. Affirmed.

The petition avers that Harris is a resident citizen of Birmingham, and that the Jefferson County Bank is a corporation organized for the purpose of carrying on a banking business, and that it continued in such business to January 28, 1916, when said Walker, as superintendent of banks, took charge of the affairs of said bank for the purpose of liquidation as provided by law, and still has charge of said bank for said purpose; that on August 17, 1915, petitioner deposited in said bank \$34,846, under a contract with said bank stipulating that said deposit should bear interest from date at the rate of 4 per cent. per annum, in evidence of which a certificate of deposit was issued by said bank to petitioner; that since taking over the affairs of said bank said superintendent has declared and paid a dividend of 80 per cent. in favor of depositors of said bank who had not stipulated for interest, and that said Walker, as such superintendent, at the time of the filing of said petition was preparing and proceeding to declare and have issued and paid to the depositors of said bank who had not stipulated for interest an additional dividend of 20 per cent.; petitioner has made demand upon said superintendent that in declaring and issuing and paying said dividend of 20 per cent. there be included depositors who had stipulated for interest, and that such superintendent issue and pay dividends to petitioner upon his said deposit; that said superintendent had at the time of the filing of this petition in his custody sufficient moneys to declare a dividend of 20 per cent. upon the deposits of those who had not stipulated for interest, and that such moneys then in the hand of such superintendent as part of the assets of said bank was sufficient to pay a 10 per cent. dividend upon the claims of all depositors and creditors of said bank, including those depositors who had and those who had not stipulated for interest, and that, if such dividend of 10 per cent. be declared in favor of plaintiff, he would be entitled to

receive the sum of \$3,484.61; that the assets of the bank are not sufficient to pay in full all of the depositors who have and those who have not stipulated for interest, together with the other creditors of said bank; the said Walker, as such superintendent, has failed and refused to pay petitioner such dividend; that the passage of the amendment of the Constitution of Alabama striking therefrom section 250, art. 13, entitled "the petitioner to the relief prayed."

Defendant answered the petition and set up: First, that the amendment to the Constitution striking therefrom section 250 was not adopted by the vote of a majority of the qualified voters voting in the election upon the amendment thereat submitted, the total vote on amendment No. 1, the educational amendment, being 116,884, while the total vote on amendment No. 3, the bank deposit amendment, was only 93,865, of which 50,373 were cast for the amendment, and 43,492 against it; second, that said amendment has not been rendered effective by any act of the Legislature so declaring; third, that the ballot issued for the amendment election did not clearly indicate the substance or subject-matter of the proposed amendment; fourth, that at the amendment election the affairs of the Jefferson County Bank were in process of liquidation by the respondent, Walker, in accordance with the then existing law, he having taken charge of on January 28, 1916; that the rights of depositors who had not stipulated for interest had already attached, and the amendment in question was not retrospective in its operation, and did not change the relative status and rights of the previous depositors, nor of other creditors as to banks already in process of liquidation. Demurrers were overruled to the answer, and the allegations of facts in both petition and answer being confessed as true on final hearing, the trial court denied relief and dismissed the petition.

C. C. Nesmith, of Birmingham, for appellant. Coleman & Coleman, of Birmingham, for appellee.

SOMERVILLE, J. [1] Under section 1 of article 17 of the Constitution of 1875, providing for the submission to the people at a general election of amendments to the Constitution, to be proposed by act of the Legislature, such amendments became valid, as parts of the Constitution, if it appeared that "a majority of all the qualified electors of the state *who voted at said election* voted in favor of the proposed amendments."

In *May v. Mayor & Aldermen of Birmingham*, 123 Ala. 306, 318, 26 South. 537, it was held, with respect to the italicized clause as above noted that it plainly required for the passage of an amendment the affirmative vote of a majority of those who voted at the election in general.

Section 284 of the Constitution of 1901 has

clearly substituted a different requirement in this regard, and declares that:

"If it shall appear that a majority of the qualified voters who voted at said election upon the proposed amendments voted in favor of same, such amendments shall be valid to all intents and purposes as parts of this Constitution."

The only question of doubt suggested by this language is whether the vote for each individual amendment, where two or more are submitted at the same election, must be a majority of the highest number voting upon any amendment, or merely a majority of those voting upon the single amendment in question.

We can discover no reason either of subjective relevancy or of objective policy which would render probable a purpose on the part of the makers of the Constitution to so concatenate a number of separate and unrelated amendments as to make the highest vote on any amendment the basis for the adoption of all of the others; nor does the language of the ordinance require, by any reasonable intendment deducible therefrom, such a narrow construction. It is usual in the construction of statutes, a contrary intention not appearing, to hold that singular and plural forms are interchangeable (36 Cyc. 1123, 1), and section 1 of our Code so provides.

We think that "the qualified voters who voted at said election upon the proposed amendments" means, with respect to each of the proposed amendments, a majority of those voting on that particular amendment. We hold, therefore, that the proposed amendment eliminating section 250 from the Constitution was duly adopted by the number of votes required by section 284 of that instrument.

[2] Section 285, after providing for the form of the ballot and the mode of expressing the voter's choice in such elections, declares that "no amendment shall be adopted unless it receives the affirmative vote of a majority of all the qualified electors who vote at such election." This provision must, of course, be interpreted in connection with its predecessor, section 284, and the words "such election" can only mean the election on any proposed amendment. And hence the language quoted from section 285 does not mean that an amendment must be adopted by a majority of those voting for candidates at a general election, when the two elections occur at the same time. Counsel for appellee do not suggest such a meaning, and the context obviously refutes it.

[3] When a constitutional amendment is adopted in the manner specified by the Constitution, and there is nothing to indicate that the matter is referred to the Legislature for further action, it will be construed as self-executing, and effective from the date of its adoption. This very section now eliminated (section 250) was itself held to be self-executing, and its revocation is even more obviously so. *Taylor v. Hutchinson*, 145

Ala. 202, 40 South. 108. The ballot used at the amendment election fully complied with the requirements of section 285 of the Constitution, and that objection is without merit.

[4] It remains only to consider whether this amendment, as adopted, affects the rights of the depositors of a bank already insolvent, so that in the distribution of its assets those depositors who stipulated for interest are placed upon an equality with those who did not; in short, does it destroy the preference accorded by the eliminated section to depositors of the latter class over all other creditors of an insolvent bank?

"Constitutional provisions, like statutes, always operate prospectively, and not retrospectively, unless the words used or the objects to be accomplished clearly indicate that a retrospective operation was intended." 8 Cyc. 745, 746, and cases cited.

This rule of construction clearly forbids the intendment of retrospective operation in the adoption of this amendment. But, even if such intendment could be imputed, such a construction would be plainly violative of section 10 of article 1 of the federal Constitution, which inhibits the passage by a state of any law impairing the obligations of contracts. This is made unmistakably clear by what we have recently said in discussing the operation of the repealed provision and the relative rights of depositors and creditors thereunder. To quote:

"The section creates two classes of creditors and ordains a preference in respect of the payment of the demands of one class over the other class. The preferred class is constituted of those who have not stipulated for interest. Those of this class have established for them a superior, a first right to have their demands against the insolvent institution satisfied out of its assets. Those of the class who have stipulated for interest are denied the right to have their demand which is predicated of an interest-bearing deposit paid in whole or in part until the demands of the creditors of the preferred class are satisfied. The effect of the organic law enters into, affects, and governs as to rights as well as otherwise every deposit in a bank in this state, whether the deposit is accompanied by a stipulation for interest or not. Its operation is effective when the deposit is made; and, if the character of the deposit, with respect to interest, is not changed in good faith by the bank and the depositor before insolvency intervenes, the status remains fixed and controls absolutely the subsequent administration of the insolvent estate. It necessarily results from this effect of the provisions of the Constitution that (except in the very rare cases where the depositor stipulating for interest at the same moment becomes a debtor of the bank through a loan by the bank to the depositor so stipulating) the depositor stipulating for interest agrees that, in the event of insolvency, the satisfaction of his demand will await the full satisfaction of the demands of the depositors who have not stipulated for interest. Like considerations lead to the further result, remarked in *Taylor v. Hutchinson*, that depositors who, not contracting for interest on their deposits, have, when making their deposits, rightfully looked to the provisions of the section 'as their protection in case of insolvency.'" *Walker, Supt., etc., v. McCrary*, 73 South. 342.

Since the right of these depositors of this insolvent bank who did not stipulate for interest to be satisfied in full before other creditors are paid arises out of their contract with the bank as controlled by the constitutional guaranty then in force, it is in the fullest sense the "obligation of a contract" which cannot be impaired by either the Constitution or a statute of this state.

It results that the petitioner was not entitled to the relief prayed for, and the petition was properly dismissed. Let the judgment be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

(199 Ala. 138)

JOHNS et al. v. CANNON. (6 Div. 450.) (Supreme Court of Alabama. Feb. 1, 1917.)

HOMESTEAD §145—RIGHT OF WIDOW—EFFECT OF MARRIAGE AND REMOVAL.

Code 1907, § 4197 (Code 1896, § 2070, as amended by Acts 1903, p. 150), provides that if the decedent at the time of his death has no homestead exempt to him and has no other real estate out of which an exempt homestead can be carved, the widow and minor children may, by petition in the probate court, or by bill in equity, have the homestead or any other realty owned by decedent sold, and \$2,000 of the purchase money therefor applied by the court in the purchase of a homestead for the benefit of such widow and minor children or either of them. Section 4199 exempts certain personal property to the widow and minor children, while section 4228 declares that when a homestead exemption has been allotted to the widow and minor children, or either, they shall not be held to have abandoned or forfeited the same by removal therefrom. A widow who would otherwise have been entitled to homestead rights in the lands of her deceased husband intermarried with a nonresident and removed with him from the state, pending proceedings to have her homestead rights allotted to her, and afterwards, but before consummation of the proceedings, returned with her husband to reside in the state. *Held*, that as nonoccupancy after allotment did not work an abandonment of the homestead, the widow did not, by her marriage and removal, lose her right to claim the homestead.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 263, 277, 280, 285.]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by Rose Johns Cannon, for homestead exemptions to be carved out of certain real estate, upon sale of the same. Decree for complainant, and the heirs of L. W. Johns, deceased, former husband of petitioner, appeal. Affirmed.

Cabaniss & Bowle, of Birmingham, for appellants. Burgin & Brown, of Birmingham, for appellee.

MAYFIELD, J. The abstract question of law involved on this appeal is whether or not a widow who would otherwise be entitled to homestead rights in the lands of her deceased

ed husband would lose or forfeit such rights by intermarrying with a nonresident and removing with him from the state, pending proceedings to have her homestead rights allotted to her, and afterwards, but before the consummation of such proceedings, returning with her husband to reside in the state. We feel no doubt that this question is correctly answered in the negative. The concrete case presented by the appeal is that appellee was the widow of one L. W. Johns, who died in the year 1912, in the city of Birmingham, leaving a considerable estate both in personalty and in lands. Appellee, as the administratrix of the estate of her deceased husband, proceeded in the probate court of Jefferson county, soon after the death of her said husband, to administer on the estate and to have allowed and allotted to her, her statutory exemptions as widow. The personalty was so allotted to her as such widow, but as to her homestead rights the allowance or allotment was not consummated in the probate court, because the commissioners appointed to allot the same reported that the homestead of the deceased husband, "after being reduced to its lowest practical area, still exceeds \$2,000 in value, thereby rendering it impracticable to allot and set it off." Before sale of the homestead for the purpose of allowing \$2,000 of the purchase price to be set aside to the widow as a homestead fund, as section 4220 of the Code directs, the administration of the whole estate, including the allotment of homestead, was removed into the chancery court of Jefferson county; and the widow, pending the proceedings, remarried, becoming the wife of a Mr. Cannon, who then resided in St. Louis, Mo. The parties resided for a time in Missouri; but both removed back to Birmingham, Ala., before the allotment of homestead and the conclusion of the administration of the estate, and were there residing when the decree was rendered allowing Mrs. Cannon \$2,000, as a homestead fund, out of the estate of her former (deceased) husband. From the decree mentioned this appeal is prosecuted.

The main contention for appellants on this appeal is that appellee, as the widow of L. W. Johns, lost, forfeited, or abandoned her right to homestead by changing her residence to Missouri, as above indicated, and that this right did not reattach upon her subsequently becoming a resident of Alabama. A great deal of the argument and brief of counsel on each side is taken up in discussing the questions and citing authorities, to the end of showing that appellee, by intermarrying with Mr. Cannon, who resided in Missouri, and living there with him, lost her residence and domicile in Alabama. In the view we take of the case it is not necessary or important to consider these questions, for the reason that, even if appellants' contention as to the fact of a change of residence and domicile be correct, appel-

lee's homestead right, which had theretofore attached, would not thereby be cut off or defeated.

It is true that this court has repeatedly declared that exemption and homestead statutes are intended for the benefit of residents only; but those decisions were construing statutes which exempted property to the resident only, or to "members of his family," and were not construing the statutes as now written. So far as our Constitution and statutes now exempt property to residents only, they are, and should be, so construed; but when the statutes no longer require that the widow or the minors be members of the husband's, or father's, family, in order to be entitled to the exempt property, the court should not write into such statutes such provisions, or that these parties must continue to reside in the state in order to enjoy the property which the statutes exempt to them on the sole conditions that the husband or father was a resident of the state at the time of his death, and owned such property as is exempt, and that the parties to whom it is exempt were then his widow or minor children, no matter where they resided. This change in the statutes, and therefore of the decisions, was recently pointed out by Mr. Justice Sayre, in the opinion of the court in the case of *Chamboredon v. Fayet et al.*, 176 Ala. 216, 57 South. 846, where it is said:

"It seems to be contended, on the authority of *Ex parte Pearson*, 76 Ala. 521, that complainant's ward is not entitled to exemptions of any sort, because she was never a member of decedent's family. In that case it was held that the exemptions of personal property to the widow and minor children of a decedent, under the Code of 1876, like the exemption of a homestead, contemplated the existence of a family relation in this state, so that where a decedent died in this state, after a residence of several years, while his wife and children continued to reside at his former residence in another state, and never came to this state until after his death, they were not entitled to statutory exemptions of personalty. This was put upon the language of section 2824 of the Code of 1876, providing that 'any person dying, leaving a widow, or child, or children, under the age of twenty-one years, members of his family, in addition to the exemption heretofore made under this chapter [homestead exemption], there shall be exempt all the wearing apparel of the deceased,' etc. But the law was significantly changed in the codification of 1896, when the section was made to read: 'In favor of the widow and minor child or children, or either, of such decedent, there shall be exempt from administration and the payment of debts \* \* \* all the wearing apparel of the decedent,' etc. Code 1896, § 2545. Such has been the language of the provision since that time. Code 1907, § 4199. And in 1903 (Acts 1903, p. 150) section 2070 of the Code of 1896, which provided for exemptions in lieu of homestead, was amended so as to read as section 4197 of the Code of 1907 now reads; the effect being that, if decedent, at the time of his death, has no homestead exempt to him, or has no other real estate out of which a homestead can be carved, 'the widow and minor children, or either of them, may by petition in the probate court, or by bill in equity, have the homestead or any other real estate owned by the decedent at the time of his death sold, and two thousand



dollars of the purchase money therefor applied by the court in the purchase of a homestead for the benefit of such widow and minor children, or either of them.' \* \* \* But for the decree of divorce the wife would have been entitled to homestead, notwithstanding she had lived apart from her husband for years prior to his death. *Coker v. Coker*, 160 Ala. 269, 49 South. 684, 135 Am. St. Rep. 99; *Nolen v. Doss*, 133 Ala. 259, 31 South. 969. The language of the statute providing for homestead and other exemptions for minor children covers the case of this child, and it is not within the province of the court to ingraft upon it any exceptions."

The decision above quoted we think is conclusive of the material question involved on this appeal; and we can see no doubt as to its correctness, when our present statutes of exemptions are examined and compared with former statutes under which the decisions relied upon by the appellants were rendered. The statutes then construed, being materially and radically changed in respect to the question here involved, are, of course, not now apt or controlling.

It is very true that this court formerly held that the homestead right which the widow and minor children acquired in the lands of the deceased husband or father was a mere right to occupy; that such right was neither vendible nor alienable, and was lost by removing from the premises; but the statutes under which this holding obtained have all long since been changed. This court, speaking through that accurate writer, Justice Sharpe, in the case of *Tartt v. Negus*, 127 Ala. 307, 28 South. 715, said:

"Since the passage of the act of February 28, 1889, now embodied in part in section 2101 of the Code, occupancy of the homestead is not necessary to the preservation of the homestead right. The forfeiture dealt with in *Banks v. Speers*, 97 Ala. 560 [11 South. 841], occurred before the passage of that act, and the decision was placed expressly upon that consideration. There, with reference to whether a sale made after that act was adopted would forfeit the homestead right, the court said that 'on principle it would seem that it should not.' In *Garland v. Bostick*, 118 Ala. 209 [23 South. 698], it was held that under the statute removal from and renting out of the exempted premises did not work a forfeiture. If the widow may without occupation lease to others, no good reason appears why her entire right may not be disposed of by a sale, and we think the act was intended to allow such disposition of the right as might best suit the interest of those for whose benefit the exemption was created."

In the case of *Coker v. Coker*, 160 Ala. 270, 49 South. 684, 135 Am. St. Rep. 99, the court, speaking through Denson, J., said:

"The sole question for determination is whether a widow, who had lived apart from the husband for two years or more prior to his death, but between whom and the husband there had been no dissolution of the marital relations, is entitled to a homestead exemption. We regard the question as being ruled in the affirmative by the decision in the case of *Nolen v. Doss*, 133 Ala. 259, 31 South. 969. It was there urged, upon the grounds made the basis of the contention in this case, that the widow was not entitled to share in the distribution of the husband's personal estate. The court, speaking through the present Chief Justice, said: 'The law as it is written is plain, and it is not within the province of the court to ingraft upon it any excep-

tions. As long as the marital relation in law continues, just so long the rights of the wife under this statute exist.' The principle is the same in respect to the rights of the widow to have realty of the husband exempt to her. The statute does not make separation terminate the widow's right, and it would be judicial legislation if the courts should do so."

The right of the widow and minor children, one or both, to homestead exemption in the lands of the deceased husband or father, respectively, depends upon the existing status of the lands and of the parties at the time of the death of the husband or father. The right, title, or interest of the widow vests at the death of the husband, though it is thereafter formally allotted by proper proceedings in the proper court. The right of the widow or of the minors is not, by our present statute, made to depend upon the residence of the beneficiaries, but upon the residence of the husband or father. If the right to the vesting is not made to depend upon the residence of those who take, but upon the residence of the decedent at the time of his death, surely the vested interest is not lost by a change of residence during the continuance of the estate so vesting.

At one time the right of the widow and minor children to take the homestead of the husband or father on his death did depend upon their residence with the deceased at the time of his death; in order to take, or for the exemption to vest, those who took had to be a part of the family of the deceased. Then the only right which the widow or minors took was the mere right to possess, use, or occupy. It was then, so far as the homestead was concerned, a mere quarantine right. At the present time they take a vested property right therein, by virtue of the statute; and this may be vendible and alienable. The estate they now take may be for years, for life, or in fee, depending upon the facts of each particular case.

This record indisputably shows that appellee would have been entitled to the exemptions herein claimed, had she not, after the right thereto had vested, and while proceedings were pending to have the homestead allotted, married a nonresident of this state and for a time resided with him in another state. We do not understand from appellants' brief that they dispute or contest this proposition; but they insist that when appellee thus became the wife of another man, a nonresident of this state, she abandoned, forfeited, and lost her right or claim to homestead exemptions in the lands of her former (deceased) husband. Counsel are in error, in this contention; neither the subsequent marriage of the widow nor the change of her residence, under our laws, is an abandonment of her claim to the exemption before it is allotted, or even after it is allotted. The law in respect to exemptions to the widow and minors in this particular is different from that in respect to exemptions of property to the husband or father, while living,



from the debts and demands of his creditors or from sale under legal process. In the latter case, the right of exemptions is by statute limited to residents of the state; consequently, when one ceases to be a resident of this state, the right to the exemptions ceases; while in the former case, the exemptions are to the widow and minor children of a deceased resident—not to the widow and minors who are residents. The statutes do not now require that the widow and minors, one or all, shall be residents, even in order that the right shall vest; nor do they provide that it shall cease upon their becoming nonresidents. The homestead is not exempted to them on condition that they reside therein, or so long as they shall remain on it or remain residents of the state; but is in terms by the statute exempted to them, from the administration, or from the payment of the debts of the deceased, during the life of the widow or the minority of the children; and in some instances the absolute fee-simple title is vested in them. There are no provisions in our statutes to the effect that leaving the homestead or the state, or even becoming nonresidents of the state, amounts to an abandonment of their right or interest in the homestead so allotted to them, or of their right to have it so allotted. In fact, section 4228 of the Code expressly provides that they shall not be held to have abandoned the home so allotted by removing therefrom. Another statute (section 4196) expressly provides that the rents and profits of the homestead of the deceased resident shall inure to the widow and minor children, without regard to their residence upon the homestead or within the state. The residence of the deceased on the land and in the state, at the time of his death, is all that the statutes require, to the vesting of the homestead in the widow and minors during the life of the widow and the minority of the child or children, "which ever may last terminate." In some cases, mentioned in the statute, the right and title thereto vests in them in fee simple.

Our present statutes, exempting property of deceased residents to the widow and minor children, are now a part of our statutory law of descent and distribution, as well as of our statutory system exempting certain property from the claims of creditors and from legal process.

If removing from the homestead after it is allotted is not an abandonment thereof (Code, § 4228), surely removing from the state pending proceedings to allot is not such. The beneficiaries cannot occupy it as a homestead until it is allotted; and, if no allotment can be made, then most certainly they do not abandon the \$2,000 allowed them in lieu thereof, by removing from the state pending proceedings to acquire such amount in lieu of the homestead. We have shown that the right is not dependent upon their being

residents of the state, nor upon their residing on the homestead at the time of the death of decedent; and this record discloses no fact to show a waiver of the right by appellee to claim the \$2,000. She has ever insisted upon her right to have it awarded to her, both when a resident and a nonresident of this state.

It is wholly unnecessary to pass upon the various questions argued in brief of counsel. Even conceding the facts to be as contended for by appellants, the decree of the chancellor was in all things correct, and, had every ruling against appellants, complained of, except the rendition of the decree appealed from, been in their favor, the decree would have been correct, and the only proper one to be rendered.

Affirmed.

ANDERSON, O. J., and SOMERVILLE  
and THOMAS, JJ., concur.

(199 Ala. 123)

WALSH et al. v. STATE ex rel. COOK et al.  
(1 Div. 960.)

(Supreme Court of Alabama. Feb. 1, 1917.)

1. CORPORATIONS ¶283(1)—OFFICERS—ELECTION—TIME.

Code 1907, § 3463, provides that every corporation must have at least three directors, who shall own stock, and who shall be elected annually and hold office for one year and until their successors are elected. Section 3464 provides that failure to elect directors shall not dissolve the corporation, but the existing directors shall hold over. Section 3478 provides for annual stockholders' meetings. Section 3481 authorizes corporations to make and alter by-laws for transaction of business. *Held* that, construed together, such sections contemplate that if the election of directors is not held on the designated date, the election may be held within a reasonable time thereafter.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1195, 1198-1205, 1249½.]

2. MANDAMUS ¶127—CORPORATE OFFICERS—ELECTION—NOTICE.

The duty of the corporation "committee" to warn of annual meetings for election of officers may be enforced by mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 262.]

3. CORPORATIONS ¶283(2)—OFFICERS—ELECTION—RIGHT TO VOTE.

The right to hold annual elections for directors of a corporation and to vote at such elections is a right that is inherent in the ownership of stock in the corporation; and a stockholder who appears by the books of the corporation to be such cannot be deprived of this right upon the allegation that he proposes to use his legal rights for purposes which other stockholders may think not to the best interests, or even to the detriment of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1207-1220.]

4. CORPORATIONS ¶294—OFFICERS—TERMS.

A director cannot be suspended or removed from office until the end of his term, at least without cause, and if unlawfully removed from office, he is entitled to be reinstated in an ap-

propriate action to test the title to the office of director.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1263-1266.]

5. CORPORATIONS ⇨283(1)—OFFICERS—ELECTION—TIME.

Where the charter of a corporation provides that annual meetings of stockholders shall be held for the election of officers and directors, the directors cannot by a change in by-laws so change the time of holding the annual election as to have the effect of continuing themselves in office, against the will of the majority of stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1195, 1198-1206, 1249½.]

6. CORPORATIONS ⇨193 — ANNUAL MEETING OF STOCKHOLDERS—TIME FOR HOLDING.

Under Code 1907, §§ 3463, 3464, 3478, and 3481, where the annual meeting of stockholders is not called or held on the date prescribed in the by-laws, it becomes the duty of the directors within a reasonable time thereafter to call such annual meeting, and when such meeting is held, it becomes the annual meeting.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 733.]

7. CORPORATIONS ⇨194 — STOCKHOLDERS' MEETING—CALLING.

The corporate directors are the proper officers to cause to issue notice of the stockholders' meeting when the by-laws do not designate the time and place.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 734-743.]

3. CORPORATIONS ⇨283(1)—OFFICERS—ELECTION—TIME—CALL.

That the ownership of some of the corporation's stock was in litigation, and certain of its stock had been bought in by the corporation at a sale for the purpose of enforcing the corporation's statutory lien thereon for a debt due the corporation by a stockholder, was no good reason why the annual election should not be held, and the stockholders entitled to participate therein given the opportunity to express a choice for directors and other officers, for the ensuing year.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1195, 1198-1206, 1249½.]

9. CORPORATIONS ⇨171 — OFFICERS — RIGHT TO VOTE.

The stock book is evidence of the right to vote the stock shown to be in the name of its owner.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 633-636.]

10. CORPORATIONS ⇨283(2)—RIGHT TO VOTE.

The stock purchased by the corporation to enforce its statutory lien becomes treasury stock, and, as such, is not entitled to be voted.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1207-1220.]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Mandamus by the State, on the relation of Thomas L. Cook and others, against J. M. Walsh and others, as directors of the Mobile Towing & Wrecking Company. From an order granting the writ, the respondents appeal. Affirmed.

Gregory L. Smith & Son, of Mobile, for appellants. Stevens, McCorvey & McLeod, of Mobile, for appellees.

THOMAS, J. This is an appeal from an order granting the writ of mandamus commanding the directors of the Mobile Towing & Wrecking Company to take the necessary steps to hold an annual meeting of the stockholders of said company. The order was made on submission upon the petition for the writ, with the answers of the defendants thereto, and the admission that witnesses present would testify to the truth of the allegations of defendants Pope, Walsh and Dorgan.

The question presented by this appeal is: When the by-laws of the corporation provide that the directors shall be elected at an annual meeting of stockholders to be held on a designated date, and that the officers and directors then and thus elected shall hold office for one year and until their successors are elected, can an election for officers and directors be validly held on another date, where the annual election was not called or held by reason of the failure of the directors or other officials whose duty it was to issue the call therefor?

The Mobile Towing & Wrecking Company, of which petitioners and respondents were the respective stockholders and directors, was organized under and subject to the provisions of article 1, c. 69, of the Code of 1907, p. 397 et seq. The several statutory provisions pertinent to this inquiry are to the effect that:

"Every corporation organized under article one of this chapter must have at least three directors, who shall be owners of stock of the corporation, and who shall be elected annually, and hold office for one year and until their successors are elected." Code, § 3463; *Rush v. Aunspugh*, 179 Ala. 542, 60 South. 802; *Nathan v. Tompkins*, 82 Ala. 437, 2 South. 747.

And that:

The "failure to elect directors shall not work a dissolution of the corporation, but the existing board of directors shall continue to manage the affairs of the corporation until their successors are elected." Code, § 3464; *Curry v. Woodward*, 53 Ala. 371, 375.

By section 3478 of the Code it is provided in part as follows:

"Meetings of the stockholders of a corporation shall be held annually, of which meetings, as well as special meetings, notice shall be given as the by-laws prescribe," etc.

And section 3481 of the Code authorizes a corporation—

"to make and alter at pleasure all needful by-laws, rules, and regulations for the transaction of its business, and the control of its property and affairs," etc.

[1] When said several sections are construed together, it is clear that it was the legislative intent to prevent a dissolution of the corporation by a failure to elect new directors at the annual stockholders' meeting; that it was in the contemplation of the statute that there should be an election of officers and directors annually; and that when the election was not held as required by the statute and the by-laws, the suc-

cessors in office of such officers and directors should be elected within a reasonable time thereafter by the stockholders.

[2] It has long been declared law that it is the duty of the "society's committee" to warn of the annual meetings of the society for the election of officers; and that if this duty be neglected a writ of mandamus, "directed either to the society's committee, or to the society itself, would enforce the annual election of the necessary officers." *Rex v. Cambridge*, 4 Burr. 2008, 2011; *Rex v. Gregory*, 8 Mod. 113; *Congregational Society v. Sperry*, 10 Conn. 200, 208; *Stabler et al. v. El Dora Oil Co. et al.*, 27 Cal. App. 516, 519, 150 Pac. 643; *People ex rel. Hart v. Blackhurst* (Sup.) 11 N. Y. Supp. 670; *Thompson on Corp.* § 810; 9 Mod. Amer. Law, 216; 2 Kent's Com. 295; 26 Cyc. 352; 1 *Thompson on Corp.* (2d Ed.) 807, 810; 2 *Cook on Corp.* (6th Ed.) 603.

[3] The right to hold annual elections for directors of a corporation and to vote at such elections is a right that is inherent in the ownership of stock in the corporation; and a stockholder who appears by the books of the corporation to be such cannot be deprived of this right upon the allegation that he proposes to use his legal rights for purposes which other stockholders may think not to the best interests, or even to the detriment, of the corporation. *Camden & Atlantic Ry. Co. v. Elkins*, 37 N. J. Eq. 273; *render v. Lushington*, L. R. (6 Ch. Div.) 70; *Hurlbut v. Marshall*, 62 Wis. 590, 22 N. W. 852; *Wright v. Commonwealth*, 109 Pa. 560, 1 Atl. 794; *Commonwealth v. Gill*, 3 Whart. (Pa.) 228, 247; 2 *Cook on Corp.* p. 1365, § 603.

[4] A director cannot be suspended or removed from office until the end of his term, at least without cause. If unlawfully removed from office, he is entitled to be reinstated in an appropriate action to test the title to the office of director. *Moses v. Tompkins*, 84 Ala. 613, 616, 4 South. 763; *Crow v. Florence I. & C. Co.*, 143 Ala. 541, 39 South. 401; *Med. & Surg. Soc. v. Weatherly*, 75 Ala. 248; s. c., 76 Ala. 567; *People ex rel. Manice v. Powell*, 201 N. Y. 194, 94 N. E. 634.

[5] Where the charter of a corporation provides that annual meetings of stockholders shall be held for the election of officers and directors, the directors cannot by a change in by-laws so change the time of holding the annual election as to have the effect of continuing themselves in office, against the will of the majority of stockholders. 1 *Thompson on Corp.* § 812; *Mottu v. Primrose*, 23 Md. 482; *West Side Hospital v. Steele*, 124 Ill. App. 534; *Elkins v. Cam. & Atl. R. R. Co.*, 38 N. J. Eq. 467, 470; 10 Cyc. 319.

In *State v. Wright*, 10 Nev. 167, 175, the Chief Justice said:

"The fact that the day provided for in the by-laws for the calling such an election has passed, does not justify the trustees in refusing to

call the meeting. When the day has passed it is the duty of the trustees to call the meeting within a reasonable time—certainly to call it whenever demanded by any stockholder. When called it is just as much an annual meeting as if called upon the day specified in [and by the] by-law." *Flagg v. Lady Bryan Co.*, 4 Nev. 406; *Stabler v. El Dora Oil Co. et al.*, supra; *State v. Bonnell*, 35 Ohio St. 10; 2 *Cook on Corp.* § 604; 1 *Thompson on Corp.* § 812.

In *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 740, 59 S. E. 806, 809, it is said:

"For some reason, presumably because they were not informed that it was in their power to legally elect a board of directors, no action was taken at the January meeting. The term of the old board of directors expired at this time, and it was the duty of the stockholders to have elected their successors. As no election was held, any stockholder could by mandamus compel the calling of a meeting for the purpose of complying with the statutory duty."

The rule is thus stated in *Stabler v. El Dora Oil Co.*, supra:

"That the stockholders may avail themselves of the remedy by mandamus to compel a recalcitrant board of directors to call an annual meeting for the election of directors admits of no controversy. Mr. Thompson in his work on Corporations, § 810, says: 'Officers have been known to attempt to defeat the will of stockholders by purposely failing to give notice of either regular or special meetings. But where the officers whose duty it is to issue the call or give notice of a stockholders' meeting either fail or refuse to do so, the stockholders are not without remedy. Whatever may be the rule with reference to the liability of officers under such circumstances, it is now the well-settled rule that stockholders may by mandamus compel the officers to issue the call or give the proper notice for meetings.'"

In *People ex rel. Young v. Trustees of the Town of Fairbury*, 51 Ill. 152, it is said:

"The old board are still in office, and may exercise all the powers and should perform all the duties properly belonging to them in their official capacity; and one of those powers and duties is to give notice for the election of their successors. This notice need not, necessarily, be given within the year for which they were elected; 'the sounder and better doctrine' is, as laid down by Chancellor Kent, 'that where the members of a corporation are directed to be annually elected, the words are only directory, and do not take away the power incident to the corporation to elect afterwards, when the annual day has, by some means, free from design or fraud, been passed by.' 2 Kent's Com. 295."

The hardship of any other rule is stated in *People ex rel. Miller v. Cummings*, 72 N. Y. 436, as follows:

"If trustees could keep themselves in office by not having an annual election, the stockholders would be powerless, and they might perpetuate themselves in power as long as they chose. Such a course would also be in direct opposition to the mandatory provision requiring that trustees to be annually elected shall manage the affairs of the company. The enactment \* \* \* prevents any such arbitrary use of power and protects stockholders of corporations from the misconduct of their officers in this respect. \* \* \* To hold that an election of officers of a corporation must utterly fail because those in power, by accident or design, omit to do their duty, and by neglecting to give the proper notice, or by failing to make proper by-laws for that purpose, would be in contravention of the manifest intention of the law and sanction a construction entirely unwarranted."

Appellants insist that where no election of directors is had on the date fixed by the by-laws, the remedy is to call a special meeting of the stockholders, to amend its by-laws, fixing a new date for the annual election, and then call an annual meeting in conformity with the by-laws as thus amended; that until this procedure is adopted no annual election can be held, though the annual election in the instant case was prevented by the unprecedented storm that devastated Mobile on the day on which the annual election was to be held according to the by-laws of the corporation. The cases of *Weatherly v. Med. & Surg. Soc.*, 76 Ala. 567, 572, and *Nathan v. Tompkins*, supra, are cited as authorities. In the latter case this court said:

"The statutes fix the term of office of the directors, contemplating only annual elections. The term of office of those first elected continues until the time fixed for the annual election, which was the third Tuesday in April, 1888. No power is conferred by the charter, or by statute, and there is no inherent power, to remove directors, who are elected for a definite period fixed by statute, before the expiration of that period. \* \* \* They really constitute the governing body; and the charter of incorporation, the statutes and the by-laws, are a contract between the shareholders, as to their election and the duration of their term of office. A majority of the board of directors cannot abrogate nor extend their term of office by merely changing the time of the annual meeting of the stockholders. If they have such power, they could cause quarterly or monthly elections, by successive amendments of the by-laws changing the time of the annual meeting."

The court pointed out that it could not be determined from the record in the *Nathan Case* what four of the new directors, if any specifically, were elected to fill the vacancies on the board; that the sale and transfer of the stock of the four directors did not operate ipso facto to remove said four directors from office (though it may have afforded sufficient cause for removal); and that it certainly did not remove the remaining directors, who had not parted with their stock, nor constitute a cause therefor. It was further pointed out that:

"Without proceedings looking to removal, or even declaring vacancies, the majority of the stockholders elected an entire new board, thus indirectly superseding all the directors first elected."

Thus the *Nathan Case* specifically points out that a majority of the board of directors cannot extend their term of office by merely changing the time of the annual meeting of the stockholders; nor extend their term of office by negligently or designedly refusing to call the annual stockholders' meeting at which officers are required to be elected; nor amend the by-laws to prevent the call for a stockholders' meeting for the election of officers.

If appellants have the correct view of this question, any board of directors falling or refusing, by inadvertence or design, to call the annual meeting of stockholders, can continue themselves in power for an additional

period beyond the statutory term, in the office to which they were elected, and thus affect or jeopardize the serious business interests of the corporation and of its stockholders. As illustrated in brief of appellant's counsel, by their own neglect or design, the directors in the instant case would remain in office from July 11, 1916, to November 21, 1916, beyond the year for which they were elected by the stockholders.

The *Weatherly Case* is not in conflict with the view we have expressed. There there was an application by a licensed physician for a writ of mandamus to a medical and surgical society, a private corporation, to compel the restoration of relator to membership and office in the society. By the provisions of the society's constitution the business of each regular meeting was particularly specified; and it was further declared that the prescribed order of business might be suspended at any time by the vote of a majority of the members present. The holding was, that while the society might, at any meeting set apart for any specified purpose, suspend the prescribed order of business by the vote of a majority present, and postpone consideration to a future meeting, this could be done only at the particular meeting at which such business was by the constitution of the society prescribed to be considered. The business relating to the revision of the roll of members, being specially prescribed for the regular meeting in April, it was held, could not be transacted at a call meeting in August, unless regularly postponed to that time from the regular meeting in April. Relator's name having been "struck from the roll of membership" at the regular meeting in April, by proceedings which were thereafter held to be irregular and which were set aside by its order, the society had no authority, at a call meeting in August, to strike relator's name from the roll. Mandamus was awarded to compel his restoration.

It has been held that provisions in statutes and by-laws requiring the election of directors to be had on a specified day are to be regarded as directory, that if the given election is not held on the specified day, it may be held at a later date within a reasonable time thereafter, and that the directors then chosen will be directors de jure. *Hughes v. Parker*, 20 N. H. 58; *N. F. Ins. Co. v. Moore*, 55 N. H. 48 (in regard to a by-law); *Beardsley v. Johnson*, 121 N. Y. 224, 24 N. E. 380; *Scanlan v. Snow*, 2 App. D. C. 137; *Vandeburgh v. Broadway Co.*, 29 Hun (N. Y.) 348; 1 *Thompson on Corp.* § 812; 10 *Cyc.* 321, 322.

[8] We believe it to be in consonance with both the letter and the spirit of our statute that where the annual meeting of stockholders is not called or held on the date prescribed in the by-laws, it becomes the duty of the directors within a reasonable time thereafter to call such annual meeting. Especially is this true when demand is made on

the directors for such purpose by a stockholder. When such meeting of the stockholders is called and held, it becomes the annual meeting thereof, required to be held by the by-laws and by the statute. *State ex rel. Sears v. Wright*, supra; *Sylvania Co. v. Hoge*, supra; *Stabler v. El Dora Oil Co.*, supra; *Hicks v. Lanoeston*, 1 Rolle, Abr. 514, pl. 6; 10 Cyc. 218.

[7] The directors are the proper officers to cause to issue and be given the legal notice of the time and place of a stockholders' meeting, when the by-laws do not designate the same. 1 *Thompson on Corp.* (2d Ed.) § 808; *Cook on Corp.* (6th Ed.) §§ 593, 594; 10 Cyc. 321; *Knoll et al. v. Levert*, 136 La. 241, 66 South. 959. The directors failing to give this notice and to call the annual meeting in the case at bar, the petitioning stockholders first applied to the directors for redress of their grievance—the failure to call the annual meeting—requesting that the annual meeting be forthwith called for the election of officers. The directors failing to comply with this request, the petitioners applied for the writ of mandamus to compel the issuance of the call for the annual meeting of stockholders. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 South. 897; *Howze et al. v. Harrison*, 165 Ala. 150, 51 South. 614; *L. & N. R. Co. v. Neal*, 128 Ala. 149, 29 South. 865; *Crow v. Florence Co.*, supra.

[8, 9] That the ownership of some of the corporation's stock was in litigation, and certain of its stock had been bought in by the corporation at a sale for the purpose of enforcing the corporation's statutory lien thereon for a debt due the corporation by a stockholder, was no good reason why the annual election should not be held, and the stockholders entitled to participate therein given the opportunity to express a choice for directors and other officers for the ensuing year. The stock book is evidence of the right to vote, the stock shown to be in the name of its owner. 2 *Cook on Corp.* § 611; *Comm. v. Dalzell*, 152 Pa. 217, 25 Atl. 535, 34 Am. St. Rep. 640; *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174; *State v. Ferris*, 42 Conn. 560, 568; *Hoppin v. Buffum*, 9 R. I. 513, 11 Am. Rep. 291; *Allen v. Hill*, 16 Cal. 113.

[10] The stock purchased by the corporation to enforce its statutory lien becomes treasury stock, and, as such, is not entitled to be voted. 2 *Cook on Corp.* (6th Ed.) 611, 613; 1 *Cook on Corp.* (6th Ed.) § 129; 8 *Thompson on Corp.* (2d Ed.) § 1945; 4 *Thompson on Corp.* (2d Ed.) § 3763; *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225, 230; *Ex parte Willcocks*, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525.

Applying the foregoing well-established rules for the protection and management of the affairs of corporations, to the admitted facts in this case, we are of opinion that the

writ of mandamus awarded by the judge of the law and equity court of Mobile was properly awarded, that the petitioners were entitled to the relief prayed, and that the judgment should be and it is affirmed.

The time having passed for compliance with the writ heretofore granted by the lower court, said lower court will fix another day for compliance with said former writ of mandamus granted in said cause.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(199 Ala. 83)

#### KAYSER v. BIRD. (7 Div. 818.)

(Supreme Court of Alabama. Feb. 1, 1917.)

#### HIGHWAYS §130 — COUNTY ROAD TAXES — CUSTODIAN OF FUNDS.

Loc. Acts 1911, p. 343, § 8, provides that the county treasurer shall collect the road fund provided for and keep it and any other road fund appropriated separate from all other funds, and shall pay the same on warrants drawn by the commissioners' court or board of revenue of the county. By Loc. Acts 1915, p. 285, the act of 1911 was amended by designating the tax collector as the person to collect such road funds, and providing that the tax collector keep such funds separate from all other funds. Code 1907, § 2206, provides that whenever a tax collector collects special taxes, he shall specify in the receipts given to taxpayers their amount and the purpose for which they were levied and collected. Section 2207 provides that such special taxes, when collected, shall be paid to the county treasurer, to be kept as a distinct fund. Section 2208 provides that the county treasurer receiving such special taxes shall keep the same separate and distinct from all other public funds, and shall keep a separate account thereof, and shall promptly disburse the same upon orders drawn thereon by the legally authorized authority. Section 2200 provides for a monthly report by the county collector to the county treasurer until final settlement of taxes collected, and requires him within five days after such report to pay the county treasurer all taxes then due. *Held*, that the amended section does not indicate a legislative intent to constitute the tax collector permanent custodian of country road funds, but only requires him to keep them separate from other funds until he pays them over to the treasurer, and hence the county treasurer is the lawful custodian of a road fund paid over to him and the fund is payable upon a warrant properly drawn upon the treasurer to that end.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 387.]

Appeal from Shelby County Court; E. S. Lyman, Judge.

Action by Leo Kayser against J. S. Bird as treasurer of Shelby county, and the sureties on his official bond, for the amount of interest due on certain warrants drawn by the county board of revenue on the county treasurer in favor of plaintiff's assignor, A. T. Newell. Judgment for defendant and plaintiff appeals. Reversed, rendered, and remanded.

These warrants were issued under the authority of the general laws of the state, and

in accordance therewith, and pursuant to resolutions adopted and contracts duly signed by the board of revenue for the purpose for paying for roads and bridges constructed in said county under a contract with Newell. They were issued June 1, 1914, and these interest coupons were presented to and registered by the county treasurer on June 8, 1914, as claims against the county. They are payable out of the road fund of Shelby county. The motion shows that they were presented to the county treasurer for payment on March 11, 1916, and payment was refused although at that time, the treasurer had in his hands a large sum, to wit, \$10,000 belonging to the road fund, which was more than sufficient to pay plaintiff's claim, and all other claims against the fund prior thereto. Among other special pleas defendant interposed the following:

(24) These defendants say that at the 1915 session of the Legislature of Alabama the Legislature passed a local act, a copy of which was attached to the plea and made a part of the plea, which act amends sections 7, 8, 9, 18, and 22 of an act, entitled "An act to provide for the control, working, maintenance, building and improvement of the public roads and bridges of Shelby county, Alabama," passed at the session of the Legislature of Alabama, 1911 (a copy of said sections above enumerated is attached to the plea and made a part of it), and defendants aver that on account of the passage of said Local Acts of 1915, said Joe S. Bird, as treasurer of Shelby county, at the time demand was made upon him by movant, for the payment of warrants described in movant's motion had no funds in his hands out of which he could legally pay the warrants described in the motion.

(35) Defendants say that at the 1915 session of the Legislature of Alabama, said Legislature passed a local act (a copy of which is attached and made a part hereof) which act was approved by the Governor of Alabama, on September 4, 1915. And at the 1911 session of the Legislature, said Legislature passed an act (a copy of which is attached and made a part hereto) and which was approved by the Governor on April 22, 1911. And defendants aver that said money in the hands of Joe S. Bird as treasurer of Shelby county at the time said demand was made on him, and constituting the road fund described in said motion, or any part thereof, was collected by the tax collector of said county in pursuance of an assessment of taxes made by the assessor of Shelby county under and in accordance with the levy of said taxes made by the board of revenue of said county (a copy of said levy is attached and made a part hereof), and defendants further aver that therefore said money so collected by said tax collector was erroneously and wrongfully paid by him to said J. S. Bird as treasurer.

Demurrers to these pleas present the question of their unconstitutionality on various grounds, and also invoke the construction of the law to determine whether under the Local Acts of 1915, the county tax collector or the county treasurer is the lawful custodian of the road fund in question.

Tillman, Bradley & Morrow, of Birmingham, for appellant. W. L. Acuff and W. W. Wallace, both of Columbiana, for appellee.

SOMERVILLE, J. Section 8 of the act approved April 22, 1911 (Local Acts 1911, pp. 341, 343), relating to the public roads of Shelby county, is as follows:

"The county treasurer is hereby designated as the person to collect the road fund provided for in this bill, and he shall attend the places designated by the tax assessor and collector for assessing and collecting the state and county taxes in the various beats of said county. The said county treasurer shall have printed at the expense of the county receipt books with stubs or duplicate of such receipt which shall be at all times open to the inspection of the public. And the county treasurer shall keep said three dollars road fund, and any other road fund appropriated by the commissioners of said county or board of revenue out of either the general or special funds collected for said county, separate from all other funds, and shall pay out the same on the warrants drawn by the commissioners court or board of revenue of said county."

It is the theory of defendant's special pleas 24 and 35, that the amended section substitutes the tax collector for the treasurer, not only as the agent for the collection of the special road tax, but also as the permanent custodian of the fund after it is collected; and hence the conclusion that, whether the fund has in fact been paid over to the treasurer or not, the collector remains its custodian de jure et lege, and it is not payable upon a warrant drawn upon the treasurer. At first sight such may indeed seem to be the purpose and effect of the amendment in question. But our consideration of the language of the amended section, and its relation to the general laws, leads us to a different conclusion. Section 2206 of the Code is:

"Whenever any tax collector collects any special taxes, he shall specify in the receipts given to taxpayers the amount of such taxes, and the purpose for which they were levied and collected."

Section 2207 is:

"Such special taxes, when collected, must be paid over by him to the county treasurer, and be kept by him as a distinct fund."

Section 2208 is:

"The county treasurer receiving such special taxes shall keep the same separate and distinct from all other public funds, and shall keep a separate account thereof, and shall promptly disburse the same upon orders drawn thereon by the legally authorized authority."

And section 2200 provides for a report by the county collector to the county treasurer, within the first three days of each month until his final settlement for the year, "setting forth separately the taxes collected by him \* \* \* during the preceding month," and requiring him, within five days thereafter to "pay to the county treasurer all county taxes then due from him to the county, by him before that time collected."

We find nothing in the language of the amended section that indicates a legislative intent to change these general laws in the particular referred to. To require the collector to keep the special road fund separate from other funds falls very far short of requiring or authorizing him to keep it perma-

nently as its final and only custodian. Under the general statutes quoted, he must needs "keep" the fund as collected from month to month, until he pays it over to the treasurer; and the natural meaning of the amended section is that, while the fund is in his hands, he, like the treasurer, must keep it separate from other funds. It follows that the county treasurer, the defendant, is the lawful custodian of the fund here sought to be subjected to plaintiff's claim, and the warrants are properly drawn upon the treasurer to that end.

We hold that the demurrers to special pleas 24 and 35 should have been sustained, and the judgment of the trial court in overruling them will be reversed, and a judgment here rendered accordingly.

We pretermit, as unnecessary, any discussion or decision as to the constitutionality of the Amending Act of September 4, 1915, since the pleas attacked are bad on other grounds.

Reversed, rendered, and remanded.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

(199 Ala. 9)

**EX PARTE CITY OF BIRMINGHAM.**  
(6 Div. 455.)

(Supreme Court of Alabama. Jan. 18, 1917.)

**1. PUBLIC SERVICE COMMISSIONS § 85—CERTIORARI—SCOPE OF REVIEW.**

On certiorari to review a proceeding of the Public Service Commission where the court has not before it the evidence or facts upon which the Commission proceeded, its inquiry is limited to whether the commission had jurisdiction and the regularity of such proceeding, as it can only answer the questions raised on the face of the record.

**2. CONSTITUTIONAL LAW § 62—LEGISLATIVE POWERS—DELEGATION.**

Acts 1915, p. 268, conferring upon the Public Service Commission jurisdiction to determine whether a sale, conveyance, or lease of the property and franchises of a public utility is consistent with the interests of the public, was a proper delegation of the legislative power, since while the legislature cannot delegate its power to make a law it can make a law to delegate a power to determine some fact or state of things upon which the law makes its own action depend.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102.]

**3. CONSTITUTIONAL LAW § 48—VALIDITY OF STATUTE.**

A statute need not enjoin obedience to the Constitution, as the inhibition of the Constitution will be read into the statute and given effect.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Statutes, Cent. Dig. § 56.]

**4. PUBLIC SERVICE COMMISSIONS § 6—POWERS—SALE OF PUBLIC UTILITIES—OBJECTIONS—DETERMINATION.**

Acts 1915, p. 268, conferring on the Public Service Commission power to authorize transfer of property and franchises of public utilities, expressly includes the provisions of Const. §

220, providing that no person, firm, etc., shall be authorized or permitted to use streets or public places of any city or town for the construction or operation of a public utility or private enterprise without the consent of the proper authorities of such city or town. *Held*, that neither the constitutional provision nor an objection on the part of a city would affect the powers of the commission under said act to determine whether a conveyance of the property of a public utility together with its franchises was "consistent with the interests of the public"; but the question of the city's power to veto the proposed transfer must be tried in the customary courts, since while the commission exercises a quasi judicial power, it does not enforce rights or redress wrongs, but is only authorized to ascertain a fact upon which a statutory license depends.

**5. CONSTITUTIONAL LAW § 205(2)—SPECIAL PRIVILEGES—FRANCHISES IN STREETS.**

The assent of the Public Service Commission under Acts 1915, p. 268, to the sale of the franchise of a public utility using the streets of a city does not violate Const. § 22, inhibiting any law making an exclusive grant of a special privilege.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 596-606, 615, 618-621.]

**6. MONOPOLIES § 16(5)—CONSOLIDATION OF STREET RAILROADS—ASSENT OF PUBLIC SERVICE COMMISSION.**

The act of the Public Service Commission under Acts 1915, p. 268, in assenting to a transfer of the franchise and property of a street railway, though it effected a consolidation of parallel and competing lines, is not violative of Const. § 103, which requires that the Legislature provide by law for the regulation, prohibition, or reasonable restraint of common carriers, partnerships, associations, trusts, monopolies to prevent them from making scarce articles of necessity, etc., or prevent reasonable competition, since in the strictest sense of the word it does not create a "monopoly," which is an exclusive right granted to one person or a class of persons or something which was before of common right.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12.]

For other definitions, see Words and Phrases, First and Second Series, Monopoly.]

**7. STREET RAILROADS § 4—CONSOLIDATION—STATUTORY PROVISIONS.**

Code 1907, § 3481, which permits the consolidation of railroad corporations only in case their lines admit the passage of cars continuously or without break or interruption directly or by means of intervening lines, construed with Acts 1915, p. 268, still remains in effect as evidencing the public policy of the state that in the absence of the approval of the Public Service Commission there shall be no such consolidation, but has been limited by the act of 1915 to that extent.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 2-7.]

**8. PUBLIC SERVICE COMMISSIONS § 35—CERTIORARI—JURISDICTION.**

On certiorari to review a proceeding of the Public Service Commission approving the transfer of the property and franchises of a public utility under Acts 1915, p. 268, the Supreme Court has neither original nor appellate jurisdiction to pass upon the city's objections to approval of the proposed consolidation.

Certiorari by the City of Birmingham to review the record of a proceeding had before the Alabama Public Service Commission on the joint application of the Birmingham Rail-



way, Light & Power Company and others for the Commission's approval of a proposed sale and conveyance of properties and franchises. Order of the Commission approving the plan proposed affirmed.

M. M. Ullman and James Weatherly, both of Birmingham, for appellant. W. L. Martin, Atty. Gen., Lawrence M. Brown, Ass't Atty. Gen., Forney Johnston, E. D. Smith, William B. White, and Tillman, Bradley & Morrow, all of Birmingham, for appellee.

SAYRE, J. This is an application by the municipal authorities of the city of Birmingham to review the record of a proceeding had before the Alabama Public Service Commission on the joint application of the Birmingham Railway, Light & Power Company, the Birmingham Tidewater Railway Company, and J. D. Kirkpatrick, for the commission's approval of a proposed sale and conveyance of all the properties and franchises formerly owned and exercised by the Birmingham, Ensley & Bessemer Railroad Company to the Birmingham Railway, Light & Power Company on terms the substance of which will be presently stated.

By the application to the Public Service Commission it was made to appear that at a sale ordered by the District Court of the United States at Birmingham, Kirkpatrick, as agent for a committee of the holders of the mortgage bonds of the Ensley Company, so to speak of the Birmingham, Ensley & Bessemer Railroad Company, had bid in the properties and franchises of that company and proposed to assign all his rights and obligations as such bidder to the Birmingham Company, so to speak of the Birmingham Railway, Light & Power Company, and the Tidewater Company, jointly, the plan, to state it roughly, being that, in consideration that the Birmingham Company would guarantee the committee's bonds, the properties and franchises purchased for them by Kirkpatrick should be assigned to the Tidewater Company, a corporation organized for the purpose of taking over and operating the properties and business of the Ensley Company, and all the capital stock of the Tidewater Company transferred and assigned to the Birmingham Company. The city of Birmingham was allowed to intervene by way of formal protest in which several objections were taken to the proposed consolidation, but the commission, after hearing the evidence, gave its approval to the plan proposed, after which this application for a review of the record of the proceeding by the common-law writ of certiorari.

The Public Service Commission, which succeeded to all the powers and jurisdiction of the Railroad Commission by virtue of the act approved September-25, 1915 (Gen. Acts, p. 865), in giving its approval, acted under authority of section 1 of the act approved Au-

gust 6, 1915 (Gen. Acts, p. 268), providing as follows:

"Section 1. The property of a public utility, together with its franchises, contracts, business, good will and other assets, may be lawfully sold and conveyed or leased to, and thereafter lawfully held, enjoyed and operated by, a purchaser then engaged or proposing to engage in the business conducted by such public utility; or the capital stock of a corporation owning and operating a public utility may be lawfully sold and conveyed to, and thereafter lawfully held and enjoyed by, a purchaser whether or not such purchaser is engaged, or proposes to engage in the business conducted by such public utility; whenever such sale and conveyance or lease of the property, franchises, contracts, good will and other assets of such public utility, or whenever the sale and conveyance of the capital stock of such corporation, is consistent with the interests of the public. In cases where the property of the public utility proposed to be sold and conveyed or leased lies within, and the franchises and public duties thereof relate to, a single municipality, and in cases where such a public utility is owned by a corporation, and its capital stock is proposed to be sold, the question whether the proposed sale and conveyance or lease is consistent with the interests of the public shall be determined by the governing body of such municipality, and also by the Railroad Commission of Alabama, and if the governing body of such municipality and the Railroad Commission of Alabama shall each determine that the proposed sale and conveyance, or lease, is consistent with the interests of the public, their determination shall be shown by their approval of the proposed sale and conveyance or lease; in all other cases the question whether the proposed sale and conveyance or lease is consistent with the interests of the public shall be determined by the Railroad Commission of Alabama, and if the Railroad Commission of Alabama determines that the proposed sale and conveyance or lease is consistent with the interests of the public, its determination shall be shown by its approval of the proposed sale and conveyance or lease"—and more of no present concern.

In the intervention, which appears as a part of the record certified by the commission to this court, it was alleged that the line of railway that had been owned and operated by the Ensley Company lay partly within and partly without the corporate limits of the city of Birmingham, that it was practically a parallel and competing line with lines of railway owned and operated by the Birmingham Company, and that the municipal franchise under which it had been constructed and operated along the streets of the city contained the following stipulation:

"The franchise hereby granted shall not be transferred or assigned, in whole or in part, to any parallel or competitive line without the consent of the city of Birmingham, directly or indirectly, either by purchase, consolidation or merger; and if this condition is violated or evaded, the city council reserves the right, on due notice, to annul the entire franchise. Provided, however, that this section shall not be construed to prevent the grantee or its assigns from conveying this franchise to any trustee or mortgagee and to his, their or its assigns, as security for bonds issued in good faith and without any purpose or intent thereby to evade the conditions imposed by this section."

And upon these allegations and upon some propositions of law, to be stated and considered, the city denies the constitutional au-



thority, and, however that may be determined, the propriety in any event, of the commission's action in the premises.

[1] In this proceeding the court can only answer the questions raised on the face of the record. Even though it be conceded that the result of the considerations of fact upon which it must be assumed the commission's approval was based might have been reviewed by certiorari with a bill of exceptions, as in *Ex parte Buckley*, 53 Ala. 42, and that the municipal authorities of the city of Birmingham have an interest in the question proposed by the petition to the commission such as to make it proper to grant the writ of review on their application—to which point they here cite *Earle v. Juzan*, 7 Ala. 474—still the court cannot consider whether on the evidence or the facts the authority conferred by the statute upon the Public Service Commission has been properly exercised with reference to the public interests involved for the very good reason that it has not before it the evidence or the facts upon which the commission proceeded. In these circumstances the court is limited in its inquiry to the consideration whether the commission had jurisdiction of the proceeding, and, incidentally, the regularity of the proceeding upon which the jurisdiction of the commission depended. *Fore v. Fore*, 44 Ala. 478; *Kirby v. Commissioners' Court*, 186 Ala. 611, 65 South. 163. From this, there being no question as to procedural regularity, it results at once that the finding and determination of the commission that the disposition of the properties and franchises of the Ensley Company according to the proposed plan is consistent with the interest of the public, if within the jurisdiction of the commission, must be accepted as an indisputable fact.

[2] We find in the brief of counsel for the city of Birmingham no very definite or apparently confident assertion that the act of August 6, 1915, in so far as it conferred upon the Public Service Commission the jurisdiction it undertook to exercise in this case, was wholly without the power of the Legislature. It is suggested, however, that the act delegates legislative power to the commission. Commissions with like powers are no novelty. We follow a well-beaten path when we hold that the Legislature had not by this act delegated any part of that constitutional and prerogative power which is peculiarly its own; it has not delegated any power strictly and exclusively legislative. It has committed discretion and judgment to the commission; but such delegations of administrative function and authority which the Legislature might itself exercise are common and necessary to our scheme of government. *McNiell v. Sparkman*, 184 Ala. 96, 63 South. 977. The distinction between the delegable and non-delegable powers of the Legislature is thus well stated by the Supreme Court of Penn-

sylvania in *Locke's Appeal*, 72 Pa. 498, 13 Am. Rep. 716:—

"The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend."

The case of the statute here is accurately described by the last clause of the quotation above. *Railroad Commission v. Ala. North. Ry. Co.*, 182 Ala. 357, 62 South. 749; *West Jersey, etc., Railroad Co. v. Board of Public Utility Commissioners*, 87 N. J. Law, 170, 94 Atl. 57.

Referring to section 220 of the Constitution which provides that "no person, firm, association, or corporation shall be authorized or permitted to use the streets, avenues, alleys, or public places of any city, town, or village for the construction or operation of any public utility or private enterprise, without first obtaining the consent of the proper authorities of such city, town, or village," it is insisted that to construe the act as authorizing the commission to exercise jurisdiction over the transaction in question would involve an application of the act to facts and conditions beyond the lawful reach of legislative power.

[3] Section 4 of the act provides, in substantially the foregoing language of the Constitution, as follows:

"Nothing herein contained shall be construed to authorize or permit any person, firm, association or corporation to use the streets, alleys, avenues or public places of any city, town or village, for the construction or operation of any public utility or private enterprise, without the consent of the proper authorities of such city, town or village."

But in the absence of such declaration in the statute the constitutional inhibition would of course be read into it and its provisions given operation and effect, as far as might be, in accord with the Constitution. The legal content of the situation presented by our constitutional and statutory provisions touching the subject in hand is well shown by the language of the court in the analogous case of *Manufacturers' Light & Heat Co. v. Ott* (D. C.) 215 Fed. 940, where, to an objection that the statute there under consideration attempted to authorize the Public Service Commission of West Virginia to take property without due process of law, the court responded:

"As the statute is silent on the subject, the presumption is that the Legislature intended the commission to comply with the Constitution, not to violate it. Such commissions are under two laws, namely, the statute law of the state, which confers upon them certain powers over public service corporations, and the constitutional law of the state and of the United States, which requires that they shall exercise the powers conferred by statute only by due process of law, that is, after giving the companies due notice and opportunity to be heard. A statute is invalid which requires something to be done which is forbidden by the Constitution, but it cannot be essential to the validity of a statute that it should enjoin obedience to the Constitution."

[4] The record shows, as we have said, that the city of Birmingham appeared before the Public Service Commission and objected to the plan proposed by the joint petitioners, the practical effect of which, it must be conceded, will be to permit the sale and conveyance of the properties and franchises heretofore owned and exercised by the Ensley Company to the Birmingham Company. But that objection has neither enlarged nor diminished the power or duty of the commission to pass upon the question whether such sale and conveyance will be consistent with the interests of the public. That question, we apprehend, after the city had intervened, remained to be determined upon just the same considerations as would have been the case had the city not intervened, the city having appeared, not as a party to a judicial proceeding *inter partes*, but to protect, adduce evidence, or make suggestions in respect of the public interest, as any other constituent part of the public might have done.

The commission, when proceeding under the act of August 6, 1915, exercises judicial, or rather quasi judicial, power; but the proceeding differs radically from those customary proceedings in court by which rights are enforced or wrongs redressed. It is, in substance, a proceeding for a statutory license to do that which the law otherwise does not permit. The statute makes no provision for parties adverse to the petition. The issue raised is of a general, public nature, the interests of the public being represented by the commission. The necessity for an ascertainment of the fact upon which the license depends does not convert the finding into an act strictly judicial. Such is not the judgment, or discretion, which is an essential element of judicial action. *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65. The provision of the act to the effect that the question whether that proposed sale and conveyance is consistent with the interests of the public shall be determined by the governing body of the municipality, as well as by the Public Service Commission, in cases where the property of the public utility lies within and the franchises and public duties thereof relate to a single municipality, works no change in the nature or scope of the inquiry to be made by the commission. It effects nothing more than a saving in favor of the municipality, reserving to it the right in a proper case to pass upon the question for itself and without regard to the finding of the commission. From these considerations it results that the Public Service Commission did not furnish a forum for the litigation of any question as to the right or effect of the city's dissent from sale and conveyance on any grounds deemed peculiar to itself, as contradistinguished from the larger general public, as, for example, its contention that the original consent of the proper authorities of the city—which, it may be as-

sumed, the Ensley Company had when it first laid its track in the streets—would not suffice to authorize the use of the streets by the Birmingham Company in the event the commission approved the proposed transfer, or that the stipulation of the ordinance contract, constituting the municipal franchise under which the Ensley Company operated, stood in the way of the proposed transfer. Any controversy as to the existence or effect of these and all like grounds of objection to the proposed transfer or sale, and as well the question whether the municipal authorities have a power to veto in case the Tidewater line does lie partly without the city limits—these are questions, we judge, which must of necessity be tried out in the customary courts of the country, since there is in the statute no authority for their adjudication by the Public Service Commission. Nor is there anything in the Constitution or laws of this state which requires that the consent of the municipal authorities in any particular instance shall be a condition precedent to the action of the Public Service Commission or requires the commission to condition its approval upon the consent of the municipal authorities. The commission and the municipality, each acting in its own sphere, independently, and without reference to the action of the other, give or withhold their approval and consent as they may judge the interests represented by them respectively require. We do not, of course, mean to say that the commission will not consult the interests of the municipality in a case requiring municipal consent, but only that in such case it will act independently upon its own judgment as to the interests of the larger public in which the people of the municipality are included.

[5] Much is said in the briefs by way of discussing the question whether the commission's assent to the proposed sale and conveyance would involve an exercise of the authority of the act of August 6, 1915, in violation of the policy of the state as shown by the constitutional inhibition against any law making an exclusive grant of a special privilege (section 22 of the Constitution) and by section 103 of the Constitution which requires that:

"The Legislature shall provide by law for the regulation, prohibition, or reasonable restraint of common carriers, partnerships, associations, trusts, monopolies, and combinations of capital, so as to prevent them or any of them from making scarce articles of necessity, trade, or commerce, or from increasing unreasonably the cost thereof to the consumer, or preventing reasonable competition in any calling, trade, or business."

In the same connection the city refers to section 3481 of the Code which was in effect when the Ensley Company got its franchise from the city and which permitted the consolidation of railroad corporations in case only their lines admitted the passage of burden or passenger cars continuously and with-

out break or interruption directly or by means of intervening lines.

In view of what has been already said, no extended discussion of the questions thus proposed is deemed necessary. It is proper to say, however, that it does not appear that there has been any effort to create or approve any exclusive privilege. Every grant of a franchise or right to the use of the streets or highways for the transportation of persons, commodities, or intelligence is special and in a sense exclusive, for the instrumentalities necessary in carrying on the business much occupy space which cannot at the same time be occupied by the like instrumentalities of other persons, natural or artificial, who would engage in the same business. But, so far as the public is concerned, every such grant is justified on the theory that the surrender to some extent of the previous right to the common use of the public property in its entirety is more than compensated by the substitution of other more valuable facilities, while, so far as concerns other persons or corporations who would serve the public by exercising similar franchises, such grant of rights is not exclusive so long as the power to grant other similar franchises is reserved, and the Constitution operates as a reservation in every case.

[8, 7] Further, it may be said that the plan proposed to, and approved by, the Public Service Commission does not create a monopoly in the strict sense of the word, for a monopoly is an exclusive right granted to one person, or a class of persons, of something which was before of common right. *Birmingham Railway Case*, 79 Ala. 465, 58 Am. Rep. 615. There is no common right to operate railroads along the public streets of a city, town, or village. It may be conceded that the plan in question tends toward the creation of a monopoly in the common, and possibly the constitutional, acceptance of the term, in that it will operate to destroy competition to some extent; but it does not seem likely that section 103 of the Constitution, after specifying common carriers as things to be regulated, or reasonably restrained—it cannot be supposed that the framers of the Constitution intended to authorize the prohibition of common carriers—intends to repeat the idea by the use of the term “monopoly”; at any rate, while action is enjoined upon the Legislature, even in respect of monopolies it is left to choose between regulation, prohibition, or reasonable restraint, and it cannot be said that the act of August 6, 1915, is out of harmony with the requirement that the Legislature shall provide by law for the regulation or reasonable restraint of common carriers so as to prevent them from preventing reasonable competition. Rather, we think, the Legislature, in passing the act, was discharging the duty prescribed by the Constitution. We take it that the reason-

ableness of the competition which the Constitution intends to conserve depends on its effect upon the public interests, whether or not it makes reasonable the cost of the commodity furnished to the consumer. Competition in some circumstances may amount to needless economic waste in the duplication of investments and the cost of operation for which in the end the consuming public must pay. Hence a general drift of public opinion and legislative practice, consonant with the language and purpose of section 103, towards the supplanting of competition by the regulation of rates. This broad general policy of the state on this subject finds its latest expression in the act of August 6, 1915, and the policy so expressed is to commit the question of consolidations, such as the one here proposed, to the judgment and discretion of the Public Service Commission. Section 3481 of the Code, assuming for the moment that the consolidation in question falls within the influence of its provision, has probably survived the act in question as still evidencing the will of the state that in the absence of the approval of the commission there shall be no consolidation of lines of railway which do not admit the passage of cars continuously and without break or interruption; but to this extent the effect of the section has been limited and cut down by the act, and so the policy of the state has found a new, to some extent a different, and yet a competent expression. And so of the criminal statutes against monopolies, combines, etc. “We know of no ground upon which a constitutional legislative enactment can be rightly spoken of as contrary to public policy. What is and what is not public policy must obviously be determined by the written and the unwritten law, giving precedence to the former where the two are in conflict. \* \* \* Laws are never said to be contrary to public policy in any other sense than contrary to constitutional policy. \* \* \* When we leave constitutional limitations out of view, the will of the legislative branch of the government, when expressed, is the highest evidence of public policy. To judicially condemn its expressed will, when exercised within constitutional limitations, would be the plainest kind of usurpation.” *Julien v. Model Building, Loan & Investment Association*, 116 Wis. 79, 92 N. W. 561, 61 L. R. A. 668; 6 R. C. L. p. 109, § 108. And if it were conceded that the act was unwise, unnecessary, or inexpedient, these are matters with which the courts are not concerned. They are for the Legislature. 6 R. C. L. p. 107, § 107.

[8] Briefs and arguments on either side seem to proceed upon the theory that the court will in this proceeding render a judgment settling the right of the city in the premises. The city has protested against approval by the Public Service Commission, but we are not given to know that the Birm-

Ingham City Commission has taken any formal official action in the way of determining whether the proposed sale and conveyance is consistent with the interests of that part of the public for which it has authority to speak in respect to its peculiar interest; but even if we knew that it had determined that question in the negative, still, considering the limited jurisdiction of the Public Service Commission and the narrow scope of the proceeding in this court, we are unable to see how the expected judgment can be rendered consistently with settled legal principle. It is clear upon this record that this court has neither original nor appellate jurisdiction in this cause to pass upon the effect of the city's possible determination, now or hereafter, against the proposed consolidation, and we must decline the expression of an unauthoritative opinion upon facts not shown save by the averments of the city's protest. Assuming, doubtfully, that the city had the right to bring the cause here in its present shape, but, on that assumption, going as far as possible in deciding the question argued, we hold, in brief, that upon the record before us the Public Service Commission had and regularly exercised jurisdiction in the premises to determine that the proposed sale and conveyance was consistent with the interests of the public. As we construe the record, this it has decided and nothing more. The effect any determination by the municipal authorities may have, and, by the same token, the right of the parties to the proposed consolidation to proceed as in a case in which the municipal authorities have no interests of lawful recognizance, are questions that remain to be determined in the customary way of determining judicial controversies.

It follows that the order of the Public Service Commission must be affirmed.

**Affirmed.**

ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., concur. GARDNER, J., concurring in the conclusion.

(199 Ala. 97)

### HALL v. LONG. (4 Div. 635.)

(Supreme Court of Alabama. June 8, 1916.  
On Rehearing, Jan. 18, 1917.)

#### 1. DEEDS ⇨114(1)—LAND CONVEYED—PARTICULAR DESCRIPTIONS LIMITED.

The words "west of Brady Mill creek" in a deed to L. of the "N. E.  $\frac{1}{4}$  and N. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  and N. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  and 20 acres more or less of the S. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  northeast of the A. creek and west of Brady Mill creek, in section 20, T. 6, R. 29, containing 260 acres, more or less," applies only to the 20-acre tract, and not to the N. E.  $\frac{1}{4}$ , which would do violence to the explicit and unqualified description thereof, and cut off 30 or 40 acres of it and reduce the land granted to 220 or 230

acres; and this though the 20-acre tract does not lie immediately west of the creek.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 316, 317, 319, 327, 328.]

#### 2. EASEMENTS ⇨12(1)—DEEDS—LIMITATION ON PARTICULAR DESCRIPTION.

A deed otherwise conveying with certainty a quarter section does not indicate an intention to convey only the part west of a creek, by provision that, if the grantee shall at any time build a mill on the creek, the grantor agrees to give him an easement on the east side thereof, so as to secure ingress and egress, where the grantor owns other land on the east side.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 35-38.]

#### 3. DEEDS ⇨101—CONSTRUCTION BY PARTIES.

Though if a deed is of doubtful meaning, or its language ambiguous, the construction given it by the parties, as exhibited by their conduct or admissions, will be deemed the true one, unless the contrary be shown, yet, if the language is plain and certain, their acts and declarations cannot be resorted to to aid a construction.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 233.]

#### On Rehearing.

#### 4. EASEMENTS ⇨36(1)—DEEDS—LATENT AMBIGUITY—BURDEN OF PROOF.

Where a latent ambiguity in a deed can arise from grant of an easement of way over land east of a creek only if the grantor owned no land east of the creek, other than part of that in terms granted by the same deed, one contending for the ambiguity has the burden of showing that he owned no other land there.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88, 89.]

Appeal from Circuit Court, Henry County; H. A. Pearce, Judge.

Ejectment by J. B. Long against R. F. Hall for land a part of the N. E.  $\frac{1}{4}$  of section 20, township 6, range 29, that lies east of Brady Mill creek. Judgment for plaintiff, and defendant appeals. Affirmed.

Lee & Glover, of Abbeville, and Hill, Hill, Whiting & Stern and William C. Oates, all of Montgomery, for appellant. B. G. Farmer and T. M. Espy, both of Dothan, for appellee.

ANDERSON, C. J. The description of the land in the conveyance over which this controversy arose is as follows:

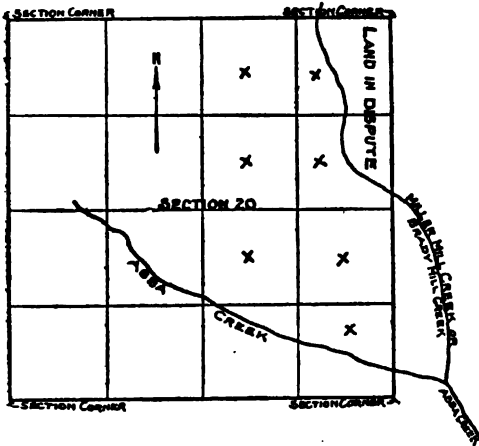
"The northeast quarter and northeast quarter of southeast quarter and northwest quarter of southeast quarter and 20 acres more or less of the southeast quarter of the southeast quarter northeast of the Abba creek and west of Brady Mill creek, in section 20, township 6, range 29, containing 260 acres, more or less; and should said Long at any time build a mill on said Brady Mill creek, I agree to give him an easement on the east side thereof so as to secure the ingress and egress to said mill."

[1] The question involved in this case is whether or not that part of the general description placing certain of the land west of the "Brady Mill creek" applies to the 20 acres more or less in the S. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  as lies northeast of Abba creek alone, or also applies to the N. E.  $\frac{1}{4}$  so as to exclude so much thereof as lies east of the Brady Mill creek from the tract of land conveyed by W. C. Oates to W. O. Long, as the land

involved in this suit is all of the E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  as lies east of said creek. (The reporter will set out the map on page 12 of the record.)

## EXHIBIT E.

PLAT OF SECTION 20, TOWNSHIP 6, RANGE 29.



The deed from Oates to W. O. Long unequivocally and without qualification or limitation conveys the N. E.  $\frac{1}{4}$ , N. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  and N. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , being six full 40's as per government survey. It does not say so much of the N. E.  $\frac{1}{4}$  only as lies west of the Brady Mill creek or all of said N. E.  $\frac{1}{4}$ , less so much thereof as lies east of said creek. The last part of the general description as to land west of said Brady Mill creek necessarily applies to the fractional part of the S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  northeast of Abba creek and estimated at 20 acres, and the words "more or less" were intended to cover any error in said estimate. The land was sold by metes and bounds, and was supposed to contain 260 acres more or less, being six full 40's, 240 acres, and as much of the S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  as was northeast of Abba creek and west of Brady Mill creek, estimated at 20 acres "more or less." On the other hand, to hold that the words "west of the Brady Mill creek" applied to the N. E.  $\frac{1}{4}$  would take therefrom 30 or 40 acres on the east side and read into the particular description a conveyance of a fractional quarter section, though said quarter section is conveyed in full without limitation, and would also cut down the quantity from 260 acres to 220 or 230 acres, subject, of course, to a variation as to quantity in either instance, in the estimate of the fractional part of the S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ . The fact that the land in the S. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  does not lie immediately west of the Brady Mill creek does not compel the last recital to apply to the N. E.  $\frac{1}{4}$ , as said S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  is west of said creek, and it is not placed in the description as being immediately west. It would do violence to the explicit and un-

qualified description of the N. E.  $\frac{1}{4}$  to cut 30 or 40 acres off of the east side by making the creek the dividing line at this point; yet the whole thing can be reconciled by making the words "west of Brady Mill creek" apply only to an effort to aid in the description of the fractional part of the S. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$ , the parties, perhaps, thinking that said creek was nearer to or ran through same.

[2] Nor do we think that the granting of the easement over lands of the grantor on the east side of the Brady Mill creek, in the event the grantor wanted to place a mill on said creek, indicates that there was no intention to convey any lands east of said creek as the grantor owned other lands east of the creek and the use of which may have been necessary for ingress and egress. Moreover, there is a point where the creek is the border line in the lower part of the N. E.  $\frac{1}{4}$ , and it may be that the mill was to be placed at this point, and which would place the east bank on the unconveyed land of the grantor.

[3] There can be no doubt of the soundness of the proposition that, where a deed is of doubtful meaning, or the language used is ambiguous, the construction given by the parties themselves, as exhibited by their conduct or admissions, will be deemed the true one, unless the contrary be shown. 13 Cyc. 608. But if the language is plain and certain, acts and declarations of the parties cannot be resorted to to aid a construction. Dunn v. Mobile Bank, 2 Ala. 152. We think that the deed in question plainly shows that the grantor conveyed all of the N. E.  $\frac{1}{4}$ , and that it was not reduced by excluding therefrom all that was east of Brady Mill creek. It is also plain that the description as to section, township, and range applied to all the land, and which cannot be limited to the S. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  simply because the general description as to boundaries was so limited.

The trial court did not err in giving the general charge for the plaintiff, and the judgment is affirmed.

Affirmed.

MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur.

## On Rehearing.

ANDERSON, C. J. [4] It is suggested that the opinion is erroneous in the statement that Oates owned other land east of Brady Mill creek at the time he executed the deed to W. O. Long. We confess that the statement, though a most natural assumption of a fact, is erroneous; for while Oates subsequently conveyed the lands east of the Long land, the proof does not show that he owned it at the time the Long deed was executed, and if, as a matter of fact, the grantor, Oates, did not own lands immediately east of the Brady Mill creek other than the strip in controversy, the leave for ingress to and egress

from a mill to be erected by the grantee on the west bank of the creek would be of considerable significance, and would probably produce a latent ambiguity, not by way of a general description over a particular one, but as a qualification or limitation upon the particular description. Inasmuch, however, as the description of the land in the N. E.  $\frac{1}{4}$  is definite and certain, the recital as to the mill could not render it ambiguous unless it was accompanied by proof that the strip in question was all the land that Oates owned east of the Brady Mill creek adjoining to the tract conveyed to W. O. Long. The opinion should have read, however, that from aught that appears, Oates owned other lands east of the creek, instead of stating as a fact that he did. In other words, it was incumbent upon the party contending for a latent ambiguity to establish the same, and the recital of the deed as to the mill and ingress to and egress from could render the particular description doubtful and uncertain only when accompanied by proof that the grantor, Oates, owned no other land east of the creek over which one would have to go to reach a mill on the west bank of the creek.

The application for rehearing is overruled.

(196 Ala. 154)

**AMERICAN LAUNDRY CO. v. E. & W. DRY-CLEANING CO.** (6 Div. 447.)

(Supreme Court of Alabama. Feb. 1, 1917.)

**1. INJUNCTION**  $\S$  61(1) — **RESTRAINING BREACH — CONTRACT IN RESTRAINT OF TRADE.**

A bill for injunction to restrain violation of a contract of a laundry to collect dry-cleaning work for the complainant and for no one else for ten years in a certain county, by which contract the plaintiff agreed not to engage in the laundry business in the same county for a like period, did not show an enforceable contract, and an amendment alleging that it was necessary to the business that such contract be performed, and that there were other laundries and dry-cleaning establishments in the county, was insufficient to authorize equitable relief.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 120, 130.]

**2. CONTRACTS**  $\S$  116(1) — **LEGALITY OF OBJECT—RESTRAINT OF COMPETITION.**

Contracts in restraint of trade are in themselves, if not shown to be reasonable, bad in the eye of the law.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542, 543, 545, 546.]

**3. CONTRACTS**  $\S$  116(2) — **LEGALITY OF OBJECT—RESTRAINT OF COMPETITION—GENERAL RESTRICTIONS.**

Whatever restraint in a contract is larger than the necessary protection of the parties is void, as being injurious to the interest of the public, on the ground of public policy.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 544.]

**4. CONTRACTS**  $\S$  116(1) — **LEGALITY OF OBJECT—RESTRAINT OF COMPETITION—GENERAL RESTRICTIONS.**

General restraints of commerce are all void, whether by bond, covenant, or promise, with or

without consideration, and whether it be of the party's own trade or not.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542, 543, 545, 546.]

**5. CONTRACTS**  $\S$  116(1), 117(2) — **LEGALITY OF OBJECT—UNLIMITED RESTRICTIONS.**

A contract not to carry on any business whatever is unreasonable, and not enforceable, however limited the time or space may be, and likewise a contract which makes one party the sole judge whether one business competes with another.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542, 543, 545, 546, 555, 556, 568.]

**6. CONTRACTS**  $\S$  117(9) — **LEGALITY OF OBJECT—LIMITATION AS TO TIME AND SPACE.**

Contracts in restraint of trade, unlimited as to time and space, are void as against public policy.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 567.]

**7. CONTRACTS**  $\S$  117(7, 8) — **LEGALITY OF OBJECT—LIMITATION AS TO TIME AND SPACE.**

A contract in total restraint of trade, limited as to space, but unlimited as to time, is not illegal, and may continue for the life of the party restrained, but one limited as to time and unlimited as to territory is void.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 565, 566.]

**8. CONTRACTS**  $\S$  117(1) — **LEGALITY OF OBJECT—RESTRAINT OF TRADE—NATURE OF BUSINESS.**

If a contract in restraint of trade is in respect to a duty which the party owes the public, although it is limited as to time and space, it will not be enforced in equity, but is void.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554, 557, 569.]

**9. CONTRACTS**  $\S$  117(1) — **LEGALITY OF OBJECT—RESTRAINT OF TRADE—NATURE OF BUSINESS.**

An agreement for a limited space upon proper consideration is usually held valid, and the sale of a business by one person to another and the good will of the business is usually held a sufficient consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554, 557, 569.]

**10. CONTRACTS**  $\S$  116(2, 3) — **LEGALITY OF OBJECT—RESTRAINT OF TRADE—NATURE OF BUSINESS.**

The restriction of trade is allowed to such an extent as is reasonable to protect the interests involved, but the test of the reasonableness and the necessity of the interest to be protected depend upon the peculiar circumstances of each case, but all combinations to enhance or depreciate prices are contrary to public policy and void.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 544, 547-549.]

**11. CONTRACTS**  $\S$  116(3) — **LEGALITY OF OBJECT—RESTRAINT OF TRADE—NATURE OF BUSINESS.**

He who has commodities to sell in the market has the same right to competition among buyers as the buyers have to competition among sellers.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 547-549.]

**12. SPECIFIC PERFORMANCE**  $\S$  55 — **LEGALITY OF OBJECT—RESTRAINT OF TRADE—NATURE OF BUSINESS.**

A contract between a dry-cleaning company and several laundry companies, by which each agreed not to engage in the business of the other in the county for ten years, and by which the laundries agreed for a commission to col-

ject and deliver the work for the dry-cleaning company, if not wholly void, was such as might injure the public, and therefore ought not to be specifically enforced, but the parties should be remitted to their actions at law for damages.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 173-176.]

### 13. SPECIFIC PERFORMANCE ⇌8—RIGHT TO REMEDY.

Specific performance is a matter of grace, and not of absolute right.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 17, 18.]

### 14. SPECIFIC PERFORMANCE ⇌8—RIGHT TO REMEDY—DISCRETION OF COURT.

The discretion of the court to award specific performance is not an arbitrary assumption of authority, but a sound discretion regulated as near as may be by general rules.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 17, 18.]

### 15. INJUNCTION ⇌58 — SPECIFIC PERFORMANCE ⇌75—CONTRACTS ENFORCEABLE—AFFIRMATIVE ACTION.

Courts will never order specific performance of contracts requiring continuous affirmative action to perform, because the court cannot superintend such work or performances; but in certain cases it will award specific performance by forbidding the doing of certain acts to enforce negative stipulations or covenants.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 111-113; Specific Performance, Cent. Dig. §§ 206-208, 210.]

### 16. INJUNCTION ⇌60—CONTRACTS ENFORCEABLE—AFFIRMATIVE ACTION.

Breach of contract for services, if the services to be rendered do not require or contemplate peculiar or unusual personal art, will not be enjoined.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 117-119.]

### 17. INJUNCTION ⇌58—CONTRACTS ENFORCEABLE—NEGATIVE COVENANTS.

Restraint of breach of a negative covenant is limited to cases in which the negative covenant is negative in fact as well as in form.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 111-113.]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by the E. & W. Dry-Cleaning Company, a corporation, against the American Laundry Company, to enjoin the violation of contracts. From a decree overruling demurrers to the amended bill, respondent appeals. Reversed, rendered, and remanded.

The substance of the original bill sufficiently appears. The amendment is as follows:

Complainant further avers that it was organized for the purpose of engaging in the dry-cleaning business in the city of Birmingham, and was incorporated March, 1912; that prior to said incorporation the terms of said contract had been practically agreed upon between said laundry company, including respondent and complainant's incorporators, and that the moving consideration causing complainant's incorporation and the establishment of its dry-cleaning plant was the execution of said contract by said laundry company; that said laundry company at said time did not do any dry-cleaning work, and did not have any equipment or plant for such work, but they did have wagons and agents covering the city of Birmingham and Jefferson county collecting laundry, and said wagons and

agents afforded a reasonable means for complainant through such companies to get dry-cleaning work, and to collect dry-cleaning work without the expense of maintaining wagons and agents; and that in fact complainant could not, out of its business, have maintained such wagons and agents. Complainant further avers that its incorporators realized such fact, and realized that a large business could likely be built up by diligent application with the aid of said laundry company upon the faith of said contract, and it was so incorporated; thereafter complainant, upon the faith of said contract, and relying thereupon, invested the sum of \$10,000 in dry-cleaning machinery and equipment, and erected a modern up-to-date dry-cleaning plant in the city of Montgomery, all of which could not have been done without the aid of said laundry company as agreed upon in said contract; that among its said incorporators and stockholders were the owners of all the said laundry companies executing said contract, including respondent, and that said laundry companies, or their owners, are part of complainant's stockholders to-day. Complainant further avers that to have established the laundry during the life of said contract would have seriously interfered with its dry-cleaning establishment, as it was designed that its dry-cleaning business should be of large volume as it had been, and that all of complainant's time and attention should be required by said dry-cleaning business, as it had been. Complainant further avers that all of said laundry companies have continuously advertised that complainant did their dry-cleaning work for them, and have printed signs to that effect upon their windows at their places of business. Complainant further avers that at the time of the execution of said contract there were other laundries operating in Birmingham and Jefferson county, and that there were and had been numerous other establishments carrying on a dry-cleaning business, with which concern your complainant has had no connection whatever.

Morris Loveman, of Birmingham, for appellant. Stokely, Scrivner & Dominick, of Birmingham, for appellee.

MAYFIELD, J. The equity of appellee's bill is to specifically enforce a contract set out in the bill by injunction, or, more definitely speaking, to enjoin breaches of this contract. The prayer of the bill is that:

"Upon the final hearing of this cause your honor will make and enter a decree permanently enjoining respondent from the violation of said contract during the life of the same, and permanently restraining respondent from delivering over to dry-cleaning and dyeing establishments other than complainant the cleaning and dyeing work obtained by it, which under said contract, respondent is bound to turn over to complainant."

The substance of the contract was that appellee was to establish in Birmingham, Ala., a dry-cleaning business and plant, and that five laundry companies in the city should not for a period of ten years engage in the dry-cleaning business, and that appellee for the same period should not engage in the laundry business in Jefferson county, Ala.; that the five laundry companies mentioned should deliver to the dry-cleaning company all dry-cleaning work which they received from their customers, and that the work should be done by appellee and returned to the offices of the

laundry company from which it was received, to be by the latter returned to the customers; that the laundry company should receive 25 per cent. of the price paid by the customer for the dry cleaning, which price should be fixed exclusively by the dry-cleaning company; that the garments or work so dry-cleaned and delivered to the customers should bear the mark and brand of the laundry company, and not that of the dry-cleaning company, which did the work and fixed the price, the laundry company to collect such price from the customer and be directly responsible to the dry-cleaning company for 75 per cent. of the schedule price so fixed by the dry-cleaning company.

It is alleged that the laundry companies, including appellant, each advertised the fact that appellee did its dry-cleaning business, but that appellant has recently breached, and continues to breach, its contract, by refusing and failing to deliver the work so collected by it from its customers to complainant, but has delivered and continues to deliver the work so collected by it to other dry-cleaning companies, and allows such other dry-cleaning companies to advertise to the public that appellant is collecting work for them.

The bill was demurred to on the ground that the contract set out therein, and which is sought to be specifically enforced by injunction, was void because in restraint of trade and because it tended to create a monopoly in the dry-cleaning and laundry business in Jefferson county, Ala. The demurrer was sustained to the original bill, but the bill was subsequently amended. The reporter will set out the amendment. The demurrer was reinterposed to the bill as amended, and was overruled; and from the decree overruling the demurrer, appellant appeals.

[1] We do not see that the amendment cured the defect in the original bill, nor that it shows that the contract set out was valid or that it should be enforced by the injunctive relief sought. The contract in question, we think, falls clearly within the class of that construed in the cases of *Tuscaloosa Co. v. Williams*, 127 Ala. 110, 28 South. 669, 50 L. R. A. 175, 85 Am. St. Rep. 125, and *Arnold & Co. v. Jones Cotton Co.*, 152 Ala. 501, 44 South. 662, 12 L. R. A. (N. S.) 150, and cases there cited, and not within the class of the contracts upheld and enforced in the cases of *Smith v. Webb*, 176 Ala. 596, 58 South. 913, 40 L. R. A. (N. S.) 1191, *McCurry v. Gibson*, 108 Ala. 451, 18 South. 806, 54 Am. St. Rep. 177, *Moore v. Towers Co.*, 87 Ala. 206, 6 South. 41, 13 Am. St. Rep. 23, *Robbins v. Webb*, 68 Ala. 393, *Harris v. Theus*, 149 Ala. 133, 43 South. 131, 10 L. R. A. (N. S.) 204, 123 Am. St. Rep. 17, and *Pearson v. Duncan & Son*, 73 South. 406.

Doubtless there is some, if not much, conflict in the authorities, text-books, and decisions of America and England as to the extent to which courts of equity may or should

go to restrain by injunction breaches of contracts in partial restraint of trade. Mr. High, in his work on Injunctions, says that the law upon this subject has gone through three distinct stages of transition, and states the three doctrines announced in the development of the law. Volume 2, § 1167.

The doctrine prevailing in this state may be found in the Alabama cases above referred to, in the authorities therein cited, and in the notes thereto when reported in *American State Reports* and *Lawyers' Reports Annotated*. Some of the propositions as settled by this and other courts may be summarized as follows:

[2] Contracts in restraint of trade are in themselves, if not shown to be reasonable, bad in the eye of the law.

[3-5] Whatever restraint is larger than the necessary protection of the party with whom the contract is made is unnecessary and void, as being injurious to the interest of the public, on the ground of public policy. General restraints are all void, whether by bond, covenant, or promise, with or without consideration, and whether it be of the party's own trade or not. A contract not to carry on any business whatever is unreasonable, and not enforceable, however limited the time or space may be; and likewise a contract which makes one party the sole judge as to whether or not one business competes with another.

[6, 7] There is a well-recognized tendency in the English and American cases of recent date to modify the ancient strictness touching contracts in restraint of trade. Those unlimited as to time and space, and in total restraint of trade, are void as against public policy. One limited as to space, but unlimited as to time, is not illegal, and may continue for the life of the party restrained; but one limited as to time, but unlimited as to territory, is void. *Bowser v. Bliss*, 7 Blackf. (Ind.) 344, 43 Am. Dec. 93; *Wiley v. Baumgardner*, 97 Ind. 66, 49 Am. Rep. 427.

[8] If, however, the contract for restraint is in respect to a duty which the party owes the public, although it is limited as to time and space, equity will not enforce it, and it will be held void. *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 110, 28 South. 669, 50 L. R. A. 175, 85 Am. St. Rep. 125; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; *Commercial Union Tel. Co. v. New England Tel. & Tel. Co.*, 61 Vt. 241, 17 Atl. 1071, 5 L. R. A. 161, 15 Am. St. Rep. 893.

The true test was said by the great Tindal, C. J., to be:

"Is the restraint such only as to effect a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interest of the public." 7 Bing. 735.

[9] No definite or certain rule can be given to determine when contracts are in restraint of trade or against public policy and therefore void. As a rule, a general agreement



without limit as to time and space by which one person agrees with another that he will not engage in a certain business is void, but an agreement for a limited space upon proper consideration is usually held valid, and the sale of a business by one person to another and the good will of the business is usually held a sufficient consideration. *Arnold & Co. v. Jones Cotton Co.*, 152 Ala. 501, 44 South. 662, 12 L. R. A. (N. S.) 150.

[10] The restriction is allowed to such an extent as is reasonable to protect the interests involved, but the test of the reasonableness and the necessity of the interest to be protected depend upon the peculiar circumstances of each case, but all combinations to enhance or depreciate prices are contrary to public policy and void. *Arnold & Co. v. Jones Cotton Co.*, *supra*.

[11] He who has commodities to sell in the market has the same right to competition among buyers as the buyers have to competition among sellers. A secret combination among grain dealers in the nature of a partnership was held void as tending to stifle all competition. *Arnold & Co. v. Jones Cotton Co.*, *supra*.

The doctrine as to contracts in partial restraint of trade was thus summed up by Anderson, J. (now Chief Justice), in the opinion in *Flowers et al. v. Smith Lumber Company*, 157 Ala. 510, 511, 47 South. 1022, 1023:

"There are a few instances when contracts have been upheld by the courts, notwithstanding they had a tendency to restrain trade, such as sales of a stock or business and the good will of the vendor, with an obligation not to engage in a similar business or calling in the same locality. Contracts of this kind have been upheld and enforced upon the theory that they did not generally, but only partially, restrain trade, and only to the extent of protecting the purchaser in the enjoyment and use of the business purchased, and which was not otherwise injurious to the public. Contracts, however, whose chief, if not sole, aim is to stifle competition and create a monopoly, will not be enforced, because they are contrary to public policy. And in considering such contracts courts will not stop to inquire as to the degree of injury inflicted upon the public. It is enough to know that the inevitable tendency of such contracts is injurious to the public." *Arnold v. Jones Cotton Co.*, 152 Ala. 501, 44 South. 662, 12 L. R. A. (N. S.) 150."

[12] The contract in question may be classed with those condemned in the last two cases cited. If, however, it can be said in this case that the contract in question was not wholly void, and might support an action as for some breaches thereof, yet we are clear to the conclusion that it does or may affect the public in such manner as to work injury to the public, and for that reason ought not to be specifically enforced, when the very enforcement of it may injure the public, but that the parties should be remitted to their actions at law to recover the damages suffered, where recoverable damages were sustained.

[13] Specific performance is a matter of

grace, and not of absolute right. As early as 1746 Lord Hardwicke said:

"The constant doctrine of this court is that it is in their discretion whether they will decree a specific performance, or leave the plaintiff to his remedy at law." 8 Atk. 388.

This doctrine has been steadily maintained, down to the present time. *Seymour v. Delancey*, 6 Johns. Ch. (N. Y.) 222; *Ellis v. Burden*, 1 Ala. 458; 2 *Story's Equity*, 736-42. "The question is, not what the court must do, but what the court may do, under the circumstances."

[14] This discretion is not an arbitrary assumption of authority, but a sound discretion, regulated, as near as may be, by general rules. *Pulliam v. Owen & Russell*, 25 Ala. 492; *Sims v. McEwen's Adm'r*, 27 Ala. 184; *Casey v. Holmes*, 10 Ala. 777; 7 *Mayf. Dig.* 836.

[15] Courts will never order specific performance of contracts requiring continuous affirmative action to perform, because the court cannot superintend such work or performance; but in certain cases it will award specific performance by forbidding the doing of certain acts to enforce negative stipulations or covenants.

There are both English and American cases in which contracts to render personal services requiring peculiar and particular skill, such as that employed by public singers, dancers, etc., have been specifically enforced, where the contract contained negative covenants not to perform such services for any other person; such specific performance being compelled by enjoining the party from rendering such services for other persons—not by compelling the performance for the party for whom the services were agreed to be performed. The original and leading case is *Lumley v. Wagner*, 21 L. J. Ch. 898 (English case), s. c., 6 Eng. Rul. Cas. 652, and notes thereto which collect the authorities.

[16, 17] These cases show that the reason for the injunction is to be found in the facts that the services are of purely personal skill and art, for which an adequate substitute cannot be had; that the damages to be awarded in a court of law would be difficult of ascertainment, and the remedy at law wholly inadequate. If the services to be rendered do not require or contemplate peculiar and unusual personal art or skill, specific performance will not be awarded in such case. The rule is also limited to cases in which the negative covenant is negative in fact as well as in form. If the covenant to be so enforced is in substance and in fact affirmative in effect, although negative in form, it will not be so enforced.

The leading case in this state on the subject is that of *Iron Age Publishing Co. v. Western Union Telegraph Co.*, 83 Ala. 498, 3 South. 449, 3 Am. St. Rep. 758. The bill in that case sought to enjoin the telegraph company from delivering Associated Press dispatches to oth-

er newspapers in the complaint named, because of the covenant in a contract not to so deliver. A demurrer to the bill was sustained by the trial court, and the ruling of the trial court was by this court affirmed; and in the opinion many, if not all, of the American and English authorities were reviewed on the subject. Justice Somerville, in reviewing the cases, thus concludes, and what is said there is, we think, apt and conclusive here:

"How, it may be asked, is it practicable for the court to compel the complainant to perform personal services, as agent and correspondent of the Associated Press at Birmingham, which it has contracted to perform from year to year, under this agreement? We have seen that the duty involves the exercise of special skill, judgment, and discretion, being intellectual as well as mechanical in its character. These duties are also continuous in their nature, and of indefinite duration. There can be, as we have shown, no specific performance affirmatively of such duties by a court of equity. The most that can be done is to negatively enforce them by injunction prohibiting their breach, and this only on bill filed praying such particular relief." 83 Ala. at page 510, 3 South. at page 454 (3 Am. St. Rep. 758).

"This might involve the frequent necessity on the part of the court of hearing complaints from the defendant charging the complainant with a breach of its duties, or from the complainant arraigning the defendant for contempt for a violation of the injunction. There would thus be no end to the number of occasions when the court might be called on from year to year to say whether the complainant has performed the duties in question faithfully and efficiently, so as to have kept the injunction in force, or negligently and unskillfully, so as to justify its breach. For these reasons, the rule is that 'equity will not enforce the performance of continuous duties involving personal labor and care of a particular kind which the court cannot superintend.'" 83 Ala. at page 511, 3 South. at page 455 (3 Am. St. Rep. 758).

How is it possible for a court to specifically enforce the contract in question? How can it compel dozens of drivers of laundry wagons to solicit and gather up the soiled clothes and linens of thousands and thousands of people, and to carry all of those to be cleaned by the dry process, to appellee, and compel appellee to clean them and deliver them back to appellant, and then compel appellant to collect from the customers the prices fixed by appellee, and to remit 75 per cent. thereof to appellee? The answer of appellee is, by enjoining appellant from delivering the goods to other companies to be dry-cleaned. This might have the effect of preventing, rather than enforcing, performance. Moreover, we are not sure that the performance of this contract will not tend to injure the public. The substance and effect, if not the object, of this contract, was to prevent competition in the business of cleaning, both wet and dry, so far as the parties thereto could do so. It may be true, as alleged in the bill, that there are other companies engaged in Birmingham in the laundry business and the dry-cleaning business, and that there is com-

petition, and no restraint of trade, in this field. If so, it is not by virtue of this contract sought to be enforced, but in spite of it. It has done what it could do to prevent competition in the dry-cleaning business; it agrees that, so far as the parties are concerned, the dry-cleaning business shall be done exclusively by one of the six parties, and not by the other five, nor by any one of the public, and this one party who is to do the dry-cleaning business for all the parties to the contract, as well as the public, is, by the very terms of the contract, given the sole and exclusive right to fix the prices for cleaning. It is difficult to see why the public is not better served by the breach than by the performance of this contract.

It follows that the demurrer to the amended bill should have been sustained.

Reversed, rendered, and remanded.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

(199 Ala. 152)

ANDREWS et al. v. GREY. (7 Div. 847.)

(Supreme Court of Alabama. Feb. 1, 1917.)

1. APPEAL AND ERROR §1009(1)—REVIEW—FINDINGS OF CHANCELLOR—STATUTE.

Code 1907, § 5955, subd. 1, providing that on chancery appeal no weight shall be given chancellor's decision upon facts, but Supreme Court shall weigh the evidence, applies only where the judge trying the issue had not the advantage of seeing the witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970, 3978.]

2. APPEAL AND ERROR §981(1)—FINDINGS OF CHANCELLOR—PRESUMPTION—STATUTE.

The Legislature intended by enactment of Gen. Acts 1915, p. 705, providing for the taking of oral testimony before chancellor, the same presumption by Supreme Court in favor of chancellor's findings as are accorded to those of a register under construction of Code 1907, § 5955, subd. 1.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3762.]

Appeal from Chancery Court, Talladega County; W. W. Whiteside, Chancellor.

Bill by Randolph Grey against D. J. Andrews and others, to annul a mortgage and to quiet title. Decree for complainant, and respondents appeal. Affirmed.

Graves Embry, of Talladega, for appellants. Isadore Shapiro, of Birmingham, and Riddle & Burt, of Talladega, for appellee.

THOMAS, J. The appeal is from a decree of the chancery court, canceling a mortgage, purporting to have been executed by appellee and wife upon the lands specifically described in the bill.

The testimony was taken orally, in open court, under the provisions of the act of September 22, 1915 (Gen. Acts 1915, p. 705). The act provides, among other things, that in all cases in equity the judge or chancellor be-

fore whom the case is pending may, at any time before final decree, cause any or all of the witnesses to be examined orally before him in open court. The chancellor, therefore, had the opportunity in this case of seeing and hearing the witnesses, and of observing their demeanor, when giving their testimony in the cause, which is enjoyed by the judge trying a civil cause at law without the intervention of a jury (Hackett v. Cash, 72 South. 52; Finney v. Studebaker Corp., 72 South. 55; Thompson v. Collier, 170 Ala. 469, 54 South. 493; Woodrow v. Hawving, 105 Ala. 246, 16 South. 720; De Vendell v. Hamilton, 27 Ala. 156; Bott v. McCoy, 20 Ala. 578, 56 Am. Dec. 223; Barnes v. Mayor, 19 Ala. 707; Etheridge's Case, 18 Ala. 565), or by the judge in a criminal case (Scruggs v. State, 165 Ala. 121, 51 South. 302), or by the trier of facts on testimony given viva voce in the presence of the probate court (Nooe v. Garner, 70 Ala. 443, 446; Bell v. Bell, 183 Ala. 645, 62 South. 833), or by the trial judge in passing on a motion for a new trial (Jackson Lumber Co. v. Trammell, 74 South. 469, or by a register in chancery in finding a submitted issue of fact, from evidence given viva voce, or from pleadings before him (Bidwell v. Johnson, 70 South. 685; Chancellor v. Teel, 141 Ala. 634, 37 South. 665; Pollard v. Mortgage Co., 139 Ala. 183, 35 South. 767; Faulk & Co. v. Hobble Grocery Co., 178 Ala. 254, 59 South. 450; Roy v. O'Neill, 168 Ala. 354, 52 South. 946; Jones v. White, 112 Ala. 449, 20 South. 527; Anniston v. Ward, 108 Ala. 85, 18 South. 937; Vaughan v. Smith, 69 Ala. 92).

[1] In the decisions as to findings of fact by the register on evidence given viva voce, section 5955, subd. 1, of the Code of 1907 has, in effect, been made to apply only to cases where the judge trying the issue of fact has not the advantage of seeing and hearing the witnesses and of noting their manner on the stand, which facts, of necessity, may or may not influence the decision or finding.

[2] In view of the constructions of like statutes by this court, in connection with the construction given to section 5955 (subdivision 1) of the Code, as to findings of fact by the register, matters of public knowledge when the act of September 22, 1915, was passed, we cannot escape the conclusion that by this new statute the Legislature intended that where the evidence is taken orally, in open court, before the chancellor, the same presumptions must be indulged in favor of the chancellor's finding that are now accorded to a finding of fact by the register. See Alabama, Tennessee & Northern Railway Co. v. Aliceville Lumber Co., 74 South. 441, for analogous ruling. This rule is not in conflict with the construction of this section of the statute, found in Huntsville Elks' Club v. Garrity-Hahn Co., 170 Ala. 128, 131, 57 South. 750, Thornton v. Esco, 181 Ala. 241,

61 South. 255, and Shows v. Folmar, 133 Ala. 599, 32 South. 495. These cases were tried before the statute was enacted, and the testimony was not taken ore tenus before the chancellor.

Having due regard for the burden of proof, and after a careful examination of the evidence, we are of opinion that the chancellor correctly ordered and decreed that complainant was entitled to relief, that the respondents have no interest in the lands in controversy by a virtue of the mortgage in question or by reason of any assignment or foreclosure thereof, and that the mortgage be annulled and canceled. The common justice of the situation has been enforced by the chancellor (Chance v. Chapman, 70 South. 676), without taking into view the rule of the act of September 22, 1915.

The decree of the chancery court is affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(199 Ala. 164)

SOUTHERN STATES FIRE INS. CO. OF  
BIRMINGHAM v. KRONENBERG.  
(6 Div. 165.)

(Supreme Court of Alabama. Feb. 1, 1917.)

1. INSURANCE §641(2) — FIRE INSURANCE—ACTIONS — WAIVER OF BREACH OF COVENANTS—PLEADING.

In an action on a fire policy, where insured's breach of the iron-safe clause was set up, replications averring that the insurer's duly authorized agents waived the breach are not subject to demurrer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1626, 1628, 1629.]

2. INSURANCE §646(5) — FIRE INSURANCE—BREACH OF COVENANTS — WAIVER — JURY QUESTION.

Where insured set up a waiver by the insurer of breach of conditions in a fire policy, insured has the burden of proof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1658.]

3. INSURANCE §668(15)—FIRE INSURANCE—WAIVER—JURY QUESTION.

The disputed question of the authority of an agent of a fire insurance company to receive notice or waive breach of a condition of the policy is for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1743, 1748, 1761, 1767, 1770.]

4. INSURANCE §78 — FIRE INSURANCE — AGENTS.

Fire companies may employ agents with general or limited authority as they may choose and as the nature of the business or the duties of the agency require.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 103.]

5. PRINCIPAL AND AGENT §93—"GENERAL AGENT"—AUTHORITY OF.

A "general agent" may be said to be one who has authority to transact all of the business of the principal of a particular kind or in a particular place, the powers of such an agent be-

ing prima facie coextensive with the business intrusted in his care.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 247.]

For other definitions, see Words and Phrases, First and Second Series, General Agent.]

#### 6. PRINCIPAL AND AGENT §116(1)—AUTHORITY OF AGENT—APPARENT AUTHORITY.

The ostensible or apparent authority of a general agent cannot be narrowed by secret instructions and limitations unless the party dealing with the agent had notice.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 377.]

#### 7. PRINCIPAL AND AGENT §94—"SPECIAL AGENT"—AUTHORITY.

A "special agent" is only authorized to act for the principal in a particular transaction and in a particular way of the business or matter intrusted to him.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 248, 249.]

For other definitions, see Words and Phrases, First and Second Series, Special Agent.]

#### 8. INSURANCE §388(3)—FIRE INSURANCE—BREACH OF CONDITIONS—WAIVER.

Where a fire company before loss is notified of a forfeiture or breach of condition by the insured, it is the duty of the company to take some affirmative action notifying insured that a forfeiture will be claimed, or a waiver may be inferred; but, when notice is had only after the loss, a waiver cannot be inferred from mere silence, but some affirmative act, conduct, or declaration of the company, evidencing an intent to waive the forfeiture, is necessary to furnish basis for a claim of waiver.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1027.]

#### 9. INSURANCE §377(1)—FIRE INSURANCE—WAIVER OF FORFEITURE.

A fire company cannot waive a ground of forfeiture until it knows such ground exists or is in possession of facts which if it pursued would result in knowledge of forfeiture.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 942, 966, 967, 975-997.]

#### 10. INSURANCE §375(2)—FIRE INSURANCE—WAIVER OF FORFEITURE.

A mere soliciting agent of a fire company, having only authority to take applications for insurance, and not directly acting for the company in the adjustment of losses, cannot waive a forfeiture for breach of the iron-safe clause.

#### 11. INSURANCE §664—FIRE INSURANCE—WAIVER OF FORFEITURE.

Where the insured asserted a waiver of the forfeiture for his breach to comply with the iron-safe clause in a fire policy, testimony as to whether defendant's agent who was claimed to have waived the breach was acting within the apparent scope of his authority in attempting the adjustment of the loss, and whether his acts, declarations, and conduct amounted to a waiver of the forfeiture, is properly admissible.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1687, 1688, 1699.]

#### 12. INSURANCE §664—ACTIONS—EVIDENCE.

In an action on a fire policy by an assignee, where the issues raised by the pleadings were whether a forfeiture had been waived, the assignee should not be interrogated as to the mode of the assignment; that matter being immaterial, the assignee having testified that he was the owner of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1687, 1688, 1699.]

#### 13. INSURANCE §668(13)—FIRE INSURANCE—ACTIONS—MOTION FOR JURY.

In an action on a fire policy, held, that it was a question for the jury whether the policy was one falling within Code 1907, §§ 4594, 4595, as amended by Acts 1911, p. 316, providing that where a contract of insurance is made by a company belonging to a tariff association there shall be added 25 per cent. to the face of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1746, 1765.]

#### 14. TRIAL §139(1)—JURY QUESTION—PROVINCE OF COURT AND JURY.

Where there is any evidence tending to establish plaintiff's cause of action, the court should not withdraw the case from the jury or direct a verdict, it being the province of the jury to decide conflicting tendencies in the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341.]

#### 15. INSURANCE §661—FIRE INSURANCE—ACTIONS—EVIDENCE.

In an action on a fire policy where it was contended that 25 per cent. should be added to the face of the policy under Code 1907, §§ 4594, 4595, as amended by Acts 1911, p. 316, because the insurer was a member of an underwriters' association, questions to the stamping clerk of the association as to whether he examined the rate of premiums to be charged on the policy in suit and stamped it, etc., are permissible.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1696.]

#### 16. INSURANCE §27—FIRE POLICIES—ACTIONS—EVIDENCE—ADMISSIBILITY.

Under Code 1907, §§ 4594, 4595, as amended by Acts 1911, p. 316, providing that, if at the time of making such insurance contract or policy of insurance or subsequently before the time of trial the insurer belonged to or was a member or in any way connected with any tariff association or such like thing by whatever name called, or had made any agreement or understanding with any other person engaged in the business of insurance as to the rate of premiums to be charged, 25 per cent. shall be added to the face of the policy, an insurance company while penalized for belonging to a tariff association is not penalized for the doing of only an incidental thing, such as corresponding with a tariff association about a matter not connected with its policies or rates; the purpose of the statute being to prevent the formation of associations for the fixing of rates.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 34, 35.]

#### 17. INSURANCE §658—FIRE INSURANCE—ACTIONS—EVIDENCE.

In an action on a fire policy, it is not error to allow plaintiff to show how and when the fire was communicated to his property from other or adjacent buildings.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1689, 1690, 1694.]

#### 18. TRIAL §76—RECEPTION OF EVIDENCE—OBJECTIONS—TIME.

Where a question was of such nature as to inform defendant of the expected answer, an objection to the answer as irrelevant comes too late.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 172, 183-190, 237.]

#### 19. APPEAL AND ERROR §1078(1)—REVIEW—WAIVER OF ERRORS.

Assignments of error not insisted upon in argument by counsel for appellant are deemed waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256.]

**20. INSURANCE**  $\S$  668(1)—ACTION ON POLICY—PROVINCE OF JURY—DIRECTED VERDICT.

In an action on a fire policy, where there was evidence tending to make out a case for plaintiff, general affirmative charges are properly refused.

**21. INSURANCE**  $\S$  669(9) — FIRE POLICIES—ACTIONS—INSTRUCTIONS—PROOF.

In an action on a fire policy, where forfeiture for breach of the iron-safe clause was relied on and the insured filed replications asserting a waiver of the breach, the refusal of a requested charge, that the burden of proof was on insured to satisfy the jury of the proof of matters set up as a waiver, and that unless reasonably satisfied from the evidence that insured had proven one of the replications verdict should be for defendant, was not error; the instruction being misleading as to what burden of proof the law imposed on insured to establish the waiver.

[Ed. Note.—For other cases, see Insurance, Cent. Dig.  $\S$  1777.]

**22. INSURANCE**  $\S$  669(9) — FIRE POLICIES—ACTIONS—INSTRUCTIONS.

Where insured relied on waiver of a breach of a condition in the policy, requested charges that, in order to constitute a waiver, such waiver must have been made by defendant or by an agent duly authorized or by an agent with authority to make such waiver, are properly refused tending to mislead the jury, where the agent had ostensible or apparent authority to waive the forfeiture.

[Ed. Note.—For other cases, see Insurance, Cent. Dig.  $\S$  1777.]

**23. INSURANCE**  $\S$  669(9) — FIRE POLICIES—ACTIONS—INSTRUCTIONS—REFUSAL.

In an action on a fire policy, where insured relied on waiver by the agents of insurer who attempted to adjust the loss, refused charges that, if insurer had left the matter of adjustment to an adjustment bureau, no act of any other agent of the insurer unless expressly authorized to make such waiver would be sufficient to constitute a waiver, were erroneous disregarding the ostensible or apparent authority of the agent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig.  $\S$  1777.]

**24. INSURANCE**  $\S$  669(9)—FIRE INSURANCE—ACTIONS—INSTRUCTIONS.

In such case, the charge was properly refused as subjecting the insured to secret agreements that might have subsisted between the insurer and the adjustment bureau.

[Ed. Note.—For other cases, see Insurance, Cent. Dig.  $\S$  1777.]

**25. TRIAL**  $\S$  260(1)—INSTRUCTIONS—REFUSAL.

The refusal of requests covered by the charges given is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig.  $\S$  651.]

**26. APPEAL AND ERROR**  $\S$  1050(1) — HARMLESS ERROR—EVIDENCE.

In an action on a fire policy, where insured contended that an adjustment operated as a waiver of forfeiture for breach of the iron-safe clause, refusal to exclude testimony by counsel who represented insured in the adjustment proceedings as to counsel's statements to the insurer's agents concerning the honesty of the loss, made with respect to the nonwaiver agreement which was not signed, was not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig.  $\S$  1063, 1069, 4153, 4157.]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by I. A. Kronenberg, as assignee, against the Southern States Fire Insurance Company of Birmingham, upon a fire insurance policy. Judgment for plaintiff, and defendant appeals. Affirmed.

Assignments Nos. 14 to 18, inclusive, are as follows:

(14) Overruling appellant's objection to the following question propounded by appellee to witness J. P. Hazzard:

"Don't you also examine the rate of premiums which was charged on the policy when you stamp it?"

(15) "Don't the Southeastern Underwriters' Association, the association which fixes the rate of insurance?"

(16) "Now, Mr. Hazzard, isn't it a fact that this—as to what your duties were in there, to get it before the jury, you were representing the Southeastern Tariff Association, and policies of insurance were sent by different companies through your office; the stamping consisting of putting a stamp on it, if the rate that you checked up compared with the established rate, but if it did not you took some other action?"

(17) "State whether or not the Southern States Fire Insurance Company objected to the proceedings on your part of stamping the policies as you have testified and mailing the daily report to the company."

(18) Answer to last question: "I don't remember of any objection."

The following charges were refused to defendant:

(1) General affirmative charge.

(2 and 4) Same.

(B) I charge you that the burden of proof is on plaintiff to satisfy you of the proof of the matters set up as a waiver; and, unless you are reasonably satisfied from the evidence that plaintiff has proven one of its replications, your verdict must be for defendant.

(38) I charge you that in order to constitute a waiver of the violation of a warranty in the policy sued on, which would defeat such policy, such waiver must have been made by defendant, or by an agent duly authorized to make such waiver with knowledge of the alleged violation.

(15) I charge you that, in order to constitute a waiver of any violation of the policy sued on which would defeat such policy, such waiver must have been made by an agent of defendant with authority to make such waiver.

(4) If defendant had left in the hands of the Southern Adjustment Bureau the matter of handling the adjustment of the loss under the policy sued on, no act of any other agent of such company would be sufficient to constitute a waiver of any violation of the policy by the assured, unless such agent was expressly authorized to make such waiver, or did so with the acquiescence of defendant.

(D) Unless you are reasonably satisfied from the evidence that the Southern Adjustment Bureau, after knowledge of the violation of the policy sued on, recognized and treated such policy as valid and binding, and adjusted the loss and damage under said policy, then your verdict must be for defendant.

Other matters sufficiently appear.

Tillman, Bradley & Morrow and P. P. Wal-drop, all of Birmingham, for appellant. Samuel B. Stern and John T. Glover, both of Birmingham, for appellee.

THOMAS, J. This action was brought by the plaintiff on a policy of fire insurance, whereby the defendant insured a certain

stock of merchandise of the Republic Dry Goods Company at Republic, Ala.

Plaintiff avers the destruction by fire of the insured property on October 24, 1913; that the interest of the assured in and to said policy of insurance and the proceeds thereof was assigned to plaintiff; and that he is the owner thereof. In addition to the amount of the policy, the plaintiff claims 25 per cent. penalty on account of membership in, or connection with, the Southeastern Underwriters' Association, in accordance with sections 4594 and 4595 of the Code of Alabama, as amended by an act approved April 7, 1911 (Gen. Acts 1911, p. 816).

The defendant pleaded the general issue, and several special pleas averring different breaches of the warranty contained in that part of the policy known as the "iron-safe clause." In this clause the assured warranted that a set of books, presenting a complete record and inventory of all purchases, sales, shipments, and stock on hand at all times, would be kept by assured in a place not exposed to fire, and securely locked in a fire-proof safe at night, and that in case of loss such books would be produced for the inspection of the insuring company; and agreed that, in the event of failure to produce such set of books and inventories, the policy should become null and void.

[1] The plaintiff filed replications, in which a waiver of the defense pleaded was averred. The first replication set up an alleged waiver by one M. J. Harper, the agent of defendant who wrote the policy sued on, in that such agent, "with full power and authority on behalf of the defendant, \* \* \* made an adjustment of said loss and damage with the Republic Dry Goods Company, Inc., \* \* \* after having been fully informed in every particular as to how and when \* \* \* the assured had violated the terms, conditions, covenants, and warranties of the policy sued on, recognized and treated said policy as binding and valid, and promised to pay to the assured \* \* \* the sum of \$1,500 in full payment of the demand herein sued for." The second replication averred a similar waiver by the Southern Adjustment Bureau, acting for defendant. The third replication was like unto the second, except that, in addition to the allegation of waiver by the Southern Adjustment Bureau, it contained the averment that M. J. Harper, with full power and authority to bind the defendant, promised that the defendant would pay the alleged adjustment made by the Southern Adjustment Bureau.

No error was committed in overruling the demurrers to the replications.

The facts averred in defendant's pleas were admitted by the plaintiff's witness B. Zavello, manager of the Republic Dry Goods Company, and the evidence presents no contradiction to the pleas.

As to the replications of the plaintiff, it

was undisputed that Mr. Zavello, after the fire in question, went to the office of M. J. Harper, said agent, and that Mr. Harper sent him to the Southern Adjustment Bureau, where the matter of claim of loss was taken up. On questioning by the agents of the adjustment bureau, Mr. Zavello stated that the books of the assured had burned; and it was thus ascertained that the warranty in the policy of insurance had been violated. Thereupon a nonwaiver agreement was presented to Mr. Zavello for signature before proceeding further in regard to the adjustment of the claim of loss. The matter of signing the nonwaiver agreement was discussed on several occasions by the parties, but in the end it was not signed.

[2] The testimony as to the waiver set up in the several replications was in conflict. The burden of proof was on the plaintiff as to this waiver. Ala. State Mut. Ass. Co. v. Long, etc., Co., 123 Ala. 687, 677, 678, 26 South. 655; B. R. L. & P. Co. v. Washington, 192 Ala. 617, 69 South. 65.

[3] A disputed question of the authority of the agent to receive the notice, or to waive a breach of the contract provisions of the policy, is for the jury. Cont. Ins. Co. v. Parkes, 142 Ala. 650, 39 South. 24; Robinson v. Aetna Fire Ins. Co., 128 Ala. 477, 30 South. 665; Ray v. Fidelity Fire Ins. Co., 187 Ala. 91, 96, 65 South. 536; Penn Fire Ins. Co. v. Draper, 187 Ala. 103, 65 South. 923.

The effect of the nonwaiver agreement has heretofore been declared by this court. Queen Ins. Co. v. Young, 86 Ala. 424, 5 South. 116, 11 Am. St. Rep. 51; Day v. Home Ins. Co., 177 Ala. 600, 58 South. 549, 40 L. R. A. (N. S.) 652; Penn Fire Ins. Co. v. Draper, supra.

As to the "iron-safe clause," there is no conflict in the evidence that insured did not comply with this provision of the policy. However, three questions are presented under the evidence: (1) Did defendant know of this failure of compliance before the fire damage, and waive compliance by acquiescence? (2) If this fact was known to defendant's agent, was he such agent with authority to bind the company by such acquiescence? (3) Did the insurer, after the destruction of the property, with knowledge of the breach of this clause of its policy acquired subsequent to the loss, by act, conduct, or declaration, in the attempted adjustment of the claim for the loss, waive said contract provisions?

[4-7] Insurance companies have the right to employ agents with general or limited authority, as they may choose, and as the nature of the business or the duties of the agency require. Penn, etc., Co. v. Draper, supra; Queen Ins. Co. v. Young, supra; Cent. City Ins. Co. v. Oates, 86 Ala. 558, 6 South. 83, 11 Am. St. Rep. 67; Waldman v. N. B. & M. Ins. Co., 91 Ala. 170, 8 South. 666, 24 Am.

St. Rep. 883; *L. & L. & G. Ins. Co. v. Tillis*, 110 Ala. 201, 17 South. 672; *Ga. Home Ins. Co. v. Allen*, 119 Ala. 436, 24 South. 899; *Ala. S. M. A. Co. v. Long, etc., Co.*, supra; *Robinson v. Aetna Ins. Co.*, supra; *Cassimus v. Scottish Union Co.*, 135 Ala. 256, 33 South. 163. A "general agent" may be said to be one who has authority to transact all of the business of the principal, of a particular kind, or in a particular place. The powers of such an agent are prima facie coextensive with the business intrusted to his care, authorizing him to act for the principal in all matters coming within the usual and ordinary scope and character of such business. The ostensible or apparent authority of such an agent cannot be narrowed by secret instructions and limitations from the principal, unless the party dealing with the agent has notice of them. A "special agent" is authorized to act for the principal in the particular transaction, or in the particular way of the business or matter intrusted to him. *Cruzan v. Smith*, 41 Ind. 288, 297; *Falls v. Gaither*, 9 Port. 605; *Wood v. McCain*, 7 Ala. 803, 804, 42 Am. Dec. 612; *Burks v. Hubbard*, 69 Ala. 379; *Wheeler v. McGuire*, *Scoggins Co.*, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808; *Phoenix Ins. Co. v. Copeland*, 90 Ala. 386, 8 South. 48; *Gibson v. Snow Hardw. Co.*, 94 Ala. 346, 10 South. 304; *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176, 16 South. 46; *Singer Co. v. McLean*, 105 Ala. 316, 16 South. 912; *B. M. R. R. Co. v. T. C. I. & R. R. Co.*, 127 Ala. 137, 28 South. 679; *Ga. Home Ins. Co. v. Allen*, 128 Ala. 451, 30 South. 537; *Penn. etc., Co. v. Draper*, supra.

[8, 9] As to notice to the insurer of a forfeiture by the insured, and the duty of the insurer thereafter, it may be said: (1) If the notice of forfeiture is given the insurer before the destruction of the property, it is the duty of the insurer to take some affirmative action by which to express dissent in an unequivocal way, and put the assured on notice that the forfeiture will be claimed. That is to say, before the damage has occurred, and after notice of forfeiture, a waiver of the forfeiture may be inferred from mere silence on the part of the insurer if it be for such an unreasonable time as to imply the purpose not to insist on the forfeiture. (2) Where notice of the forfeiture was had by the insurer only after the damage, destruction, or loss, a waiver of such forfeiture cannot be inferred from mere silence; some affirmative act, conduct, or declaration, of the insurer, evidencing the intent to waive the forfeiture, is requisite. *Ala. State Mut. Ass. Co. v. Long, etc., Co.*, supra, 123 Ala. 675, 676, 26 South. 655; *Queen Ins. Co. v. Young*, supra; *Cassimus Bros. v. Scottish, etc., Co.*, supra; *Sovereign Camp, W. O. W., v. Jones*, 11 Ala. App. 433, 66 South. 834. In any event, there can be no such thing as a waiver by an insurance company of a ground of forfeiture until the company knows that

such ground exists, or until it is in possession of facts which, if pursued, would result in knowledge of the forfeiture. *Security Co. v. Laird*, 182 Ala. 121, 125, 62 South. 182.

[10] Not every agent of an insurance company can waive forfeiture upon a breach of the material provisions or conditions of the policy such as, for examples: That insured will not take subsequent insurance without notice (*Ala. S. M. A. Co. v. Long, etc., Co.*, supra; *Queen Ins. Co. v. Young*, supra; *Phoenix Ins. Co. v. Copeland*, 90 Ala. 386, 8 South. 48); the "iron-safe clause" (*Penn Fire Ins. Co. v. Draper*, supra; *Day v. Home Ins. Co.*, supra; *Ga. Home Ins. Co. v. Allen*, supra); the stipulation for a sworn statement of the circumstances of the loss by the insured (*Ray v. Fidelity-Phoenix Ins. Co.*, supra); stipulations as to the storage of gasoline (*Aetna Fire Ins. Co. v. Kennedy*, 161 Ala. 600, 607, 50 South. 73, 135 Am. St. Rep. 160; *Cassimus Bros. v. Scottish, etc., Co.*, supra); the provision for rescission of the contract of insurance (*Allen v. Smith*, 165 Ala. 247, 51 South. 724). The contract relations of the parties, after the policy has been issued and delivered to the insured, cannot be changed or waived by a mere soliciting agent having only authority to take applications for insurance, and not apparently acting for the company in the adjustment of loss thereunder.

After consideration of the evidence on this point, we are of the opinion that the company had no notice, before the destruction of the property by fire, of insured's disregard of the policy provision termed the "iron-safe clause." If the agent who took the application for, and delivered, the policy of insurance, did thereafter have knowledge that the insured had no iron safe in which to keep his inventories, as required by the provision of the policy, this was not notice to the company, since he was then only a special agent to negotiate for it applications of insurance.

The evidence is clear, further, that the notice of the insured's breach of the "iron-safe" condition of the policy came to the company through its authorized agents only after the destruction by fire of the property so insured. It was then necessary that the company do some unequivocal act, or adopt some course of conduct, or make some declaration, amounting to a waiver of the forfeiture under this provision of the policy. The law on this point has been reiterated in *Penn Fire Insurance Co. v. Draper*, supra; *Ray v. Fidelity-Phoenix Co.*, supra; *Day v. Home Insurance Co.*, supra. The rule of waiver adhered to in these cases was that announced in *Insurance Co. v. Young*, supra, and *Georgia Home Insurance Co. v. Allen*, supra.

[11] The trial court committed no error in admitting the testimony objected to, as tending to shed light upon the questions whether defendant's agent was acting within the ap-

parent scope of his authority in attempting the adjustment of said loss, and, if so, whether the acts, declarations, and conduct of such agent amounted to a waiver of the forfeiture under the condition of the policy relied on by defendant. It is unnecessary to discuss the evidence on this point. It is sufficient to say that a jury question was presented.

[12] The evidence of plaintiff was to the effect that he was the owner of the policy sued on. Whether its assignment was oral or written, and what was the consideration therefor, were immaterial inquiries under the pleading. The court committed no error in declining to permit witness Kronenberg to be interrogated as to these matters. *Sheffield Nat. Bank v. Corinth Bank & Trust Co.*, 72 South. 127; *Insurance Company of North America v. Forchheimer & Co.*, 86 Ala. 541, 5 South. 870; *Taylor v. Perry*, 48 Ala. 240, 245; *Cosmopolitan Fire Ins. Co. v. Gingold*, 8 Ala. App. 537, 57 South. 266.

[13] Assignments of error numbers 14 to 18, inclusive, challenge the rulings of the trial court as to questions propounded to, and answered by witness, J. P. Hazzard, a stamping clerk with the Southeastern Underwriters' Association at the time of the trial and during the month of October, 1913, when the policy in question was issued and delivered to the insured by the Southern States Fire Insurance Company. Under the testimony of this witness, a jury question was presented as to whether the contract of insurance sued on came within the class defined by the act of 1911 (Gen. Acts 1911, p. 316), amendatory of sections 4594 and 4595 of the Code, and dealing with the subject indicated in the caption: "Contract of insurance made by company belonging to tariff association construed to add 25 per cent. to face of policy." The same question raised by the objections and exceptions to this evidence was likewise presented by the refusal of the defendant's written charge 2: "If the jury believe the evidence, they cannot find the 25 per cent. penalty provided by the statute."

[14, 15] If there be any evidence which tends to establish the plaintiff's cause, the court should not withdraw the same from the jury or direct a verdict. It is not for the court to adjudge of the sufficiency of the evidence or decide which of conflicting tendencies of the evidence should be adopted by the jury. *Tobler v. Pioneer Mining & Mfg. Co.*, 166 Ala. 517, 52 South. 86; *Amerson v. Corona Coal & Iron Co.*, 194 Ala. 175, 69 South. 601.

The court properly refused this charge, and correctly admitted this evidence.

[16] The act amending sections 4594 and 4595 of the Code, just adverted to, provides for the penalty under the following conditions:

"If at the time of making such contract or policy of insurance or subsequently before the

time of trial, the insurer belonged to, or was a member of, or in any way connected with any tariff association or such like thing by whatever name called or who had made any agreement or had any understanding with any other person, corporation or association engaged in the business of insurance as agent or otherwise about any particular rate of premium which should be fixed or charged or fixed for any kind of class of insurance risk," etc.

The expression in the statute, "or in any way connected with any tariff association or such like thing," may not be construed to mean that an insurance company may be penalized for the doing of only an incidental thing, such as corresponding with a tariff association about a matter not connected with its policies and the rates thereon. This penal statute must be given a stricter interpretation, as intended by the Legislature (*Atlanta & St. Andrews Bay Ry. Co. v. Fowler*, 192 Ala. 373, 68 South. 283), to prevent the fixing of insurance rates to be charged, or which should be charged, for a particular class of insurance risk.

The tendency of the evidence in question was to show an association, or joint dealing, on the part of the defendant company, with the underwriters' association, and defendant's liability *vel non* for this 25 per cent. penalty, as applying to a loss on the policy in question, was properly submitted to the jury.

[17] There was no error in allowing the plaintiff to show how and when the fire was communicated to his building from other or adjacent buildings as a part of the transaction or cause of the destruction of the property in question.

[18] The question whether the plaintiff had other insurance, if irrelevant, was not objected to till after answer made, and it was of such nature as to inform the defendant of the expected answer. Moreover, there was no error in overruling defendant's motion to exclude the answer, in view of the other provisions of the policy as to additional insurance and apportionment of the insurance loss.

[19] The invoices were competent evidence, as tending to prove plaintiff's replications. This particular assignment of error is not insisted on in argument by counsel for appellant. *Ga. Cotton Co. v. Lee*, 72 South. 158.

[20] Under the evidence, affirmative charges 1, 2, and 4, requested by defendant, were properly refused.

[21] The several written charges requested and given at the instance of the defendant did not instruct the jury as to the burden of proof under the three replications to the defendant's plea of waiver. There was no error in refusing defendant's written charge B, as being confusing to the jury. Its first clause required the jury to be "satisfied" of the truth of the matter set up as a waiver; whereas, the legal condition to a recovery by the plaintiff under the replications, or under either one of them, was that the jury should



be "reasonably satisfied." *Emerson v. Lowe Mfg. Co.*, 159 Ala. 350, 49 South. 69; *Moore v. Heineke*, 119 Ala. 627, 640, 24 South. 374; *Smiley v. Hooper*, 147 Ala. 646, 652, 41 South. 660, 661. The statement, in the latter part of the charge, "unless you are reasonably satisfied from the evidence that the plaintiff has proved one of its [his] replications, your verdict must be for the defendant," did not make plain what burden of proof the law imposed upon the plaintiff as to "the matter set up as a waiver."

[22] Charges 38 and 15, by their respective use of the expressions "duly authorized" and "with authority," were calculated to mislead the jury where the agent had the "ostensible or apparent authority" to undertake, or to make adjustment of a fire loss or claim set up under the policy. *Penn Fire Ins. Co. v. Draper*, supra; *Georgia Home Ins. Co. v. Allen*, supra, 128 Ala. 459, 30 South. 537; *Ray v. Fidelity-Phoenix Co.*, supra; 1 *Joyce on Ins.*, §§ 425, 426, 440.

[23, 24] Refused charges 4 and D, which sought to instruct the jury that, if the defendant had left in the hands of the Southern Adjustment Bureau the matter of handling the adjustment of the loss under the policy, no act of any other agent of the company, unless such agent were expressly authorized to make such waiver, would be sufficient to constitute a waiver of any violation of the policy by the assured, were likewise subject to the infirmity of ignoring the ostensible or apparent authority of such agent. Moreover, the charges would have subjected the plaintiff to secret agreements that may have subsisted between the defendant and the Southern Adjustment Bureau, for it was within the power of the defendant to leave the matter of the adjustment of the claim with its other adjusters or agents having or exercising the apparent authority to adjust the loss.

[25] Charges 6 and 7 were properly refused, as the defendant had the benefit of the same under its given charges.

[26] The twenty-fourth and twenty-fifth assignments of error are based on the refusal of the court to exclude these statements of the witness Stern: "If there is any question in the minds of you gentlemen as to the honesty of this fire." And: "But as to the amount of stock he had on hand I would waive this, and leave it open for them to find out and discuss, I said, if you have in mind that this man has not lost." These statements were narrative in form, and as soon as made defendant's counsel moved to exclude them as irrelevant and prejudicial. The court denied this motion. The witness was detailing the conversation that had occurred between witness, as plaintiff's counsel, and defendant's agents, as to the adjustment and the nonwaiver agreement; and no

prejudicial error was committed in this ruling.

The exception in the instant case is different from that in the case of *Southern Railway Co. v. Renes*, 68 South. 987, where reversal was awarded on account of the prejudicial testimony as to plaintiff's educational deficiencies.

Let the judgment of the city court be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(199 Ala. 192)

NATIONAL PARK BANK OF NEW YORK  
v. LOUISVILLE & N. R. CO.

(8 Div. 833.)

(Supreme Court of Alabama. Feb. 1, 1917.)

1. APPEAL AND ERROR ⇨1136—REVIEW—  
SUSTAINING DEMURRERS—GROUNDS.

Where there are several grounds of demurrer, some of which are sufficient and others insufficient, and the judgment sustaining the demurrer is general, the ruling will be referred to the grounds that are well taken.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3247-3486.]

2. CONSPIRACY ⇨18—CIVIL LIABILITY—ACT  
OF COCONSPIRATOR.

Where a conspiracy is established, all conspirators are civilly liable for the act of any in pursuance of the original plan and for the common object, though not intended as a part of the original design.

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. § 14.]

3. CORPORATIONS ⇨496—TORTS—CONSPIRACY—CIVIL LIABILITY.

An action may be maintained against a corporation for damages caused by a conspiracy in which it participated.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1907.]

4. CORPORATIONS ⇨423—TORTS—CONSPIRACY—AUTHORITY OF AGENT.

To render a corporation liable for damages caused by a conspiracy in which it participated, it is not necessary that the officers or agents through whom it acted had authority to perform all the acts done in execution of the conspiracy, or agreed to be performed by the other conspirators.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1692-1695, 1903, 1906.]

5. CORPORATIONS ⇨423—TORTS—CONSPIRACY—CIVIL LIABILITY—AUTHORITY OF AGENT.

To render a corporation liable for a conspiracy, it is necessary that any essential act which was agreed the corporation's agent should do must be done by the agent acting for the corporation and within the line and scope of his employment, and in the prosecution of the corporation's business.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1692-1695, 1903, 1906.]

6. CONSPIRACY ⇨13—CIVIL LIABILITY—COMPLETION OF CONSPIRACY.

Only those participating in a conspiracy to its completion in acts which injure plaintiff are liable therefor, since the law always leaves a place of repentance to a conspirator.

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. § 14.]

# 7. CONSPIRACY $\Leftrightarrow$ 6—CIVIL LIABILITY—DAMAGE—PROXIMATE CAUSE.

To render a conspirator liable for injuries caused thereby to plaintiff, the act under the conspiracy need not be the sole proximate cause of the injury, but must be at least a concurring proximate cause thereof.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 5.]

# 8. CONSPIRACY $\Leftrightarrow$ 18—CIVIL LIABILITY—PLEADING.

A complaint for conspiracy must allege the acts done in pursuance of the conspiracy to plaintiff's injury definitely and accurately, so that if the facts are admitted the court can draw the legal conclusion therefrom.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 18-24.]

# 9. PLEADING $\Leftrightarrow$ 8(18)—CONCLUSIONS—AUTHORITY OF AGENT.

In an action against a corporation for conspiracy, an allegation that the acts committed by the agent of the corporation in furtherance of the conspiracy were within the scope of his employment is a conclusion of the pleader and insufficient.

# 10. CARRIERS $\Leftrightarrow$ 47(1)—BILL OF LADING—LIABILITY—STATUTE.

Code 1907, § 6136, making a carrier which issues a bill of lading without having received the property described therein liable to an innocent holder of the bill, imposes such liability only when the bill was issued by an agent having authority to issue genuine bills, or by some one under his direction or authority, so as to make it his own act, but does not make the carrier liable for spurious bills of lading issued by an agent who had only authority to supervise other agents authorized to issue bills of lading, or by unauthorized persons acting under that agent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 134.]

# 11. CARRIERS $\Leftrightarrow$ 47(1)—BILL OF LADING—LIABILITY—ISSUANCE BY STRANGER.

That section does not authorize an agent having power to issue bills of lading for property received to empower third persons not in the carrier's employ or in the prosecution of its business to issue at will bills of lading without receipt of the property to be shipped.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 134.]

# 12. CARRIERS $\Leftrightarrow$ 177(4)—LIABILITY—CONNECTING CARRIER.

In the absence of a special contract or of a relation of partnership or agency between the initial and connecting carrier, a connecting carrier is liable only for loss or damage occurring on its own line.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 791-803.]

# 13. CONSPIRACY $\Leftrightarrow$ 18—COMPLAINT—AUTHORITY OF AGENT.

In an action against a railroad for conspiracy to defraud by the issuance of false bills of lading, allegation that defendant's agent through the influence of defendant's relation with connecting carriers agreed to have those carriers deliver cotton shipped on genuine bills of lading on surrender of the spurious bills of lading theretofore issued, does not allege any acts within the scope of his employment, for which the railroad is liable, since such deliveries by connecting carriers were not within the scope of defendant's business.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 18-24.]

# 14. CONSPIRACY $\Leftrightarrow$ 9—CIVIL LIABILITY—SEVERAL ACTS.

The fact that a railroad shipper conspired to issue spurious bills of lading upon which the railroad through its business associates procured the delivery at the point of destination of goods subsequently shipped on genuine bills, and on which plaintiff suffered no loss, does not make the carrier liable for loss caused by other spurious bills issued by the shipper on which no shipments were made, and of which it was not shown to have had knowledge, since the issuance of each false bill of lading was a separate criminal offense or cause of civil action.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 12.]

# 15. CONSPIRACY $\Leftrightarrow$ 18—COMPLAINT—ALLEGATION OF CONSPIRACY.

In a civil suit as well as in a criminal prosecution, the conspiracy must be sufficiently charged; it cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the plot.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 18-24.]

# 16. CONSPIRACY $\Leftrightarrow$ 18—COMPLAINT—COURSE OF BUSINESS.

In a complaint for conspiracy between a railroad company and a shipper, a count which alleged that it had become a course of conduct or business between the conspirators for the shipper to issue false bills of lading, and for the railroad thereafter to cause cotton shipped on genuine bills to be delivered on the false bills, and that in consequence the public engaged in the cotton trade were induced to believe that the shipper was legitimately engaged in the sale of cotton on a large scale, and to give him credit on future false bills of lading, does not show a liability on the part of the carrier for loss sustained by the issuance of subsequent spurious bills of lading on which no cotton was delivered, and which were issued without the carrier's authority.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 18-24.]

# 17. CONSPIRACY $\Leftrightarrow$ 18—COMPLAINT—INSOLVENCY OF CONSPIRATOR.

The additional allegation that the shipper was insolvent, and that that fact would have been discovered long prior to the issuance of bills of lading which caused plaintiff's loss, does not show liability on the part of the carrier.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 18-24.]

# 18. PLEADING $\Leftrightarrow$ 8(3)—CONCLUSIONS—PROXIMATE CAUSE.

Averments in a count for conspiracy that the proximate cause of plaintiff's loss was the continuance in business of one of the conspirators, and the fraudulent conduct of such business, were conclusions of the pleader.

# 19. PLEADING $\Leftrightarrow$ 20, 34(4)—COMPLAINT—CONSTRUCTION AGAINST PLEADER—ALTERNATIVE ALLEGATIONS.

Where the complaint alleges that one of two things is true, the complaint must be held insufficient, unless each alternative allegation is sufficient, since the complaint must be construed most strongly against the pleader.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 43, 66.]

# 20. CONSPIRACY $\Leftrightarrow$ 18—COMPLAINT—AUTHORITY OF AGENT.

A count for conspiracy, which alleges that the duties of the agent were to supervise the carrier's foreign shipments, to issue or cause to be issued by his subordinates bills of lading therefor, to procure deliveries of cotton under bills of lading issued by it, or purporting to be

issued by it, and to adjust complaints, inquiries, and difficulties arising between the consignees of the cotton and the holders of bills of lading, does not show that the delivery of cotton by connecting carriers, nor the authorizing of the issuance of bills of lading by third parties without the receipt of the property, was within the scope of the agent's employment.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 18-24.]

**21. CARRIERS §47(1)—AUTHORITY OF AGENT—SCOPE OF BUSINESS.**

The fact that cotton had been previously delivered by connecting carriers upon spurious bills of lading of defendant does not show that the issuance of subsequent bills of lading was within the scope of the authority of defendant's agent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 134.]

**22. CARRIERS §177(1)—AUTHORITY OF AGENT—SCOPE OF BUSINESS.**

It is beyond the scope of a carrier's business to adjust controversies between consignees of property shipped over another carrier, and the holders of bills of lading purporting to be those of other carriers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775, 778.]

**23. FRAUD §17—FRAUDULENT CONCEALMENT.**

To maintain an action for fraudulent concealment, there must be shown a duty to disclose the truth, and that the disclosure was not made when opportunity was presented whereby the party to whom the duty was due was induced to act to his injury.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 15.]

**24. FRAUD §43—COMPLAINT—FRAUDULENT CONCEALMENT.**

In a count for conspiracy to defraud by the delivery of cotton on spurious bills of lading, allegations that by willfully deceiving or causing to be deceived, or making false representations or fraudulently suppressing or causing to be suppressed truth from the holders of the false bills of lading when their complaints were referred to defendant's agent, a course of business was established by which the coconspirator was unable to sell a large number of their drafts with false bills of lading attached, does not sufficiently allege the duty to disclose the truth, nor the concealment thereof, since it does not show, except by conclusion, what the complaints were, nor show any facts which made the alleged suppression of the truth calculated to deceive the plaintiff.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 37.]

**25. APPEAL AND ERROR §917(2)—REVIEW—RULINGS OF COMPLAINT—EXHIBIT.**

On appeal from the sustaining of a demurrer to a complaint which made a bill of lading part thereof, where the bill does not appear in the record, the ruling must be affirmed on the presumption in favor of its correctness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8707, 8709.]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Action by the National Park Bank of New York against the Louisville & Nashville Railroad Company. Demurrers to the several counts of the complaint were sustained, and plaintiff took a nonsuit, and appeals. Judgment sustaining the demurrers affirmed.

Percy, Benners & Burr, of Birmingham, Callahan & Harris, of Decatur, and Louis F. Doyle, of New York City, for appellant. Gregory L. Smith, of Mobile, and John C. Eyster, of New Decatur, for appellee.

THOMAS, J. On former appeal count 5 was held subject to demurrer. L. & N. R. R. Co. v. National Park Bank, 188 Ala. 109, 65 South. 1008.

On the second trial, count 5 was amended, and counts A, B, C, D, E, F, and G were added, seeking to recover damages arising out of an alleged conspiracy between Knight, Yancey & Co., and one of the defendant's agents. Counts H, I, J, and K sought to recover for a fraud alleged to have been perpetrated on the part of defendant's agents, acting within the line and scope of their authority, and with Knight, Yancey & Co., that estopped the defendant to deny liability. Demurrer was sustained; plaintiff took a nonsuit, and prosecutes this appeal.

[1] The rule prevailing in this state is that, where there are several grounds of demurrer, some of which are sufficient and others insufficient, and the judgment sustaining the demurrer is general, the ruling will be referred to the grounds that are well taken. *Steiner v. Parker & Co.*, 108 Ala. 357, 19 South. 386; *Tatum v. Tatum*, 111 Ala. 209, 20 South. 341; *Richard v. Steiner Bros.*, 152 Ala. 303, 44 South. 562; *McDonald et al. v. Pearson*, 114 Ala. 630, 641, 21 South. 534; *Hull v. Wimberly & Thomas Hdw. Co.*, 178 Ala. 538, 59 South. 568.

The insistence of appellant's counsel is as follows:

"In the outset we wish to impress upon the court that the complaint under consideration is not based upon any right to recover, either under the common law or our statute, upon the issuance alone of the bills of lading by an agent of the company. We recognize that under our decisions the issuance by an agent of a bill of lading covering goods not received for shipment has been held to be ultra vires and not binding the railroad company. We have attempted in drawing the amendment to the complaint to aver clearly, more fully in some counts than in others, the doing by the defendant of a series of acts or a single act in furtherance of the system contemplated by the conspiracy, and that a system or general course of conduct thus made possible through furtherance of the conspiracy was the proximate cause of the plaintiff's damage."

[2] As preliminary to the consideration of the conspiracy counts, we may state the general rule of conspiracy in civil cases, where a corporation has participated:

(1) If the conspiracy is properly alleged, and there is also alleged the doing by one of the conspirators of the unlawful act pursuant to the conspiracy, which resulted in the damage, the act so done by any of the participants in pursuance of the original plan and with reference to the common object, is in contemplation of the law the act of all. *Smith v. State*, 52 Ala. 407; *Jordan v. State*, 79 Ala. 9; *Wil-*

Hams et al. v. State, 81 Ala. 1, 1 South. 179, 60 Am. Rep. 133; Amos v. State, 83 Ala. 1; Gibson v. State, 89 Ala. 121, 8 South. 98, 18 Am. St. Rep. 96; Martin v. State, 89 Ala. 115, 8 South. 23, 18 Am. St. Rep. 91; Ex parte Bonner, 100 Ala. 114, 14 South. 648; McLeroy v. State, 120 Ala. 274, 25 South. 247; Sheppard v. State, 172 Ala. 363, 55 South. 514; Watson v. State, 181 Ala. 53, 61 South. 334. In Carlton v. Henry et al., 129 Ala. 479, 29 South. 924, this court said:

"A doctrine applicable to civil as well as criminal cases is that where two persons enter into a combination to do an unlawful act, whatever is done by one as the proximate consequence of furthering the main purpose of the conspiracy, whether specifically included in that purpose or not, is the act of both and binds both to responsibility." Cooley on Torts, § 143; 8 Cyc. 645.

That is to say, each conspirator is responsible for everything done by his confederates which the execution of the common design makes probable in the nature of things as a consequence, even though such a consequence was not intended as a part of the original design or common plan. Jones v. State, 174 Ala. 53, 57 South. 31; Martin v. State, supra; Gibson v. State, supra; Ferguson v. State, 134 Ala. 63, 32 South. 760, 92 Am. St. Rep. 17; Griffith v. State, 90 Ala. 583, 8 South. 812; Morris' Case, 146 Ala. 66, 41 South. 274; Ferguson v. State, 149 Ala. 21, 43 South. 18. The act, however, must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not an independent product of the mind of one of the confederates outside of or foreign to the common design (Martin v. State, supra, 89 Ala. 115, 8 South. 23, 18 Am. St. Rep. 91, and note; Powers v. Commonwealth, 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 53 L. R. A. 245; State v. Taylor, 70 Vt. 1, 39 Atl. 447, 42 L. R. A. 673, 67 Am. St. Rep. 648), nor a result growing out of the individual malice, motive, or purpose of the perpetrator, having no relation to the business of the master (Republic I. & S. Co. v. Self, 192 Ala. 403, 68 South. 328, L. R. A. 1915F, 516; Martin v. State, 89 Ala. 115, 8 South. 23, supra; 18 Am. St. Rep. 91, and note; Spencer v. State, 77 Ga. 155, 3 S. E. 661, 4 Am. St. Rep. 74; Powers v. Com., supra).

[3] (2) An action may be maintained against a corporation for damages caused by a conspiracy in which it participated.

[4] (3) To bind a corporation for damages caused by such conspiracy, it is not necessary for the officers or agents through whom the corporation acts and did act to have had authority to perform all of the acts done in the execution of the conspiracy, or agreed to be performed by other confederates in the execution of the conspiracy; but

[5] (4) That, as to any essential act which the conspiracy contemplated and which it was agreed that the agent of the corporation

should do, it is necessary that such act agreed upon by the corporation be in fact done by its agent for such corporation, and that, while so doing, the agent was acting within the line and scope of his employment by such corporation and in the prosecution of its business. That is to say, the act agreed to be performed by the agent of the corporation must have been within the line and scope of his agency and of the master's business, and essential or necessary to the accomplishment of the end of the conspiracy, and have been in fact done by such agent pursuant to the conspiracy.

[6] A conspiracy is not completed without its execution to damnifying results. Those participating to that end only are responsible. There is always a place of repentance—a locus poenitentiae—ever left to a conspirator, so that before the act is done, either of the parties thereto may abandon the design and avoid committing the unlawful act, or the lawful act by the unlawful means agreed upon. A conspirator withdrawing cannot be held responsible for the wrongful act of his former confederates. In such case, it is their act, and not his. State v. Webb, 216 Mo. 378, 115 S. W. 998, 20 L. R. A. (N. S.) 1142, 129 Am. St. Rep. 518, 16 Ann. Cas. 518; United States v. Britton, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698. If a corporation's agent, having confederated for it, thereafter exercises the right of locus poenitentiae, declining to aid or participate further in the conspiracy to do the agreed act pursuant thereto, and does not contribute to the plaintiff's damage, neither such agent nor his principal can be held for the damnifying consequences. In such case the act would be that only of the participating, inciting, and encouraging confederates present, and of the participating confederates who were not present. State ex rel. Attorney General v. Tally, as Judge, etc., 102 Ala. 25, 65, 65, 15 South. 722; State v. Hamilton & Laurie, 13 Nev. 386. For it is well established that no cause of action arises from a mere agreement to commit a wrong against another.

[7] There must be some wrongful act performed that was necessary to, and concurring in, the proximate cause of the injury to the person suing, or of the damage for which the suit is brought. L. & N. R. Co. v. National Park Bank, supra; Schwab v. Mabley, 47 Mich. 572, 11 N. W. 390; Hutchins v. Hutchins, 7 Hill (N. Y.) 104; Commercial U. A. Co. v. Shoemaker, 68 Neb. 173, 88 N. W. 156; Cooley on Torts, 142, 144; 2 Hilliard on Torts, § 17, p. 256; 8 Cyc. 645; 4 Ency. Pl. & Pr. 737. The act need not be the sole proximate cause of the injury, but a concurring proximate cause thereof.

[8] As to the pleading in civil actions for damages the result of the execution of conspiracy we may note that actions on the case have taken the place of the writ of conspiracy (Mott v. Danforth, 6 Watts [Pa.] 306, 31

Am. Dec. 468; *Parker v. Huntington*, 2 Gray [Mass.] 127; *Stevens v. Rowe*, 59 N. H. 578, 47 Am. Rep. 231; *Jones v. Baker*, 7 Cow. [N. Y.] 445; that the insertion in the complaint of an averment, that the acts done were in pursuance of a conspiracy, does not change the nature of the action on the case (*Strout v. Packard*, 76 Me. 156, 49 Am. Rep. 601; *Van Horn v. Van Vorn*, 58 N. J. Law, 318, 28 Atl. 669; *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340; *Parker v. Huntington*, supra; *Schultz v. Frankfort Co.*, 151 Wis. 537, 139 N. W. 388, 43 L. R. A. [N. S.] 520; 5 Ruling Case Law, 1103; 8 Cyc. 673). The acts complained of, however, must be definitely and accurately stated, so that, if the facts themselves should be admitted the court can draw a legal conclusion therefrom—thus the illegal purpose or means, which the conspirators meant to accomplish or to resort to, must be described accurately, for unless the object is illegal, or the means agreed upon are illegal, there is no actionable wrong. *Singer Sewing Machine Co. v. Teasley*, 73 South. 969; *Dwight Manufacturing Co. v. Holmes*, 73 South. 933; *Evans v. Ala.-Ga. Syrup Co.*, 175 Ala. 85, 56 South. 529; *McDonald v. Illinois Central Railroad Co.*, 187 Ill. 529, 58 N. E. 463; *Schwab v. Mabley*, supra; *Setzar v. Wilson*, 26 N. C. 501; *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459; *Pollock on Torts*, 365; *Gould's Pl. (Wills)* 301 et seq. and notes.

On former appeal this court said:

"If the averment of the conclusion would suffice, and if it stood alone, it does not charge that the act done was within the scope of the employment of the defendant's agents; but if such was the case, and the pleader, after stating the conclusion, goes further and sets out the facts [showing] that there was no power in the agents the conclusion must yield to the facts set out. \* \* \* Therefore, if it be admitted, but which is not the fact, that the general averment that the things therein referred to as being within the scope of the agent's employment related to the things to be done in furtherance of the conspiracy, then the facts as specifically set up would negative such an averment, under the common law, as it is well settled by the decisions of this and most of the courts of the country that an agent of a public carrier has no authority to issue a bill of lading for goods before the same are delivered for shipment, and that the carrier is not responsible for such unauthorized acts of its agent. \* \* \* If the agents of the defendant would not have been acting within the line or scope of their employment had they themselves issued such a document, they would not, of course, have been acting within the line or scope of such employment in attempting to authorize, or in aiding others to do so. Clearly, under the common law, the agents of the defendant could not issue spurious bills of lading so as to bind the principal." 188 Ala. 118, 119, 65 South. 1006, 1005.

The leading cases in which corporations were held as conspirators are: *Franklin Union No. 4 v. People*, 220 Ill. 355, 77 N. E. 176, 4 L. R. A. (N. S.) 1001, 110 Am. St. Rep. 248; *Aberthaw Const. Co. v. Cameron*, 194 Mass. 208, 80 N. E. 478, 120 Am. St. Rep. 542; *West Va. Transp. Co. v. Standard Oil*

*Co.*, 50 W. Va. 611, 614, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895; *Zinc Carbonate Co. v. First Nat. Bk. of Shullsburg*, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845; *Buffalo Lubricating Co. v. Standard Oil Co.*, 106 N. Y. 669, 12 N. E. 826; *Hobbs v. Boatright et al.*, 195 Mo. 693, 724, 93 S. W. 934, 5 L. R. A. (N. S.) 906, 113 Am. St. Rep. 709; *Stewart v. Wright*, 147 Fed. 321, 325, 326, 77 C. C. A. 499; *Id.*, 203 U. S. 590, 27 Sup. Ct. 777, 51 L. Ed. 330; *Hindman v. First National Bank*, 98 Fed. 562, 39 C. C. A. 1, 48 L. R. A. 210; *Id.*, 112 Fed. 931, 939, 50 C. C. A. 623, 57 L. R. A. 108; *Johnston Fife Hat Co. v. First National Bank*, 4 Okl. 17, 44 Pac. 192, 194; *Rogers et al. v. V. S. & P. R. Co.*, 194 Fed. 65, 114 C. C. A. 85; *State v. Salisbury Ice & Fuel Co.*, 166 N. C. 366, 81 S. E. 737, 52 L. R. A. (N. S.) 216, Ann. Cas. 1916C, 456; *Dodge v. Bradstreet Co.*, 59 How. Prac. (N. Y.) 104. A careful examination of these cases will show that where these several corporations were held liable for conspiracy, the conspiring agent, acting for the corporation, was its corporate officer, or an agent acting within the line and scope of his authority, and who did for the corporation an act that was essential and necessary to the unlawful transaction or damnyfying result.

In the *Franklin Union* Case was alleged the conspiracy of officers and members of the Union to inaugurate strikes and by a course of violence, threats, intimidation, and force to prevent other persons in the employment of the members of said association from continuing in their employment, the effect of which systematic course of threats and violence was to injure and destroy the business of the members of the association. The holding of the court was that entering into the conspiracy each conspirator became liable for all the acts of his coconspirators done in furtherance of the object of the conspiracy.

In the *Aberthaw Const. Co. Case*, injunctive relief was sought against the officers and members of a labor union who were alleged to have formed a conspiracy to compel the plaintiff, under penalty of a general strike, to hire only union workmen in the prosecution of its contract work. It was held that the fact that one of the conspirators was a corporation gave it no immunity from the consequences of such an unlawful combination.

In *West Va. Transp. Co. v. Standard Oil Co.*, supra, the declaration charged that the plaintiff was engaged in the business of transporting petroleum by means of pipe lines and tank cars, had expended large sums to that end, and that the defendants maliciously and wickedly conspired to injure the plaintiff and ruin its business, and to prevent all persons from transporting oils through plaintiff's pipe lines and by means of its tank cars. The holding was that a corporation can be guilty with other corporations or persons of a conspiracy that resulted in injury to other corporations or persons. 50 W. Va. pp. 614,

615, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895.

The Shullsburg Bank, with others, was charged with conspiracy with the Zinc Carbonate Company, to receive benefits from the sale of certain property. The bank's secretary and its cashier were alleged to have actively participated to the accomplishment of the fraud. The doctrine was announced that ultra vires was not, in such cases, to be placed in the hands of the corporation itself, or of private individuals, as a means to be used by it or them, for obtaining or retaining something of value which belongs to another.

In the Hobbs and Stewart Cases, the evidence tended to show that the officers of the bank knew the business that Boatright and his associates were engaged in, knew their method of enticing strangers into their net and fleecing them, and with this knowledge lent to Boatright and associates the appearance of respectability that such a banking institution would afford, and allowed the bank to be used by the conspirators to effect the transfer of the money thus fleeced from the victim. The opinion on this point was:

"The bank was a necessary link in the scheme to defraud. Its name, character, and influence were constantly employed to give Boatright a false standing with his victims. \* \* \* While it did not decoy the various victims to Webb City, nevertheless after their arrival it assisted in despoiling them. The cashier of the bank had charge of one important station in the scheme. \* \* \* With full knowledge of the methods of the conspirators and their designs, born of past experience and participation, the managing and controlling authority of the bank assisted in the accomplishment [italics ours]." 147 Fed. 325, 328, 77 C. C. A. 490, 508.

In Hindman's Case, the bank had made a statement concerning the financial condition of its customer in furtherance of the interest of the bank; the petition charged that the bank not only made the false statement to the insurance commissioner of such financial condition, but also conspired through its cashier to repeat the statement to the public in furtherance of the fraudulent scheme or conspiracy. Circuit Judge Taft declared that it was settled law that a corporation may be held for torts in which express malice or intent to defraud is a necessary element, and that a corporation may be held for a conspiracy with others resulting in injury to a third person for acts performed in the course and within the scope of the agent's employment in the business of the principal. 98 Fed. 562, 39 C. C. A. 1, 48 L. R. A. 210.

In the second Hindman Case, 112 Fed. 931, 939, 50 C. C. A. 623, 631 (57 L. R. A. 108), Mr. Justice Lurton, distinguishing between actions on contract and actions in tort, said:

"How can it be said that, without the authority of the board of directors, the cashier's action in giving such a certificate would not be the act of the bank? This is not an action to enforce a contract made by a cashier. \* \* \* If the cashier's act is the act of the bank, the liability of the latter for the tort may be plain,

although it might not be liable for a promise by the cashier made under the same circumstances. Morse Bank, § 171; Thompson's Corp. §§ 4779, 6283."

In Johnston Fife Hat Co. v. National Bank, supra, the conspiracy alleged was between the hat company and the National Bank of Guthrie, by which the former was to purchase on credit of wholesale dealers, and when the goods so purchased were in store, the bank would, and did, take a spurious mortgage on the same, foreclose it on the fruits of the fraud, and divide the proceeds between the conspirators. The court declared (4 Okl. 25, 44 Pac. 194) that in order to render the bank liable in tort it was not necessary—

"that it should have authority to take each particular step required to consummate the fraud. It is sufficient to charge the bank that it took part in the conspiracy, knowing its purpose. This it did by taking the mortgage, by seizing and selling the goods, by appropriating the proceeds, and thus aiding in the fraudulent design and purpose."

In Roger's Case, the suit was by a widow and minor child of one who was taken from the parish jail and hanged. The common carrier was held liable for furnishing a special train to the brother of the murdered man, which train of cars was run by defendant from Monroe to the parish jail, and on which gathered, along the way, the individuals who formed the mob that broke the jail and hanged Rogers. The court said:

"The railroad company was present throughout by its authorized agents, and, \* \* \* they knew, or ought to have known, long before the special train reached Tallulah, that the object and purposes of the trip were unlawful."

In Salisbury Ice & Fuel Co. Case, supra, it was declared that where an agent of a corporation, within the scope of the agency and of the employer's business, obtains anything of value for the corporation by false pretenses or fraud, the corporation may be made to respond for this fraud exercised for it by such authorized agent.

In Dodge v. Bradstreet Co., supra, it was averred in the complaint that the corporation defendant confederated with the others to injure the plaintiff by circulating false and slanderous statements, with the view of compelling plaintiff to become a subscriber to the corporation's publication, and that in pursuance of such combination the slanderous words were uttered by the other defendant, and the corporation.

It follows, therefore, that the rule by which liability is fixed on a corporation for participation in a conspiracy resulting in injury is not different, in principle, from that imposing liability on the corporation for any other willful or unlawful act that resulted in injury to a third person. In Supreme Lodge of the World, Loyal Order of Moose, v. Kenny, as Adm'r, 73 South. 519, this court recently said:

"The following quotation taken from the case of Hardeman v. Williams, 169 Ala. 50 [53 South. 794], found in the recent case of Republic Iron & Steel Co. v. Self [192 Ala. 403]

68 South. 328 [L. R. A. 1915F, 516], succinctly states the rule as recognized in this case: "The principal is responsible for the acts of his agent done within the scope of his employment, and in the accomplishment of objects within the line of his duties, though the agent seek to accomplish the master's business by improper or unlawful means, or in a way not authorized by the master, unknown to him, or even contrary to his express direction."

The test of the corporation's liability in conspiracy cases is whether there was authority for doing the act in question by its officer or agent, and, if so, whether the agent acted for the master. Did the corporation conspire? The corporation can only be held liable for its act done by an agent, servant, or officer, in the particular business in which the corporation and its agent are engaged. If the rule were otherwise, the serious interest of corporations would be jeopardized and often destroyed by the conduct and conspirings of those of their agents or servants engaged in the conduct of the master's business, who know nothing and care nothing about the policy or the real interests of the corporation, and of whose conduct and conspirings the officer or manager or agent who directs and dictates the policy and the more serious business affairs of the corporation never knew. *Standard Oil Co. v. State*, 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015. On reason and authority, therefore, where corporations are held for conspiracy, it must be averred and proven that the conspiracy was entered into by its agent or officer, and that by implied or express authority, such agent or officer was acting within the line and scope of his employment in the accomplishment of the business of the master; and that such agent or officer, as such, did an essential or necessary act which the conspiracy contemplated.

On the former appeal this court pointed out that the complaint, as then framed, failed to charge that the act done or to be done was within the scope of the employment of the defendant's agent, that the facts set out in the complaint showed that there was no power in the agent to do the acts alleged to have been agreed on and to be done by him, and that for such reason it failed to charge liability against the defendant. 188 Ala. 118, 65 South. 1003.

[8] On the second trial said defects were sought to be met by alleging other transactions with and by third parties not in the defendant's employment, and with whom appellee did not participate or have any connection, where all of the acts conspired to be done, whether by Knight, Yancey & Co., or by the defendant, through its agents, were done, and that in the transaction out of which the cause of action arose, the forgery of bills of lading for the 1,950 bales of cotton and the sale of drafts with such spurious bills of lading attached, the acts alleged to have been conspired to be done by Knight, Yancey & Co. were done by *them*, but it is

*not alleged that the acts conspired to be done by the defendant were done.* That is to say, the effect of the facts averred was, that a conspiracy was entered into by and between the defendant and Knight, Yancey & Co., in 1905, by which Knight, Yancey & Co. were to do certain things, among which was, "thereafter" to issue bills of lading in defendant's name without delivery to the defendant of property for transportation, and that the defendant's agent was to do certain things, and that (the act of conspiring and) the things to be done (and such as were done) by defendant's agent were within the scope of his employment. However, no facts are alleged showing that the transactions in which the loss was sustained were within the scope of the employment of the defendant's agent charged with having bound it by the said conspiracy. 8 Cooley's Briefs, p. 2488; *De Jarnett's Case*, 111 Ala. 261, 19 South. 995; *Waldman Case*, 91 Ala. 170, 8 South. 666, 24 Am. St. Rep. 883.

The conspiracy sought to be alleged in the several counts may be generally stated as being between third parties—parties not in defendant's employ—and defendant's agent, by which it was agreed or conspired that such third parties, among other things, might at any time thereafter (1905), as they should desire or see fit, and without the delivery of property to the defendant for transportation, issue bills of lading for any amount of cotton, purported to be delivered by said third parties for shipment over defendant's line for transportation to European ports, and that defendant's agents would aid and assist in causing deliveries to be made at such European ports of any cotton when shipment was actually made by such third parties subsequent to the issue by them of such spurious bills of lading.

The averment of the acts to be done by such agent in causing deliveries to be made of such cotton as said third parties might ship under any spurious bills of lading issued by them in defendant's name was as follows:

"Defendant, acting by and through the said John A. Bywater, or said other agents of it, whose names to the plaintiff are unknown, and who were the same agents who entered into the said conspiracy with the said Knight, Yancey & Co., would, through the influence of its business relation with its connecting carrier, aid and assist in causing delivery to be made by such connecting carrier to the holders of such false and spurious bills of lading of any cotton which the said Knight, Yancey & Co. might, subsequently to the issue of such false and spurious bills of lading, ship over defendant's railroad and its connections, etc.; \* \* \* and plaintiff avers that it was within the scope of the employment of the said John A. Bywater or of said other agent of defendant to so aid and assist in causing in such manner such deliveries to be made."

Consequently no facts are alleged showing acts by defendant's agents (who are charged with having conspired with Knight, Yancey & Co.), or that such agents were employed by the defendant to do the acts alleged to have



been done by them pursuant to the conspiracy, so as to enable the court to determine whether the conspiracy charged was within the scope of the employment of such agents by the defendant. The allegation that the thing to be done by said agents—"to so aid and assist in causing in such manner such deliveries to be made"—was within the scope of the employment by the defendant, is a conclusion of the pleader, and is insufficient, in not showing that the act of conspiring, and the things to be done by the defendant through its said agents, were within the scope of the defendant's employment of its said agents, and of the prosecution of defendant's business. *B. R. L. & P. Co. v. Nicholas*, 181 Ala. 491, 61 South. 361; *Woodward Iron Co. v. Marbut*, 183 Ala. 310, 62 South. 804; *Langhorne v. Simington*, 188 Ala. 337, 66 South. 85; *L. & N. R. R. Co. v. Jones*, 130 Ala. 470, 30 South. 486; *Republic Iron & Steel Co. v. Self*, supra.

[10] In discussing the statute (section 6186, Code) in *L. & N. R. R. Co. v. National Park Bank*, supra, by the use of the expression "under the law as changed by our statute, in order to fasten liability upon the carrier for the issuance of a false bill of lading, it must have been issued, or authorized, by an agent charged with the duty of issuing such documents," it was not intended to say that an agent who was authorized to issue bills of lading upon the receipt of the property for transportation could bind his principal by authorizing a third person, not in the employment of the master, to generally issue bills of lading without the receipt of such property. A consideration of the whole opinion, makes this clear. For the effect of the former decision in the instant case was that under the facts then alleged in count 5, if Bywater, acting within the scope of his employment by defendant, agreed with Knight, Yancey & Co. that the latter might issue bills of lading without the delivery of the goods for shipment, he could not, as a matter of law, have been acting within the scope of his employment and in the discharge of the business of his principal. We do not think that the averment, in the alternative, that Bywater who had the conducting and superintendence of the defendant's shipments of cotton and who was charged with the authority, among other things, "of issuing or of causing to be issued by his subordinates and under his directions bills of lading," meets with the requirements as laid down in the former opinion in dealing with the statute. The complaint must be judged by its weakest alternative averment, and the averment of the fact that Bywater had a general authority to cause agents to issue bills of lading in the course of shipments falls short of averring that Bywater was an agent clothed with the duty of issuing bills of lading. He may have had a general supervision and control of the subordinate agents with power to control and

instruct them and still not have had the authority from the defendant to issue bills of lading. The holding upon the former appeal does not sanction a liability, under the statute, for the spurious issuance of a bill of lading, except when actually issued by one clothed with authority to issue bills of lading or when done by some one under his direction or authority, so as to make it his own act. In other words, the agent who issues the bill of lading or who directs or authorizes the issuance must have had the authority to issue bills of lading and it does not suffice to charge that one who merely can direct or supervise agents charged with the issuance of bills of lading, but with no authority to issue the same himself, can bind the defendant by the issuance of spurious bills of lading or by directing some one not clothed with the authority to issue proper bills of lading to issue spurious ones.

In *Alabama Great Southern Railroad Company v. Com. Cot. Co.*, 146 Ala. 388, 399, 42 South. 406, 407, it is quoted from *Jasper Transportation Co. v. K. C., M. & B. R. R. Co.*, 99 Ala. 416, 422, 423, 14 South. 546, 42 Am. St. Rep. 75, that:

"The statute must not be construed as altering the common law, or as making any innovation therein further than the words import."

It is without question that at common law no one had authority to issue bills of lading without the receipt of the property for transportation. *Friedlander v. Texas, etc., Co.*, 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991; *Hutchinson on Carriers* (3d Ed.) § 160; *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998. The leading case on this point (*The Schooner Freeman v. Buckingham*, 18 How. 182, 15 L. Ed. 341) has many times been affirmed by American courts (5 Rose's Notes, U. S. Rep. 559 et seq.). And this authority is in accord with the rule declared by the English courts. *Grant v. Norway*, 10 Eng. Com. Law (C. B.) 665; *Cox v. Bruce*, L. R. 18 Q. B. 147; *Lickbarrow v. Mason*, 2 Term Rep. 77.

The Grant Case, supra, was practically the case at bar. There the holding was that the master of a ship signing a bill of lading for goods which had never been delivered to him for shipment was not to be considered as the agent of the owner in that behalf, so as to make the owner responsible to one who had made advances to the holder of such bill of lading upon the faith of the bill of lading so signed by the master of the ship.

[11] The Alabama statute in question cannot be given the effect, to have authorized an agent of the defendant having the power to issue bills of lading for property received, to deputize or empower third persons, not in the employment of the agent's corporate master nor in the prosecution of its business, to issue at will bills of lading without the receipt of the property to be shipped and subject the master to liability thereby. The effect of the statute was to subject to liability at the suit of the party injured any



common carrier not having received things or property for carriage, who gives or issues a bill of lading or receipt for property as if actually received; or any warehouseman, or wharfinger, or person engaged in the business of storage, or keeping for shipment, or forwarding, who issues a receipt for things or property, not having received them; or such parties who give or issue a second bill of lading or receipt, the original being outstanding, without expressing on the face of such second receipt that it is a duplicate; or any such parties who shall surrender such thing or property without receiving or cancelling the bill of lading or receipt issued therefor, or who make partial delivery without indorsing such partial delivery on such bill of lading or receipt, except as provided in section 6135. The extent of the liability is fixed by the statute at "all damages, immediate or consequential, therefrom resulting."

The delegability of the authority of such an agent in important matters of the principal's business could not by implication be extended to the general power of affixing the agent's name to any bill of lading that the third party may see fit to issue without the delivery of the property to the principal so to be transported. The liability of the principal for such fraudulent bills of lading (those without the receipt of the property), in the absence of knowledge and participation by the principal or its authorized agent, not being declared by our statutes, must be limited by the rule long prevailing at the common law.

As to the transactions alleged to have been had with other third persons, as the discounting of drafts with such bills of lading attached, with which the plaintiff is not alleged to have been connected, no recovery could be had by plaintiff, because: (1) Plaintiff was not damaged thereby; (2) defendant was only liable for the act of its authorized agent done within the scope of his employment, and not for acts done by another (a third party) to which defendant's agent, as a matter of law, had no authority to agree or consent for the defendant.

[12] In the absence of a special contract, or of a relation of partnership or agency, between the initial and the connecting carrier, such connecting carrier is liable only for loss or damages occurring on its own line. *Southern Express Co. v. Saks*, 160 Ala. 621, 49 South. 392; *Central of Georgia Railway Co. v. Chicago Varnish Co.*, 169 Ala. 287, 53 South. 832.

[13] The averments in the counts, of what the defendant's agent was to do, through the influence of defendant's business relation with its connecting carriers, to aid and assist in causing deliveries to be made by such connecting carriers on such fraudulent bills of lading as Knight, Yancey & Co. might at any time issue, could not be said to set up acts within the scope of the employment of

the defendant's agent, for such alleged contemplated deliveries were not within the scope of the defendant's business. This is true by reason of the fact that, in the absence of contractual agreement otherwise, when the defendant safely transported the cotton to the end of its line and delivered the same to its connecting carrier, to be transported beyond the state of Alabama to a foreign country, the defendant's responsibility for, connection with, and authority over, such shipments were terminated.

[14] Moreover, from the averments of these several counts, the thing purported to have been agreed to be performed by defendant's agent, Bywater, to aid and assist in causing deliveries at foreign points on such fraudulent bills of lading, was never done by said Bywater or any other of defendant's agents, in the transaction in which the alleged injury was sustained and the alleged cause of action arose. If such shipments had been made on the spurious bills of lading, recovery of the actual cotton so shipped could have been had under the authority of *Lovell v. Isidore*, 192 Fed. 753, 113 C. C. A. 39, and, as remarked by Judge Anderson, this suit would not have been brought.

Each fraudulent bill of lading so issued, as the result of a conspiracy entered into between Knight, Yancey & Co., the defendant, and others, was a separate and distinct criminal offense or cause of civil action.

The averment of fact that "said Knight, Yancey & Co., between April 7, 1910, and April 30, 1910, made up and issued false and spurious documents purporting to be defendant's bills of lading, calling for the carriage by defendant and connecting carriers of, to wit, 1,950 bales of cotton from points in Alabama to Liverpool, England," in connection with the other averments of fact, falls short of the allegation that, as the result of the alleged conspiracy with Knight, Yancey & Co., the defendant or any of its authorized agents did any act within the line and scope of such agency and the master's business, in the issuing and uttering of the false and spurious bills of lading between the dates of April 7, and April 30, 1910, covering the 1,950 bales of cotton, to which there were attached the drafts, amounting to \$150,000, discounted with plaintiff, in which transaction plaintiff is alleged to have sustained its injuries.

The fact that the defendant and Knight, Yancey & Co. conspired to the end of the issuance of other spurious and fraudulent bills of lading, upon which defendant, through its business associates, assisted in procuring delivery at point of destination, on which damage or loss was, or was not, sustained by other parties than plaintiffs, did not fix liability on defendant for a separate and subsequent issue of spurious or fraudulent bills of lading, on which shipments were not made, and about which neither the defend-

ant nor its agent did any essential or necessary act.

If conspirators, other than authorized agents of the corporation, were at liberty to proceed with the commission of such fraudulent acts, and bind the defendant corporation by such subsequent acts of coconspirators in which the corporation's authorized agents did not participate, and at the doing of which they were not even present, encouraging, aiding, and abetting, the right of *locus poenitentiae* would be denied; and the serious interests of the corporation jeopardized or destroyed by agents or servants having nothing to do with the real interest of the corporation, of whose acts the officers or agents of the corporation directing its more serious business affairs have no intimation or knowledge.

It is not even averred that the defendant or its authorized agents actually knew of the issuance of the bills of lading covering the 1,950 bales of cotton in question, and on which the loan of \$150,000 was made and loss sustained. The general averment that, as a part of and in accordance with the terms of said conspiracy, under which 20,000 spurious bills of lading had been formerly issued and uttered and under which defendant had procured delivery of the cotton, was not the equivalent of an averment that Knight, Yancey & Co. were authorized by the defendant or its authorized agents to issue and utter the spurious bills of lading covering the 1,950 bales of cotton in question, and that the defendant knew that the same were to be issued or were issued by Knight, Yancey & Co.

In *State ex rel. Attorney General v. Tally*, supra, the effect of the holding was, that to aid and abet in the commission of a crime the result of a conspiracy, it is necessary that assistance should actually be rendered in its commission by acts or words of encouragement or support, or, when no actual assistance is given, the confederates must be present, actually or constructively, by prearrangement, special or general, at least to the knowledge of the principal, with the intent to render assistance should it become necessary. If a criminal prosecution were pending against the defendant for conspiracy in the matter of the issuance of said spurious bills of lading for the 1,950 bales of cotton, it would not be contended that this defendant or its agent had given assistance by word or act in the consummation of the fraud, or that, not having given assistance, the corporation's authorized agent was present by prearrangement, with the knowledge of the principal, with the intent to render assistance should it become necessary. To hold that the agent of defendant was present, actually or constructively, by prearrangement and knowledge of the principal, and assisted in the issue of the bills of lading in question by Knight, Yancey & Co., from the fact that such defendant's absent agent had aided and

assisted for defendant in the delivery of the cotton to European purchasers on past fraudulent bills of lading, would deny the right of *locus poenitentiae* to the defendant and its agents. The result of such a decision would be far-reaching, and greatly outweigh any apparent loss or hardship that might result to the holders of the spurious bills of lading acquired in the course of business of buying foreign bills of lading.

[15] It has long been a declared rule of criminal pleading that conspiracy must be sufficiently charged; that the charge cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the plot. *United States v. Britton*, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698; *Reg. v. King*, 7 Q. B. 782; *Commonwealth v. Shedd*, 7 Cush. (Mass.) 514. It must also be the rule in civil suits that the conspiracy must be sufficiently charged. In contravention of the rule is the attempt of the plaintiff in this case to fix liability on the defendant by the averment, alone, of acts alleged to have been done by one or more of the conspirators in furtherance of the general objects of the alleged conspiracy to issue spurious bills of lading; and no act is alleged by which the defendant is shown to have conspired, or in pursuance of which it is shown to have aided in the issuance or uttering of such spurious bills of lading, to plaintiff's injury.

[16] Count B is the same as count 5, except that it is therein alleged that the course of conduct between defendant and Knight, Yancey & Co. "became a system or general course of conduct or business, and that it could not have become such course of conduct or business but for the participation therein, as averred, of this defendant," and that, as a consequence thereof, "the public engaged in the cotton trade, including the plaintiff, were induced to believe and did believe that said Knight, Yancey & Co. were legitimately engaged in the sale of cotton on a large scale, and that the said spurious documents purporting to be defendant's bills of lading, issued and uttered as aforesaid by Knight, Yancey & Co., were the genuine bills of lading of the defendant, evidencing cotton received by it for shipment;" the plaintiff averring that, as a proximate result thereof, plaintiff was induced to discount said draft and suffered the loss and damage set forth.

The effect of this additional allegation is to charge that Bywater, by his method of dealing with other bills of lading, previously issued by Knight, Yancey & Co., induced the plaintiff to believe that the bills of lading so issued by that company were genuine bills of lading of the defendant's, and so to deal with them and to purchase the bill of lading in question on which the plaintiff sustained the loss complained of.

The expression of the court, on former appeal, was to the effect that:

"If the agents of the defendant would not have been acting within the line or scope of their employment had they themselves issued such a document, they would not, of course, have been acting with the line or scope of such employment, in attempting to authorize, or in aiding others to do so."

The effect of the addition of count B was to claim the right to recover, although Bywater could not have issued the bills of lading in question nor have authorized their issuance, on the theory, either that, by consenting to the issue of similar bills of lading on previous occasions he bound the defendant in this instance, or that, though he may not have authorized the issuance of such bills of lading, yet by representing to others that the former bills of lading were authorized, he subjected the defendant to liability in the present suit by the plaintiff. Thus it is sought by indirection to impress a liability that would not exist if Bywater issued the bills of lading, or authorized their issuance, without receipt of the property purported to have been received for shipment. This contention was heretofore disposed of. *L. & N. R. R. Co. v. Nat. Park Bank*, supra, 188 Ala. 119, 65 South. 1003.

Count C contains the same allegations as count B, with the addition that:

"Said firm of Knight, Yancey & Co. was insolvent, and that the issuance and utterance by them of said spurious documents, in manner and form as aforesaid, *would have been discovered long prior to the loss and damage to the plaintiff*, which is herein set forth, but for the execution of said conspiracy and the participation of the defendant therein as herein set forth, and as a proximate result of such participation by this defendant, said course of business was continued until, to wit, April 30, 1910, and this plaintiff's damages and loss as herein averred was thereby proximately caused."

[17, 18] If count B did not state a cause of action, the additional averment that Knight, Yancey & Co. could not have continued business because of insolvency, etc., did not make the act of Bywater (that would not otherwise have been within the scope of his employment) bind the defendant, nor give plaintiff a cause of action for misrepresentations which were not made to it and upon which it did not act to its detriment. The averments in the count going to show that the proximate cause of plaintiff's damage was Knight, Yancey & Co.'s continuance in business, and their fraudulent conduct thereof, were conclusions of the pleader. The proximate cause of the injury is shown to have been the obtaining of money from plaintiff upon certain drafts with fraudulent bills of lading issued by Knight, Yancey & Co. attached in the case on which the loss was sustained; and not the previous issuance and disposition of fraudulent bills of lading to others dealing in such securities. *B. R. L. & P. Co. v. Friedman*, 187 Ala. 562, 65 South. 939; *B. R. L. & P. Co. v. Weather's*, 164 Ala. 23, 51 South. 303; *B. R. L. & P. Co. v. Jordan*, 170 Ala. 535, 54 South. 280;

*Selma S. & S. Ry. Co. v. Campbell*, 158 Ala. 445, 48 South. 378; *Merrill v. Sheffield*, 169 Ala. 251, 53 South. 219.

Count D is different from count C, in that it alleges that Bywater was charged with the duties of supervising and conducting the defendant's shipment of cotton to foreign ports, of issuing or causing to be issued by his subordinates and under his direction, bills of lading for such shipments, of procuring deliveries of cotton under bills of lading issued or purporting to be issued by defendant, of adjusting complaints, inquiries, and difficulties arising between the consignee of such cotton or the holders of bills of lading issued, or purporting to be issued, by the defendant, or carriers connecting with the defendant, over whose lines such cotton had been shipped; and also alleges that some of the prior transactions in which Bywater caused deliveries were with plaintiff.

[19] If the complaint be construed most strongly against the pleader, where the allegation is that one of two things is true, unless each alternative allegation is sufficient to make out a case the count must be held insufficient. *Southern Railway Co. v. Bunt*, 131 Ala. 591, 594, 32 South. 507; *B. R. L. & P. Co. v. Nicholas*, 181 Ala. 491, 502, 61 South. 361; *Central of Georgia Railway Co. v. Freeman*, 134 Ala. 354, 32 South. 778; *Sloss-Sheffield Co. v. Sharp*, 156 Ala. 284, 288, 47 South. 279; 4 Ency. Pl. & Pr. 620. The count must be tested by its weakest alternative averment (*Jordan v. Ala. C. G. & A. Ry. Co.*, 179 Ala. 291, 60 South. 309; *Osborne v. Ala. S. & W. Co.*, 135 Ala. 571, 33 South. 687), and must be proved as alleged (*Central of Georgia Railway Co. v. Isbell*, 73 South. 648). Similarly, it has been held that a charge is to be tested by its weakest clause. *Reynolds v. Woodward Iron Co.*, 74 South. 360.

[20] In testing the sufficiency of this count, it will be treated as though it alleged that Bywater's duties were: (1) To supervise and conduct the defendant's foreign shipments of cotton through the port at Pensacola, Fla.; and (2) to issue or cause to be issued by his subordinates and under his direction bills of lading for such shipments; and (3) to procure deliveries of cotton under bills of lading issued by the defendant, or purporting to be issued by it; and (4) to adjust complaints, inquiries, and difficulties arising between the consignees of any such cotton or the holders of bills of lading purporting to be issued by carriers connecting with the defendant, over whose lines such cotton has been shipped. Thus is presented no question of surplusage, but of sufficient averment of the acts done and agreed to be done by the corporation's agent, within the line and scope of his employment, in a conspiracy case.

[21, 22] If it had been within the authority of the agent to conduct and supervise shipments of cotton to foreign ports over

defendant's lines, as a matter of law this would not have brought the delivery of cotton by connecting carriers within the scope of the agent's employment; nor, as a matter of law, does the power to cause bills of lading to be issued, make the issuance of bills of lading by third parties without the receipt of the property, within the scope of the agent's employment. Moreover, as to deliveries by connecting carriers of cotton upon bills of lading purporting to have been issued by the defendant, but not so issued, the fact that such property was so shipped and delivered under other like bills of lading issued by the defendant did not bring the alleged unlawful transaction in which the plaintiff's injury occurred within the scope of the defendant's business. It is further apparent that it was no part of defendant's business, and beyond the scope thereof, to adjust controversies arising between consignees of property, shipped over another carrier, and the holders of bills of lading purporting to be those of such other carrier.

[23] Count E alleges the same conspiracy, and attempts to aver how defendant's influence with connecting carriers exercised to procure the delivery of cotton upon false bills of lading amounted to a fraud on plaintiff. The averment is:

"By willfully deceiving, or willfully causing to be deceived, or making false representations, or causing false representations to be made, or fraudulently suppressing or fraudulently causing to be suppressed the truth from the holders of such false and spurious bills of lading when their complaints or inquiries in reference to the cotton therein purported to have been shipped were referred to him as agent of the defendant and in the line and scope of his duties as such agent," etc.

It was thus sought to allege a course of business, established by Knight, Yancey & Co. and the defendant, by which the former were enabled to sell a large number of their drafts with bills of lading attached. To base an action for fraudulent concealment, a duty to disclose the truth must be shown, that the disclosure was not made when opportunity to speak and inform was presented, and that the party to whom the duty of disclosure was due was induced thereby to act to his injury. 1 Story, Eq. Jur. § 207, p. 216; 2 Pom. Eq. Jur. § 900; Griel v. Lomax, 89 Ala. 420, 427, 6 South. 741; Hall & Bro. v. Western Assurance Co., 133 Ala. 637, 32 South. 257; Bradford v. Elyton Land Co., 98 Ala. 527, 8 South. 383; Saltonstall v. Gordon, 33 Ala. 149; Van Arsdale v. Howard, 5 Ala. 598, 602; Grell Bros. Co. v. McLain, 72 Ala. 410; Corry v. Sylvia y Cia, 192 Ala. 550, 68 South. 891. In Flewellen et al. v. Crane, 58 Ala. 627, it is said that fraud is a conclusion of law from facts stated and proved. When it is pleaded at law or in equity, the facts out of which it is supposed to arise must be stated; a mere general averment without such facts is not sufficient. Skinner v. Southern Gro. Co., 174 Ala. 359, 367, 56 South. 916; Empire

Realty Co. v. Harton, 176 Ala. 99, 57 South. 763; Phoenix Ins. Co. v. Moog, 78 Ala. 301, 56 Am. Rep. 31; Penny v. Jackson, 85 Ala. 72, 4 South. 720.

[24] In this count neither the duty nor the concealment is sufficiently alleged. The count does not show, except by conclusion, what the "complaints or inquiries with reference to other cotton purported to have been shipped" were, nor were any facts averred showing that the alleged suppression was fraudulent or of a character reasonably calculated to deceive the plaintiff to its injury in the transaction made the basis of this suit. If the alleged misrepresentation was in response to complaints or inquiries concerning cotton that had proceeded beyond defendant's control and into the possession and control of connecting carriers, or if it did not relate to the bill of lading that Knight, Yancey & Co. issued without delivering any property to the defendant for transportation and from which the injury resulted, but in some other transaction than that on which the suit is based, it could not, as a matter of law, be said to relate to a matter within the scope of the defendant's business, nor that its utterance was so within the scope of the employment of any of its agents as to bind defendant.

The additional averment injected in count G, to the effect that Knight, Yancey & Co. committed a series of acts in which defendant's agents participated, "that would have been discovered long prior to the loss and damage of the plaintiff," and that their business would have been broken up before the occurrence of the transaction in which plaintiff sustained its loss, etc., is patently bad.

It follows that defendant's demurrers to amended counts 5, A, B, C, D, E, F, and G were properly sustained.

[25] Counts H, I, J, and K sought to aver a course of fraudulent conduct, on the part of defendant, that resulted in injury to the plaintiff in the manner and form alleged, and made the bill of lading as an exhibit a part of said counts. The bill of lading purported to be attached as Exhibit A, and so made a part of said counts, does not appear in the record. We must presume in favor of the correctness of the ruling of the trial court. In the absence of the bill of lading made an exhibit, we cannot do otherwise than affirm the ruling of the court in sustaining the demurrers to said counts. Winter v. City Council, 79 Ala. 481; Wood v. Wood, 119 Ala. 183, 24 South. 841.

It results from the foregoing that the judgment of the Morgan county law and equity court, sustaining defendant's demurrers to each count of the complaint, to wit, amended count 5, and counts A to K, inclusive, be and it is hereby affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(15 Ala. App. 5157)

**SNEAD v. GROOVER et al.** (8 Div. 414.)

(Court of Appeals of Alabama. Jan. 30, 1917.)

**1. PLEADING — 422—VERIFICATION—WAIVER OF OBJECTION.**

The objection that a plea denying plaintiff's ownership of the note sued on was not sworn to is waived, where no objection was made to the plea and issue was joined thereon.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1414-1417; Dec. Dig. —422.]

**2. USURY — 69—RIGHTS OF PARTIES—NEW LOAN—BONA FIDE PAYEE.**

Where the president of a bank in good faith made a loan to a debtor of the bank at a legal rate of interest to enable the debtor to pay off his debt, he is not affected by the usury in that debt; but if the loan was not in good faith, but a subterfuge to defeat the usury statute, the president cannot recover on the note given for the loan made by him.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 144; Dec. Dig. —69.]

**3. USURY — 119—EVIDENCE—NEW LOAN—GOOD FAITH.**

In an action on notes given to the president of a bank, evidence held sufficient to take to the jury the question of plaintiff's good faith in loaning to defendant money with which to pay a usurious debt owing by defendant to the bank.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 343-357; Dec. Dig. —119.]

**4. TRIAL — 253(3) — REQUESTED CHARGES—IGNORING ISSUES.**

In an action on notes given to the president of a bank by one owing a usurious debt to the bank, where the defense was that the loan was a mere subterfuge to avoid the usury statute, requested charges ignoring the issue of good faith in making the loan were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 616; Dec. Dig. —253(3).]

**5. TRIAL — 250—REQUESTED CHARGES—ABSTRACT CHARGE.**

In an action on notes given to president of the bank, where defense was a subterfuge to avoid the defense of usury to a debt owed to the bank, a requested charge that a stockholder in a bank or its president are different persons in the eyes of the law from the bank itself, just as much as are two different individuals, was abstract.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. —250.]

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

Action by W. B. Snead against J. R. Groover and another. Judgment for defendants, and plaintiff appeals. Affirmed.

The facts sufficiently appear. .

The following charges were given for plaintiff:

(1) If you find from a consideration of the evidence that Snead acted as president of the Bank of Boaz, and as an individual and with a full knowledge of the usury and illegality of the contract, and made the loan of the money testified to for the purpose and with the intent of defeating the defense of usury and of depriving Groover of the right to assert the illegality of the contract, then your verdict should be for defendants.

(2) If Snead loaned Groover the money on the check indorsed by Groover for the purpose

and as a part of a scheme to defeat the usury in the loan made by the Bank of Boaz and with full knowledge on the part of said Snead, acting both as president of the bank and as an individual, although Snead actually loaned Groover the money from his own account, your verdict should be for the defendant.

The following charges were refused to directing a verdict for plaintiff on defendant's plea 4:

(4) If you are reasonably satisfied that plaintiff actually furnished the money to pay off the note to the bank which defendant owed plaintiff, and the money so furnished was the money of plaintiff, and not the money of the bank, then your verdict should be for plaintiff.

(5) If the bank has no interest in the note sued on, your verdict should be for plaintiff.

(6) If the note sued on had all the time been the property of Snead, and if the bank had no interest therein, then your verdict should be for plaintiff.

(7) Unless defendant has proved to your reasonable satisfaction that the note sued on belonged to the bank, then you must find for defendant.

(8) If both Snead and Groover knew that the debt to the bank was infected with usury, yet if Snead really lent Groover his own money, and if the note sued on was given to Snead for such loan, then plaintiff is entitled to recover the amount of the note sued on, and it would make no difference that Snead knew that the effect of this would be to terminate Groover's right to set up the interest, or that Snead intended it should have this effect.

(9) Affirmative charge for plaintiff.

(10) A stockholder or president of a bank is a different person from the bank itself, and a stockholder or president of a bank may lend a third person money to pay usurious debt to the bank, and, if he does so, usury cannot be pleaded to a suit for the recovery of the loan, and this is true, although the stockholder or president knew the purpose for which the money was wanted, and knew of the usury, and although the stockholder or president was desirous to lend him the money and even anxious to do so, in order that the usurious debt to the bank might be paid, and the right of the borrower to plead usury thereby terminated.

(11) A stockholder in a bank, or the president of the bank, is a different person in the eyes of the law from the bank itself, just as much as are two different individuals.

Street & Bradford, of Guntersville, and McCord & Orr, of Albertville, for appellant. John A. Lusk & Son, of Guntersville, and A. E. Hawkins, of Albertville, for appellees.

BROWN, J. [1] While plea 1 is essentially a plea denying the plaintiff's ownership of the note, and should have been sworn to, no objection was made to the plea, and the joinder of issue without objection waived the defect. *Milligan v. Pollard*, 112 Ala. 465, 20 South. 620.

Pleas 4 and 5 allege, in substance, that the sole consideration of the note is usurious interest charged on a loan made by the Bank of Boaz to the defendants, and that plaintiff, the president of the Bank, as a subterfuge, and for the purpose of evading the law and cutting off the defense of usury, took the note in his own name. These pleas present the defendants' theory of the case.

The plaintiff's theory is that the bank refused to carry the loan for the defendants, and that he (plaintiff) made the defendants a loan out of his private funds to pay the debt to the bank, and that the bank had no interest in the indebtedness represented by the note in suit.

There is no controversy in the evidence that the transaction culminating in the execution of the note originated in a loan of \$375 made by the Bank of Boaz, of which the plaintiff was president, that the defendants had paid on the loan, in two payments, \$378, and had on two or more occasions given renewal notes, all of said transactions being conducted by the plaintiff for the bank.

The evidence offered by the plaintiff tends to show that he agreed with the defendant to make him a loan out of his own funds to take up the note held by the bank, and that he did make such loan and took the note involved here, and the bank surrendered its note to the defendants.

The evidence on the part of the defendant Groover shows that there was no suggestion by the plaintiff of any such loan, and he denies that such loan was made, and his testimony tends to show that he undertook to give a renewal note to the bank for the amount of the indebtedness, and, without his knowledge or consent, the plaintiff, who drew the note, made it payable to himself; that he thereupon drew a check in favor of the defendant and shoved it through the cashier's window and asked defendant to indorse the check; that the note was signed and the check indorsed before defendant had any knowledge that the note was made payable to plaintiff.

[2] "A loan made in good faith, and at a legal rate of interest for the purpose of enabling the borrower to pay a debt owed to a third person, is not affected by the usury that may inhere in such debt." 4 Cyc. 999 (IV, G, 5, b); *May v. Folsom*, 113 Ala. 198, 20 South. 984.

On the other hand, if, in fact, the plaintiff made a loan to the defendants, and the loan was not in good faith, but a mere subterfuge to defeat the statute of usury, and the entire consideration of the note was usurious interest, the plaintiff was not entitled to recover.

[3] Under the evidence and its tendencies, the question as to whether the plaintiff loaned money to the defendants and the bona fides of the loan was for the jury, and the affirmative charges on all the issues and also as to plea 4 requested by the plaintiff were refused without error.

Charges 1 and 2 given at the request of the defendants asserted correct propositions as applied to the issues and were properly given.

In view of the tendencies of the evidence to show that the note sued on was a renewal

note for an indebtedness originally due to the bank, and the evidence of payment thereon, charge 2 was properly refused.

[4, 5] Charges 4, 5, 6, 7, 8, 9, and 10 ignore the issue of good faith, and charge 11 is abstract.

Affirmed.

(15 Ala. App. 519)

**GREENWOOD CAFE v. WALSH.**

(6 Div. 142.)

(Court of Appeals of Alabama. Jan. 30, 1917.)

**1. ASSAULT AND BATTERY — 24(1) — PLEADING.**

A count of plaintiff's complaint alleged that he was in defendant's restaurant, and that defendant wrongfully assaulted him, breaking his jawbone, bruising, crippling, mangling his head, face, limbs, and body, and permanently crippling and disfiguring him, etc. *Held*, that such count stated a good cause of action.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 25, 26; Dec. Dig. — 24(1).]

**2. TRIAL — 199 — INSTRUCTION — SUBMISSION OF QUESTION OF LAW.**

In an action for assault and battery, the charge that, if the jury was reasonably satisfied that plaintiff entered willingly into a fight with defendant, plaintiff could not recover, was bad, as submitting a question of law, besides being otherwise faulty.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 487-470; Dec. Dig. — 199.]

**3. TRIAL — 260(1) — INSTRUCTIONS — REPETITION.**

The refusal of charges substantially covered by others given is not erroneous.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 661; Dec. Dig. — 260(1).]

**4. EVIDENCE — 359(2) — PHOTOGRAPHS OF PLAINTIFF.**

In an action for assault and battery, photographs, together with the testimony of the person who took them, were admissible to reproduce plaintiff's condition shortly after the alleged injury.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1510; Dec. Dig. — 359(2).]

**5. EVIDENCE — 110 — ACTION FOR ASSAULT — DECLARATIONS OF DEFENDANT.**

In an action for assault and battery, testimony of what defendant said to a third party after the assault on plaintiff, and after plaintiff had left the place where the difficulty occurred, was inadmissible, being without value in determining the relative rights of the parties.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 230-246; Dec. Dig. — 110.]

**6. ASSAULT AND BATTERY — 13 — SELF-DEFENSE — THREE ELEMENTS.**

There are three elements of self-defense recognized by the law, within which a party charged with assault must bring himself to invoke the doctrine, they being: First, freedom from fault in bringing on the difficulty; second, a necessity to strike from an impending peril or danger, real or apparent; and, third, retreat, unless there is no convenient mode of escape, or the peril will be increased thereby.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 11; Dec. Dig. — 13.]

**7. ASSAULT AND BATTERY — 13 — SELF-DEFENSE.**

Defendant sued for assault, to make out the defense of self-defense, need not show that he

was reasonably impressed at the time, in good faith, as a reasonable man, that he was in imminent peril of life or limb, since the law of self-defense is not the same in its application to assault and battery cases as applied to homicide cases; the defense being complete in the former class, if defendant did not provoke the difficulty, did not fight willingly, but only to repel or prevent an attack, and used only such force as was reasonably necessary.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 11; Dec. Dig. ¶13.]

#### 8. APPEAL AND ERROR ¶742(5)—REVIEW—INSTRUCTIONS.

A proposition of appellant's brief is without merit which is based on an assignment of error predicated on an exception to a part of the court's oral charge which is itself but a part of the court's instructions on that phase of the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. ¶742(5).]

#### 9. ASSAULT AND BATTERY ¶42—PUNITIVE DAMAGES—QUESTIONS FOR JURY.

In case of an assault, where there are facts of aggravation, it rests within the sound discretion of the jury to award punitive, as distinguished from actual, damages, in addition to compensatory damages; but no party can claim punitive damages as a matter of right.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 56; Dec. Dig. ¶42.]

#### 10. ASSAULT AND BATTERY ¶29—CHARACTER EVIDENCE IN CIVIL ACTION.

In a civil action for assault, evidence of defendant's general good character, and of his good character for peace and quiet, was inadmissible; character evidence being admissible only in criminal cases, on account of the different burden and measure of proof.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 42; Dec. Dig. ¶29.]

Appeal from City Court of Birmingham; John H. Miller, Judge.

Action by J. L. Walsh against the Greenwood Café. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Charge B refused to defendant was as follows:

If, upon consideration of the whole evidence, the jury is reasonably satisfied from the evidence that plaintiff entered willingly into a fight with defendant, then, in that event, plaintiff cannot recover.

The tenth proposition argued by appellant is to the overruling of defendant's objection to the introduction in evidence of certain photographs of plaintiff showing bandages, etc. The eleventh proposition is based upon the refusal of the court to allow the question to the witness Monroe, "When he ordered him out, what did he say?" referring to the fact that Greenwood had ordered Walsh's friend out of the café immediately after the difficulty with Walsh. The twenty-fifth and twenty-seventh assignments sufficiently appear. The 28th assignment of error is as follows:

Exception to the following portion of the court's oral charge: "If, under the circumstances, there are facts of aggravation, it rests within the sound discretion of the jury to award punitive damages, as distinguished from actual damages. No party can claim punitive damages as a matter of right. The jury can so regard a case

as has things of that kind in it, facts of aggravation, and award punitive damages in addition to compensatory damages."

Erle Pettus, of Birmingham, for appellant. Gibson & Davis, of Birmingham, for appellee.

PELHAM, P. J. This case should be styled "Arthur Greenwood, appellant, v. J. L. Walsh, appellee," for the reason that, though the suit was originally against Greenwood Café a partnership composed of Arthur Greenwood, Spiro Greenwood and James Greenwood, individually, all parties except Arthur Greenwood were, under the pleadings, stricken as defendants, leaving the suit in the court below simply that of J. L. Walsh v. Arthur Greenwood. After considerable pleading, not necessary to be stated, the cause was finally tried on count No. 3, which reads as follows:

"Count No. 3. Plaintiff claims of the defendants \$10,000 as damages, for that heretofore, on, to wit, the 8th day of November, 1913, the defendants were engaged in the business of running and operating a public café in the city of Birmingham, Jefferson county, Ala., for the purpose of serving the public with food for a reward, that on said date the plaintiff was a customer in the defendants' said place of business, defendant Arthur Greenwood wrongfully or unlawfully committed an assault and battery on the plaintiff, so that as a proximate result thereof the plaintiff's jawbone was broken, his neck badly bruised and sprained, a tooth was dislocated, and he was otherwise bruised, mashed, mangled, and injured in his head, face, limbs, and body, he was crippled and disfigured, was permanently crippled and disfigured, was rendered for a long time unable to work and earn money, was rendered for a long time permanently less able to work and earn money, was caused to suffer great physical pain and mental anguish, was caused to spend money for medicine and medical treatment in and about his efforts to heal and cure his said wounds and injuries, to wit, \$132. All to plaintiff's damages aforesaid; hence this suit."

[1] There are 28 assignments of error, which are argued in appellant's brief under 15 propositions. The first proposition advanced goes to the sufficiency of the complaint on attack by demurrer. The count of the complaint on which trial was had states a good cause of action, and was not subject to demurrer filed against it.

[2] Charge B, which was refused by the court, on which the second proposition of appellant's brief is based, is bad in submitting a question of law to the jury, is otherwise faulty, and was substantially given in other charges of the court at appellant's request.

[3] The third, fourth, fifth, sixth, seventh, eighth and ninth propositions of appellant's brief all refer to the court's refusal to give requested charges on self-defense. These refused charges are substantially covered by given charges 2, 13, and 14.

[4] There is no merit in the tenth proposition argued by appellant, based on the objection to the introduction of certain photographs on the trial. These photographs, together with the testimony of the person who

took them, were admissible for the purpose of reproducing the condition of the plaintiff (appellee) shortly after the alleged injuries. The photograph of the condition of the plaintiff shortly after the alleged injuries would be as effective in showing the jury his condition at that time as the testimony of a witness; in fact, a photograph would ordinarily be more reliable in showing the plaintiff's condition at the time taken than the description that might be given by any witness.

[5] The eleventh proposition advanced as showing reversible error is not, we think, grounded on erroneous ruling of the court on the evidence. What the defendant said to McGann after the assault on appellee, and after appellee had left the place where the difficulty occurred, was clearly of no value in determining the relative rights between the parties to this suit; nor is it shown what was expected to be elicited by the question.

The twenty-fifth and twenty-seventh assignments of error, treated as the twelfth and thirteenth propositions of appellant's brief, are based on exceptions taken to the court's oral charge to the jury. The court, in its oral charge, stated:

"Now, there are four elements constituting self-defense, and before that doctrine can be invoked by any party charged with an offense of this kind, those elements must coexist."

An exception was duly reserved to this portion of the charge, and, separately, to the following:

"The second element is that he must be reasonably impressed at the time in good faith, as a reasonable man, that he is in imminent peril of his life or limb. A man is not allowed to invoke the doctrine of self-defense unless he brings himself within the protection of that element of self-defense."

[6] There are but three constituted elements of self-defense recognized by the law, within which the defendant must bring himself to invoke the doctrine of self-defense. They may be stated generally as, first, freedom from fault in bringing on the difficulty; second, a necessity to strike from an impending peril or danger, real or apparent; and, third, retreat, unless there is no convenient mode of escape, or the peril will be increased thereby. The court was in error in charging that the defendant could not invoke the doctrine of self-defense without bringing himself within the four elements enumerated as constituting self-defense.

[7] The excerpt from the court's oral charge defining the second element of self-defense (set out above), to which objection was made and exception noted, is erroneous. The law of self-defense is not the same in its application to assault and battery cases as applied to homicide cases. This defense is complete in the former class of cases, if it appear that the defendant did not provoke the difficulty, and did not fight willingly, but only to repel or prevent an attack upon him, and that in doing this, he used only such force as was

reasonably necessary to that end. *Blankenship v. State*, 11 Ala. App. 125, 65 South. 860; *Beyer v. B. R., L. & P. Co.*, 186 Ala. 56, 64 South. 609. It was not necessary to the defendant's plea of self-defense that he should have honestly been impressed with the belief that he was in imminent peril of life or limb. For the purposes of self-defense, which stops short of killing or attempting to kill, there is no need for the apprehension of serious bodily harm; and it is for the jury to determine in each case whether the defendant's counter assault was protective and justifiable in using no more force than necessary, or was unjustified and unlawful. Authorities last above cited. See, also, *Howell v. State*, 79 Ala. 283.

[8, 9] We cannot see any merit in the fourteenth proposition of appellant's brief. This is based on the twenty-eighth assignment of error, predicated on the exception to a part of the court's oral charge, when the part excepted to is but a part of the court's instructions on that phase of the case. The court's charge on punitive damages is a fair statement of the law on that subject, and is free from the fault suggested in appellant's exception. See *Avondale Mills v. Bryant*, 10 Ala. App. 507, 63 South. 932; *Abney v. Mize*, 155 Ala. 391, 46 South. 230; *Mitchell v. Gambill*, 140 Ala. 316, 37 South. 290.

[10] One of the principal arguments of appellant's brief is based upon the court's refusal to permit the defendant to introduce evidence of his general good character and his good character for peace and quiet. Attorneys for appellant contend with much force in favor of the admission of testimony for good character in a civil action, where the right of action is grounded on damages for assault and battery, on the theory that the action for damage is analogous to a criminal charge for a like offense. No authority supporting this contention is submitted by appellant's attorneys. On the other hand, the general rule, as stated in 16 Cyc. 1263, is as follows:

*"Evidence of Character—Civil Cases.* That a person did or did not do a certain act because his character would predispose him to do or not to do it is an inference which, although sometimes logically probative, the English law of evidence, with some exceptions, absolutely rejects, in civil cases."

We can see no better reason why testimony of the character of the defendant is admissible in a case of this kind than in any other action for damages. In all actions for damages, the defendant is charged with some wrongful conduct, either to the person or the rights of the party complaining. If a defendant is sued for damages for running over a person on the public highway, the right of action would be based upon the wrongful conduct of the defendant, and would be dependent upon that issue. The fact that such defendant had a good character generally, or in any particular way, would not be admitted in



evidence in defense of the suit, and we can see no reason why, in this case, the defendant's character would be a proper issue to introduce as logically tending to affect the rights of the parties. The reason for admitting evidence of good character in criminal cases is because the measure of proof is that the jury must believe the defendant guilty beyond a reasonable doubt, and good character is admitted and may be weighed in connection with the other evidence in the case *for the purpose of creating a reasonable doubt of guilt*. The measure of proof is different in civil cases and the element of reasonable doubt does not enter, for while the same rules govern as to the admissibility of evidence in civil suits and criminal prosecutions, the burden and measure of proof is different. *Smith v. State*, 13 Ala. App. 411, 69 South. 406, and authorities cited. The reason for the rule does not exist, and the rule should not obtain.

For the errors committed by the court in its oral charge, the case must be reversed.

Reversed and remanded.

(15 Ala. App. 526)

**BROOKS v. STATE. (5 Div. 245.)**

(Court of Appeals of Alabama. Jan. 30, 1917.)

**1. CRIMINAL LAW § 1036(8) — APPEAL — QUESTIONS PRESENTED — WEIGHT OF EVIDENCE—MOTION TO SET ASIDE VERDICT—GENERAL CHARGE.**

Where no motion was made to set aside a verdict of guilty as contrary to the weight of the evidence, nor was the general charge in behalf of the defendant requested at the trial, the question of the weight of the evidence is not presented on the record for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2644; Dec. Dig. § 1036(8).]

**2. CRIMINAL LAW § 1159(3) — APPEAL — REVIEW — VERDICT OF JURY — WEIGHT OF EVIDENCE.**

Where the evidence was conflicting, but there was ample evidence to sustain the conviction, the credibility and the weight of the evidence were questions for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076; Dec. Dig. § 1159(3).]

**3. CRIMINAL LAW § 1170½(5) — TRIAL — RECEPTION OF EVIDENCE — OBJECTION TO QUESTION.**

There was no error in sustaining an objection to a question asked by defendant's counsel on cross-examination of a state's witness as to whether she had an individual summoned, where the fact that the individual was summoned does not appear in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3133; Dec. Dig. § 1170½(5).]

**4. CRIMINAL LAW § 1170½(5) — EXAMINATION OF WITNESS — REPETITION OF EVIDENCE.**

Where a state's witness had admitted that she had given the names of the other state's witnesses and had them summoned, it was not prejudicial error to exclude a cross-question seeking to elicit a repetition of that testimony with respect to a particular witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3133; Dec. Dig. § 1170½(5).]

**5. CRIMINAL LAW § 789(8)—INSTRUCTIONS—DEGREE OF PROOF.**

In a prosecution for crime, a requested charge that before the jury can convict they must be satisfied to a moral certainty not only that the proof is consistent with defendant's guilt, but that it is wholly inconsistent with every other rational conclusion, and unless they are so convinced that they would each venture to act upon that decision in matters of the highest concern and importance to his own interest they must find defendant not guilty, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1913, 1960, 1987; Dec. Dig. § 789(8).]

Appeal from Circuit Court, Chambers County; S. L. Brewer, Judge.

Tommy Brooks was convicted of manslaughter, and he appeals. Affirmed.

The facts sufficiently appear. Charge 5, refused to defendant, is as follows:

Before the jury can convict defendant, they must be satisfied to a moral certainty, not only that the proof is consistent with defendant's guilt, but that it is wholly inconsistent with every other rational conclusion, and, unless the jury are so convinced by the evidence of defendant's guilt that they would each venture to act upon that decision in matters of the highest concern and importance to his own interest, they must find defendant not guilty.

Strother, Hines & Fuller, of Lafayette, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

PELHAM, P. J. The defendant was indicted for murder in the second degree, and convicted of manslaughter in the first degree, and sentenced to a term of imprisonment in the penitentiary within the limitations of the periods of punishment prescribed by statute in such cases.

[1, 2] The defendant, in brief filed, argues at some length that the great weight of the evidence favors the defendant's theory of the case that some one else threw the rock that killed the deceased, when defendant and several others were present at a negro gathering (the defendant and all parties concerned being colored people); and that he (the defendant) was not at a place when the rock was thrown to make it physically possible for him to have been the person that threw the rock. There was testimony introduced in behalf of the state that the defendant threw the rock, striking the deceased on the forehead, inflicting a wound from which she subsequently died. There was also evidence going to show that the defendant had made threats against the deceased. No motion was made to set aside the verdict as contrary to the weight of the evidence, nor was the general charge in behalf of the defendant requested on the trial of the case; and we cannot see that the question of the weight of the evidence is presented on the record for review. The evidence was in sharp conflict as to the defendant's guilt, but there was ample evidence before the jury to sustain the verdict

of guilt. The credibility to be accorded and the weight to be given the evidence were for the jury.

[3,4] The only exception reserved to the ruling of the court on the evidence goes to the court's sustaining an objection of the solicitor to a question asked the witness Lula Gunn on cross-examination by defendant's counsel: "Did you have Charlie Carter summoned?" The question assumes that Charlie Carter had been summoned as a witness, a fact which does not appear from anything in the record, and the court's ruling could be sustained for this reason. *Andrews v. State*, 159 Ala. 14, 27, 48 South. 858. It is also shown that the witness admitted that she had given in the names of state's witnesses and had them summoned, and no injury could have resulted to defendant in the court's sustaining an objection to permitting her to repeat the fact with respect to this particular witness—if he was a witness. *Roden v. State*, 8 Ala. App. 204, 58 South. 73.

[5] Charge No. 5 was properly refused. Beginning with the case of *Rogers v. State*, 117 Ala. 9, 22 South. 666, charges of this character have repeatedly been held bad. See *Montgomery v. State*, 169 Ala. 12, 53 South. 991; *Goodlett v. State*, 136 Ala. 39, 33 South. 892; *Rogers v. State*, 117 Ala. 9, 22 South. 666; and *Key v. State*, 4 Ala. App. 76, 58 South. 946.

We find nothing in the record justifying a reversal of the judgment of conviction. The defendant seems to have had a fair trial at the hands of the court, and the question of his guilt or innocence was a matter for the jury that it has resolved against him.

**Affirmed.**

(15 Ala. App. 527)

**DOUBLIN v. STATE.** (6 Div. 275.)

(Court of Appeals of Alabama. Jan. 30, 1917.)

**1. INTOXICATING LIQUORS §198 — AFFIDAVIT OF WARRANT—DIRECTION FOR RETURN BEFORE JUDGE INSTEAD OF COURT.**

An affidavit or warrant for violation of the prohibition laws is not bad because returnable before the judge instead of the court; the improper direction being merely an immaterial irregularity.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 218; Dec. Dig. §198.]

**2. CRIMINAL LAW §575—TIME FOR TRIAL—TRIAL WITHOUT JURY DURING WEEK DESIGNATED FOR JURY CASES.**

Though defendant did not demand a trial by jury, the court was not without authority to try her during a week of the term designated for the trial of jury cases.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1294-1296, 1377; Dec. Dig. §575.]

**3. INTOXICATING LIQUORS §198 — CONVICTION OF OFFENSE DIFFERENT THAN CHARGED.**

Where the affidavit or warrant for a violation of the prohibition laws charged a different offense and embraced an entirely different

transaction from that of which defendant was convicted, her conviction could not stand, as one cannot be convicted of an offense not charged or included in the indictment, information, or affidavit.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 218; Dec. Dig. §198.]

Appeal from Winston County Court; John S. Curtis, Judge.

Susie Doublin was convicted of an offense, and she appeals. Reversed and remanded.

Travis Williams, of Russellville, for appellant. W. L. Martin, Atty. Gen., and H. G. Davis, Asst. Atty. Gen., for the State.

**PELHAM, P. J.** [1] The affidavit or warrant for the violation of the prohibition laws is not bad because returnable before the judge, instead of the court. *Sapp v. State*, 2 Ala. App. 190, 56 South. 45; *Red v. State*, 167 Ala. 96, 52 South. 885; *Carnley v. State*, 162 Ala. 94, 50 South. 362. The improper direction for the return before the judge of the court, instead of to the court presided over by the judge, was merely an immaterial irregularity, as decided by the authorities above cited.

[2] There is no merit in the proposition that because the defendant did not demand a trial by jury the court was without authority to try the defendant during a week of the term of court designated for the trial of jury cases.

[3] On the trial of the case, it was made to affirmatively appear without conflict that the charge for which the affidavit and warrant of arrest was made and issued on probable cause of the affiant and officer issuing same, charged a different offense and embraced an entirely different transaction from that of which the defendant was convicted. It was shown by the uncontroverted evidence that the affiant and the officer issuing the process did not know of the transaction constituting the offense for which the defendant was tried and convicted, and could not have had probable cause for believing the offense had been committed that the defendant was tried and convicted of having committed. In other words, it appears without conflict from the record that the defendant was charged with one offense, and tried and convicted of an entirely different offense. This may not be done, as one cannot be convicted of an offense not charged or included in the indictment, information, or affidavit. *Garner v. State*, 3 Ala. App. 161, 57 South. 502; *Stone v. State*, 115 Ala. 121, 22 South. 275. The question was properly raised, and the judgment of conviction must be reversed, and the cause remanded, that the court below require the defendant on another trial to be tried for an offense included in the charge made by the affidavit, or such amendment thereto as the trial court, in the exercise of proper discretion, may allow.

Reversed and remanded.

(15 Ala. App. 529)

## COVEY COTTON OIL CO. v. BANK OF FT. GAINES. (4 Div. 406.)

(Court of Appeals of Alabama. Jan. 30, 1917.  
Rehearing Denied Feb. 6, 1917.)1. EXCEPTIONS, BILL OF  $\S$  57—CONSIDERATION.

Where dates on bill of exceptions showed that it was signed within 90 days after judgment, it will not be dismissed as not having been filed within that time, though the judge did not certify the date of presentment, and though a statement that the bill was tendered within the time prescribed by law could not be regarded.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig.  $\S$  97-99; Dec. Dig.  $\S$  57.]

2. CORPORATIONS  $\S$  642(1)—FOREIGN CORPORATIONS—DOING BUSINESS IN STATE.

Though a foreign corporation to secure a debt contracted in its domicile receives a mortgage executed within the state and binding property therein, it is not doing business within the state, the execution being the act of the mortgagor, and so the mortgage will not be set aside on the ground that the foreign corporation was not licensed to do business in the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig.  $\S$  2520, 2521; Dec. Dig.  $\S$  642(1).]

3. CHATTEL MORTGAGES  $\S$  57—PLACE OF EXECUTION.

Though a mortgage on property in Alabama was headed "State of Alabama, Barbour County," yet where the signature of the mortgagor was witnessed by a notary public of Georgia, the mortgage did not on its face show that it was executed in Alabama.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig.  $\S$  110-112; Dec. Dig.  $\S$  57.]

4. CORPORATIONS  $\S$  642(1)—FOREIGN CORPORATIONS—DOING BUSINESS IN THE STATE.

A foreign corporation may in the state of its domicile make loans on property located in Alabama, though it is not licensed to do business in this state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig.  $\S$  2520, 2521; Dec. Dig.  $\S$  642(1).]

Appeal from Circuit Court, Barbour County; M. Solle, Judge.

Action by the Bank of Fort Gaines against the Covey Cotton Oil Company. From a judgment for plaintiff, defendant appeals. Affirmed.

McDowell & McDowell, of Eufaula, and George W. Peach, of Clayton, for appellant. A. H. Merrill & Sons, of Eufaula, for appellee.

BROWN, J. [1] The judgment from which this appeal was prosecuted was rendered on the 3d day of December, 1914, and while the trial judge failed to indorse on the bill of exceptions the date it was presented to him for his signature, the bill shows on its face that it was signed on the 27th day of February, or within 90 days from the day of the rendition of the judgment.

While the statement in the bill, "The said bill of exceptions having been tendered within the time prescribed by law," will not be regarded, the date of the signing being within 90 days is conclusive evidence that it was presented in time, and the motion of appel-

lee to strike the bill from the record is overruled. *Brannan v. Sherry* (Sup.) 71 South. 106.

The plaintiff, a foreign banking corporation doing business at Fort Gaines, Ga., sues for the conversion of property, claiming title to the property alleged to have been converted by the defendant through a mortgage executed by J. A. Hobbs, and duly filed for record and recorded in the office of the probate judge of Barbour county at Eufaula, Ala. The property alleged to have been converted is cotton seed produced by said Hobbs on his plantation in Barbour county, and the undisputed evidence shows that the defendant purchased the seed from Hobbs in Eufaula at its place of business.

[2] The contention of appellant is that the mortgage shows on its face that it was executed in Alabama, and, the mortgage being executed to plaintiff, a foreign corporation that had not qualified under our Constitution and statutes to do business in this state, that the fact of the execution of the mortgage by Hobbs to the plaintiff in this state was doing business in violation of the statutes, and the mortgage is void on its face, and its recordation did not operate as notice to the defendant. The further contention is made that, the mortgage being void on its face, the court erred in allowing the plaintiff to show that the entire transaction between the plaintiff and Hobbs, including the execution and delivery of the mortgage, took place in the state of Georgia.

We cannot sustain either of the appellant's contentions. The mere fact that Hobbs executed the mortgage in Alabama on property in Alabama to secure an indebtedness contracted in the state of Georgia to the plaintiff, a foreign corporation, cannot in any sense be said to be the exercise of a corporate function by the corporation in this state. The act of executing the mortgage is the act of the mortgagor, and is a mere incident to the transaction, and could not become effective until its delivery to the mortgagee.

In the recent case of *Citizens' National Bank v. Bucheit*, 71 South. 82, we had occasion to consider this question, and there held that the fact that a note was executed and delivered to an agent of a foreign corporation for an indebtedness contracted in Tennessee was not doing business by the corporation in this state in violation of the statutes. This case has recently been reviewed by the Supreme Court and affirmed. And in the more recent case of *Puffer Mfg. Co. v. Kelly*, 73 South. 403, present term, the Supreme Court holds that when an act, though done in this state, is a mere incident to the transaction of interstate commerce, it is not a violation of the statutes.

[3, 4] While the mortgage is headed "The State of Alabama, Barbour County," the signature of the mortgagor is witnessed by "W. L. Pullin, N. P., Clay County, Ga." So it

cannot be said that the mortgage shows on its face that it was executed in Alabama; and even if it did so appear on the face of the mortgage, it was permissible for the plaintiff to show that the "business was transacted" in Georgia, and that the mortgage was there executed and delivered. It has been held that:

"There is no law which prohibits a foreign corporation to make loans in the course of business done in its home state on security consisting of lands in Alabama." *American Banking, Loan & Tontine Savings Association v. Haley et al.*, 132 Ala. 185, 31 South. 88; *Collier & Pinckard v. Davis Bros.*, 94 Ala. 456, 10 South. 86; *Electric Lighting Co. of Mobile v. Rust*, 117 Ala. 680, 23 South. 751.

The evidence shows without dispute that the defendant purchased the cotton seed covered by the mortgage.

This disposes of the only questions argued by appellant.

Affirmed.

(15 Ala. App. 532)

**WESTERN UNION TELEGRAPH CO. v. MORRISON.** (2 Div. 147.)

(Court of Appeals of Alabama. Jan. 9, 1917.  
On Rehearing, Feb. 10, 1917.)

**1. TELEGRAPHS AND TELEPHONES** ¶65(2)—**NONDELIVERY OF TELEGRAM—COMPLAINT—CONTRACT—"SPECIAL DAMAGES."**

A complaint for failure to deliver a telegram announcing the illness of plaintiff's son and requesting that his other children be brought to him is not subject to demurrer because it fails to aver that if the telegram had been delivered the other children would have come, since every breach of contract imports at least nominal damages, and all general necessary damages may be proved without particular averment; the purpose of alleging "special damages," that is, such damages as are the natural and probable but not the necessary consequence of the breach, being to guard against surprise.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 55.

For other definitions, see *Words and Phrases*, First and Second Series, *Special Damages*.]

**2. PLEADING** ¶187, 362(1), 428(1) — **TRIAL** ¶255(1)—**DEMURRER—OFFICE OF—DAMAGES—SPECIAL CHARGES.**

It is not the office of a demurrer to test improper allegations concerning damages, the remedy being by motion to strike or objections to the evidence or special charges.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 400, 1147, 1154, 1155, 1433; *Trial*, Cent. Dig. §§ 627–629.]

**3. TELEGRAPHS AND TELEPHONES** ¶65(2)—**COMPLAINT—DAMAGES.**

In an action for failure to deliver a telegram announcing the illness of plaintiff's son and requesting that his other children be brought, the probability that the other children would have been brought if the telegram had been delivered is only evidence as to the special damages for mental anguish suffered, and need not be pleaded.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 55.]

**4. TELEGRAPHS AND TELEPHONES** ¶65(1)—**COMPLAINT—CONTRACT.**

A complaint for breach of contract to deliver a telegram, which alleges that the defendant in consideration of the payment to it "by

or for" plaintiff undertook to deliver the telegram, is not insufficient as implying that plaintiff was the beneficiary of the contract, not one of the parties to it.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 54.]

**5. TELEGRAPHS AND TELEPHONES** ¶73(1)—**CONTRACT—AGENCY.**

Where plaintiff instructed another to send a telegram for him, he clothed the other with authority to employ such subagents as might be necessary or proper, and it was a question for the jury whether persons participating in sending the telegram were agents of the plaintiff.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76.]

**6. TELEGRAPHS AND TELEPHONES** ¶61—**NONDELIVERY OF TELEGRAM—RIGHT TO DAMAGES—PAYMENT.**

The voluntary payment by the sender of a telegram of the charges therefor after he knew that the telegram was not delivered does not bar his remedy for the breach of the contract to deliver.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 49.]

**7. TELEGRAPHS AND TELEPHONES** ¶66(4)—**NONDELIVERY OF TELEGRAM—BREACH OF CONTRACT.**

The sender of a telegram can establish the contract to deliver it by proof that the person delivering the message to the telegraph company was acting in behalf of plaintiff as his agent or subagent, and that the company accepted it for transmission; proof of the agency of each intermediary in delivering the message to the company not being necessary.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 63.]

**8. TELEGRAPHS AND TELEPHONES** ¶74(1)—**NONDELIVERY OF TELEGRAM—INSTRUCTIONS—AGENCY.**

In an action for breach of a contract to deliver a telegram, requested charges that the jury must find for defendant, unless they found that another was agent of plaintiff in filing the telegram with defendant for transmission, were properly refused as excluding the inference from the evidence that such person was the agent of the defendant and also the inference of implied contract derived from the acceptance by the defendant of a message signed by plaintiff's name.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 77.]

**9. APPEAL AND ERROR** ¶1078(1)—**WAIVER OF ERRORS—FAILURE TO DISCUSS.**

Assignments of error not discussed in appellant's brief will be treated as waived.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4256.]

**10. NEW TRIAL** ¶128(1)—**MOTION—FORM—ERRORS OF LAW.**

A motion for new trial predicated upon errors in law should point them out.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 257.]

**11. APPEAL AND ERROR** ¶1015(5)—**REVIEW—RULING ON MOTION FOR NEW TRIAL.**

Where the affidavit in support of a motion for new trial strongly showed that the jurors rendered a quotient verdict, but one juror testifying in opposition to the motion positively denied an agreement to that effect, the appellate court cannot say that the trial court plainly erred in overruling the motion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3867–3870, 3874–3876.]

# 12. TRIAL $\S$ 815—MISCONDUCT OF JURY—QUOTIENT VERDICT.

A verdict is not bad where each juror stated the amount he found for plaintiff and the aggregate of such amounts was divided by 12 and verdict for that sum rendered, where there was no prior agreement or understanding between the jurors that they would return a verdict for the amount ascertained in that manner.

[Ed. Note.—For other cases, see Trial, Cent. Dig.  $\S$  740-742.]

## On Rehearing.

# 13. VENUE $\S$ 8—BREACH OF CONTRACT TO DELIVER TELEGRAM—"ACTION FOR PERSONAL INJURIES."

In an action for the breach of a contract to deliver a telegram, proof of the breach establishes plaintiff's right to nominal damages, after the establishment of which right damages for mental anguish may be superadded, so that the essence of the action is the right to recover nominal damages, and it is not an "action for personal injuries" within Code 1907,  $\S$  6112, requiring such actions to be brought in the county where the injury occurred or where plaintiff resided.

[Ed. Note.—For other cases, see Venue, Cent. Dig.  $\S$  17.

For other definitions, see Words and Phrases, Second Series, Action for Personal Injury.]

Appeal from Circuit Court, Hale County; B. M. Miller, Judge.

Action by N. M. Morrison against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed, and application for rehearing overruled.

The complaint is as follows:

Plaintiff claims of defendant the sum of \$1,500 damages for that heretofore, to wit, on April 4, 1914, defendant, in consideration of the payment to it by or for plaintiff of a certain sum of money, or of the liability incurred by the plaintiff to pay a certain sum of money, undertook to transmit and deliver from Moundville, Ala., to John M. Morrison, at Pell City, Ala., a message, which plaintiff caused to be delivered to it on the aforesaid date, at its office in Moundville, Ala., informing him that a son of plaintiff was at the point of death, and requesting him to bring plaintiff's children at once to Moundville; that said John M. Morrison is plaintiff's brother-in-law, and the children referred to in said message are plaintiff's son and daughter; that defendant was put on notice by the text of said message that a nondelivery of it would cause plaintiff mental anguish; that defendant breached said contract, in that defendant failed to deliver said message to John M. Morrison, and as a proximate consequence of defendant's failure to deliver said message plaintiff was deprived of the comfort and consolation of the presence of his said children at the death and burial of his said son English, and plaintiff was caused much injury to his feelings and great mental anguish by reason of the fact that he was deprived of the presence of his children, and by reason of the fact that his said children were not present at the death and burial of his said son, their brother.

The plea in abatement was as follows:

And now comes Western Union Telegraph Company, defendant in the above-styled cause, by its attorney, and appearing specially for the purpose of interposing this plea to the jurisdiction and none other, for separate plea to the complaint and to each count thereof, separately and severally, says that this court ought not to

have and maintain jurisdiction of the alleged cause of action set up therein, for the said defendant avers that the alleged cause of action therein set up, if any plaintiff has, did not arise, nor did the injury therein complained of, or the failure, if any, to deliver said message sued on occur, in Hale county, in the state of Alabama, and that plaintiff does not now, nor did he at the time of the commencement of this action, reside in said Hale county, but resides in the county of St. Clair, in the state of Alabama, in which said county defendant does business by agent, and this defendant is ready to verify. Wherefore, since the said action is brought for a personal injury within the meaning of section 6112 of the Code of Alabama (1907) in a county other than the county in which plaintiff resides, or the injury occurred, the said Western Union Telegraph Company prays the judgment of this circuit court, if said court will or ought to have further cognizance of said action.

On motion for new trial, Thomas E. Knight, one of the attorneys for defendant, made an affidavit relative to the quotient verdict in substance as follows: That the verdict was received in the courtroom by 10 o'clock p. m., and that, within about 20 minutes thereafter, affiant went into the jury room where the jury had been considering their verdict in this case, and in said room found 12 separate slips of paper, wrapped in a single slip of paper; that on the 12 separate slips was entered an amount expressed in figures, and, on the slip in which the separate slips were wrapped, the 12 separate amounts were entered, and the total was ascertained, and this total was divided by 12, and the quotient therefrom was expressed in figures \$808; that that was the only verdict for that amount that had ever been rendered in that court since the present courthouse was constructed; and that the entry of the 12 separate amounts upon the single slip of paper, the addition, and the division was in the handwriting of one of the jurors trying the case, i. e., one W. J. Stevenson.

The following charges were refused to defendant:

Assignments 17 and 19 embrace charges 3 and 5, and were the affirmative charges.

Assignment 15, embracing refused charge 1: The court charges the jury that under the evidence in this case they cannot award plaintiff any damages for mental suffering.

Assignment 16, embracing charge 2: Same as 1.

Assignment 18, embracing charge 4, same as 1.

Charge 6: The court charges the jury that if they are reasonably satisfied from the evidence in this case that plaintiff ascertained that the telegraph to said John M. Morrison had not been delivered at Pell City, and that thereafter plaintiff paid defendant's agent charges for the transmission of said telegram, then such payment by plaintiff was voluntary on the part of plaintiff, and he cannot in this action recover damages for mental anguish or pain.

Assignment 21, charge 7: The court charges the jury that unless they are reasonably satisfied from the evidence in this case that said Jordan Ramey was acting as agent of plaintiff in telephoning in said message to the agent of the Postal Telegraph Company at Moundville, Ala., and that the agent of the Postal Company, after getting said message, was the agent of

plaintiff in filing said message for transmission with defendant, then the jury must find the issue in favor of defendant.

Assignment 24, charge 10: Unless the jury are reasonably satisfied from the evidence in this case that said B. F. Elliott in writing said telegram at Moundville was acting as the agent of plaintiff, then the jury must find the issues in this case for the defendant, notwithstanding the fact that the jury may find from the evidence that, some days after the telegram had been transmitted from Moundville, plaintiff paid defendant's agent at Moundville the charges for the transmission of said telegram.

Assignment 25, charge 11: The court charges the jury that, if they believe from the evidence that said telegram was intended for the benefit of plaintiff and his two children, they must find a verdict for defendant, unless the jury also believe from the evidence that in filing said telegram by said Jordan Ramey and George B. Pickens, with defendant for transmission to said John M. Morrison, said Ramey and Pickens were acting as agents of plaintiff.

Assignment 28, charge 14: Unless you are reasonably satisfied from the evidence in this case that said Ramey, Elliott, and Pickens were each successively the agent of plaintiff in filing said message with defendant for transmission, then your verdict must be for defendant.

Assignment 30, charge 16: The judgment must be for defendant in this cause, unless the jury are reasonably satisfied from the evidence that said Ramey and Pickens were the agents of plaintiff in filing said telegram with defendant for transmission, or unless they are reasonably satisfied from the evidence that said telegram was intended for the sole benefit of plaintiff.

Assignment 22, charge 8: If you believe from the evidence in this case that the telegram in question was intended for the benefit of plaintiff, and of his two children, then the jury must find for defendant, unless the jury are reasonably satisfied from the evidence that said agent Pickens was the agent of plaintiff in filing said message with defendant for transmission to said John M. Morrison.

Assignment 23, charge 9: Practically same as 8.

Assignment 26, charge 12: If you believe from the evidence in this case that plaintiff made a trip to Pell City after the death of his son, and that he there found out that the telegram in question had never been delivered to said John M. Morrison, and that thereafter, with knowledge of the facts that said telegram had not been delivered if the jury should find such to be the facts, plaintiff paid charges to defendant's agents at Moundville for the transmission of said telegram, then the jury must find the issue in favor of defendant.

Assignment 27, charge 13: If you are reasonably satisfied from the evidence in this case that plaintiff did not pay defendant or defendant's agent at Moundville any money as charges for the transmission of said telegram until after plaintiff had made a trip to Pell City, and had found out that the telegram had not been delivered, then such payment was voluntary on the part of plaintiff, and plaintiff cannot recover of defendant in this action any amount of money for mental anguish.

The telegram was as follows:

To John B. Morrison. Come at once, August now almost dead. Bring the children. Norman Morrison.

Forney Johnston and W. B. C. Cocke, both of Birmingham, Thomas E. Knight, of Greensboro, and Albert T. Benedict and Francis R. Stark, both of New York City, for appellant. Smith & Morrow, of Birmingham,

Edward de Graffenried, of Tuscaloosa, and Evins & Jack, of Greensboro, for appellee.

EVANS, J. Appellee (plaintiff below) instituted his action to recover damages for failure to deliver a telegram sent to his brother-in-law from Moundville, in Hale county, to Pell City, in St. Clair county, advising that appellee's son was at the point of death and requesting sendee to bring appellee's children to Moundville. The action was *ex contractu*.

The complaint contained but one count, which the Reporter will set out. The message was of such character as to advise appellant that mental pain and anguish might ensue from a breach of the contract. A plea in abatement was timely interposed, challenging plaintiff's right under the venue statute (section 6112, Code 1907) to institute his action in Hale county, inasmuch as plaintiff was a resident of St. Clair county and the default or failure to deliver said message occurred also in St. Clair county. The trial court sustained demurrers to the plea; and even if it be conceded that the demurrers should have been overruled, as the plea contained appropriate averments as to plaintiff's residence and the company's business in St. Clair county, and also a denial that the "injury occurred" in Hale county, yet the plea could not have been sustained under the facts of the case as we interpret section 6112; and the ruling upon demurrer, though erroneous, was innocuous. *Going, pro ami, v. Ala. Steel & Wire Co.*, 141 Ala. 537, 37 South. 784.

[1-3] We think the complaint sufficient to withstand the attack of the demurrers, and the ruling of the trial court thereon was not erroneous. Some of the demurrers were inapt as applied to an action *ex contractu*, and others were general. The question of agency between the plaintiff and the person actually sending the telegram for plaintiff is not specifically raised by demurrer; and, while we do not express an opinion as to whether such a demurrer would be well or ill taken, we are of the opinion that the complaint was good as against the demurrers filed. One ground of demurrer argued challenges the sufficiency of the complaint because it failed to aver that plaintiff's children could or would have been present at the death and burial, had the telegram been promptly delivered; and counsel cite in support thereof a recent opinion by this court. *Western Union Tel. Co. v. Hawkins*, 70 South. 12. A suit *ex contractu* setting up the contract and showing the breach counted on is sufficient as against demurrer, for every breach of a contract imports nominal damages in the absence of proof of actual damages, and all general or necessary, as contradistinguished to special damages, may be proved without particular averment for defendant is presumed to have notice that such are claimed; the purpose of particularity in the averment or claim of special damages—1.

e., such as are the natural and proximate, though not the necessary consequence of the breach—is to put defendant on notice that such will be claimed at the trial and prevent surprise. It is not the office of a demurrer to test damages improperly claimed; the count should rather be purged by motion to strike, or objections to the evidence, or be limited through charges to reach such vice. Ala. Gt. Son. R. R. Co. v. Tapla, 94 Ala. 226, 10 South. 236; L. & N. R. R. Co. v. McCool, 167 Ala. 644, 52 South. 656; Treadwell v. Tillis, 108 Ala. 262, 18 South. 886; B'ham, Ry. Lt. & P. Co. v. Tate, 7 Ala. App. 517, 61 South. 32. Good pleading requires that the ultimate facts and not evidential facts be presented for issue. Here the question of whether the children could not or would not have attended the death bed and funeral, which the demurrer would compel as a necessary averment of the complaint, has only a probative or evidential bearing upon the proof of plaintiff's case, to wit, the proximate cause of the special damages for mental anguish. The holding in Western Union Tel. Co. v. Hawkins, supra, in so far as it conflicts with the views herein expressed, is overruled.

Code, § 6112, reads:

"A foreign or domestic corporation may be sued in any county in which it does business by agent; but all actions for personal injuries must be brought in the county where the injury occurred, or in the county where the plaintiff resides, if such corporation does business by agent in the county of plaintiff's residence."

The questions then arise: (1) Was this ex contractu action one for "personal injuries," within the meaning of said section; and, (2) where did the "injury occur," within the meaning of that phrase as used in said section?

In Hatcher v. South. Ry. Co., 191 Ala. 634, 68 South. 55, which was an action ex delicto for the breach of duty in the carriage of a passenger, the court had this section before it and there said:

"The argument for appellant in support of the first-stated contention necessarily resolves itself into the affirmation of the proposition that a 'personal injury,' to come within the purview of section 6112, must be a direct physical hurt to the body. This court, in the case of Garrison v. Burden, 40 Ala. 513, 515, 516, while interpreting the phrase 'injuries to the person,' in the statute governing the survival of actions—a phrase at least susceptible of an interpretation more favorable to the appellant's view of the proper meaning of the words 'personal injuries' in section 6112—it was expressly ruled that the signification and effect of the phrase could not be restricted to 'direct physical hurts to the body of a person.' The soundness of the stated doctrine of the cited decision has been particularly recognized in Long v. Booe, 106 Ala. 570, 17 South. 716. The like doctrine was reiterated and illustrated in the case of Jefferson Fertilizer Co. v. Rich, 182 Ala. 633, 62 South. 40. It is well and generally settled, we think, that injuries to the person or personal injuries comprehend mental distress, annoyance, inconvenience, humiliation, and such other manifestations of disturbed or perturbed feelings as ordinary persons are supposed to be subject to. The following authorities may, in

that connection, be read with interest and profit: Sou. Ry. Co. v. Hobson [4 Ala. App. 408] 58 South. 751; Morton v. W. U. T. Co., 130 N. C. 299, 41 S. E. 484; W. U. T. Co. v. Kauffman (Tex. Civ. App.) 107 S. W. 630; McKenzie v. Doran, 39 Mont. 593, 104 Pac. 677; Johnson v. Bradstreet, 87 Ga. 79, 13 S. E. 250; McDonald v. Brown, 23 R. I. 546, 51 Atl. 213, 58 L. R. A. 768, 91 Am. St. Rep. 659; Hutcherson v. Durden, 118 Ga. 987, 39 S. E. 495, 54 L. R. A. 811; State v. Ross, 24 N. D. 586, 139 N. W. 1051; Riddle v. MacFadden, 201 N. Y. 215, 94 N. E. 644. We do not think the question is debatable."

The question then recurs: Since the plaintiff elects to waive the tort and sue for the breach of the contract, does he ipso facto so alter his action that it cannot be said to be one for "personal injuries"? In other words, what stamps the action as one for "personal injuries," the form or the subject-matter?

The intrinsic, substantive nature that inheres in the right of action cannot be lost sight of because the fancy of the pleader, electing between the concurrent remedies of assumpsit and case, prefers to present his grievance in the garb of the former rather than the latter. If this be not true, then the pleader could choose his venue at will, the statute to the contrary notwithstanding; so the court will have regard to the substance rather than the form to ascertain whether the action be one for "personal injuries" as that phrase is used in said section 6112.

Assuming then the action sub judice to be one for "personal injuries," did the "injury occur" in Hale county, in the sense that that phrase is employed in section 6112?

This section brings forward in the Code 1907 the amendatory venue act relating to personal injury suits enacted March 5, 1903 (Acts 1903, p. 182), and the then and prior existent general venue statute (section 4207, Code 1896) has been brought forward and codified in the present Code as section 6112. These two statutes, being in pari materia, should be construed together. Section 6110 reads:

"All actions on contracts, except as may be otherwise provided, must be brought in the county in which the defendant, or one of the defendants, resides, if such defendant has within the state a permanent residence; all other personal actions, if the defendant, or one of the defendants, has within the state a permanent residence, may be brought in the county of such residence, or in the county in which the act or omission complained of may have been done, or may have occurred. All actions for the recovery of land," etc.

Just what was in the legislative mind in using the phrase "where the injury occurred" in section 6112 is not altogether clear or free from difficulty. At common law, personal actions were transitory and might be brought wherever service could be had upon the person. Our venue statutes, being in derogation and abridgment of this privilege, are not to derive anything by way of intentment so as to be extended beyond the express enactment of the legislative will.

Ordinarily, the paramount consideration in



determining the place to institute suit is: Where did the cause of action arise, i. e., where did the unlawful act or omission take place? The word "injury" in a technical sense ordinarily signifies a tort and is defined by Bouvier as "a wrong or tort," and of similar import is 22 Cyc. 1064. "Injury" implies an unlawful invasion of one's rights, and hence imports at least nominal damages. The words "injury" and "damage" are not infrequently confounded and used loosely as synonymous or interchangeable, whereas in strictness they are widely variant, bearing to one another the relation of cause and effect; the *injuria* being the unlawful invasion of one's rights or property, whereas the *damnum* is the extent or measure of that invasion. So that, if technical significance be given the words of the statute, "where the injury occurred," it would refer to a tort and mean where the cause of action arose; in the instant case meaning the default in delivery of the message, which was in St. Clair county.

But we are of the opinion that when the Legislature employed the phrase "injury occurred," in section 6112, it did not have in contemplation or intend the technical signification of that phrase, drawing the distinction above indicated; but rather employed it loosely in the popular sense of where the damage occurred or "accident" took place. This interpretation is in a measure superinduced and fortified by reference to section 6110, Code 1907 (section 4205, Code 1896). It will be observed that this section, before the amendment in section 6112, fixed and controlled the venue for all personal actions—tort and contract—fixing the venue (1) in both tort and contract actions at the residence of the defendant (or one of the defendants), and (2) in cases of tort "in the county in which the act or omission complained of may have been done, or may have occurred."

One of the changes wrought by the amendment reversed the condition as to residence, providing that actions for personal injuries be brought in the county of the plaintiff's instead of defendant's residence; the other, that suit be brought "in the county where the injury occurred," instead of "in the county in which the act or omission complained of may have been done, or may have occurred." Had the Legislature no intention to legislate upon any other subject except the plaintiff's or defendant's residence, undoubtedly the amendment would have related only to that phase of the matter; but it is significant that the amendment also fixed the venue where the "injury occurred," instead of employing the language of the old statute, "where the act or omission occurred."

We doubt not that the unusual or anomalous condition ever occurred to the legislative mind that the act or omission might occur in one county and the damages proximately flow therefrom in another, but rather that the *injuria* and *damnum* were regarded as so in-

timately interwoven and correlated as to be coincident in locality.

In giving effect and operation to the legislative intent, instances will readily occur to the mind where it would be difficult, if not impossible, to localize the damages, as might readily be done with regard to the tort or cause of action, e. g., the mental anguish of the sender of a death message might be suffered in a half dozen counties by reason of the deprivation of comfort and consolation on a funeral train, or where an express messenger contracted pneumonia on his route because of failure or negligence in heating of his car. It would be quite a difficult, if not impossible, thing to say that the messenger contracted his cold in one county rather than another; so that, where the damage is suffered in more than one county, the plaintiff may bring his action in any county in which he suffers damage, electing in which he will sue.

We do not consider the effect of section 232 of the Constitution upon the venue in this case; for aught that appears from the pleadings, the appellant may be a domestic corporation, construing the complaint most strongly against the pleader. It follows from what we have said that, since appellee suffered damage in Hale county and was a resident of St. Clair county, either forum was open to him.

A review of the several assignments of error relating to the testimony does not, we think, disclose prejudicial error.

[4] It is argued that the complaint fails to show a contractual relation between the parties to the suit, because the averment is that:

"The defendant in consideration of the payment to it by or for the plaintiff of a certain sum of money or of the liability incurred by the plaintiff to pay a certain sum of money undertook," etc.

In other words, that the complaint is no stronger than its weakest alternative averment, and non constat if money was paid "for" the plaintiff he may be a stranger to or beneficiary of the contract and perchance not the sole beneficiary, and predicated on this supposed absence of a contractual relation a number of refused charges were asked and are now assigned as error.

[5] While the complaint may be said to be somewhat inartificially drawn, it is not open to the criticism directed against it, for its meaning is certain to a common intent and it would be a strained and unreasonable construction that would infer plaintiff to be a beneficiary and not a party to the contract. Plaintiff's testimony showed that he was a mile or mile and a half out of Moundville in Hale county at the bedside of his son. When the son was at the point of death, plaintiff instructed one H. J. Dockery to send the telegram in question. In order to send the message, Dockery had to employ the telephone and also enlist the services of one or



two other people to get the telegram to appellant's office; and on the question of the agency of these intermediaries certain of the refused charges are predicated. Suffice it to say that, when the appellee instructed Dockery to send the telegram, he clothed him with such authority as to means and instrumentalities as might be necessary or proper to effectuate the purpose of having appellant receive and send the message. The relation of principal and agent does not depend on express appointment and acceptance, but it may be implied from the words and conduct of the parties and the circumstances of the case. 31 Cyc. 1217. Then, too, appellee might have ratified and confirmed what his agent Dockery did. However, these questions of agency and contract were for the jury.

[6-8] We have carefully reviewed appellant's written requests for charges. Under the issues and tendencies of the testimony charges embraced within assignments 17 and 19 were properly refused, being requests for the general affirmative charge. Charges embraced within assignments 15, 16, and 18, were also properly refused, being invasive of the province of the jury. Charge No. 6 embraced in assignment 20 was properly refused as misleading and invasive under the complaint as framed, for, if a valid contract was made and appellee had "incurred liability" for the fee or toll, its voluntary payment would not relieve the defendant from liability for breach of the contract. Charges embraced within assignments 21, 24, 25, 28, and 30, were properly refused, because there was no requirement upon the plaintiff that he should, in order to sustain his action, show a successive line of agencies or subagencies operating through the several parties or intermediaries assisting in delivering the message to the defendant company for transmission. It was enough if the proof showed that the person delivering the message to the defendant company was acting in behalf of plaintiff as his agent or subagent, and that the defendant company accepted it for transmission. Charges embraced within assignments 22 and 23 were properly refused, because they predicated nonliability unless the jury found that the contract was made for the sole benefit of plaintiff or that Geo. B. Pickens was agent of plaintiff, and non constat the evidence afforded an inference he might have been defendant's agent in receiving the message, which would have fastened liability upon the defendant upon its subsequent acceptance for transmission; and, further, because it pretermits consideration of all question or inference of an implied contract to be derived from the company's acceptance of a telegram signed in the name of plaintiff.

Assignments 26 and 27: The voluntary payment of the consideration after the breach of the contract did not relieve the defend-

ant from liability for damages resulting from a breach of contract.

[9] Assignments Nos. 29, 31, 32, 33, 34, and 35, will be treated as waived, as they are not discussed in appellant's brief.

[10] A motion for a new trial predicated upon errors in law should point them out. *Moneagle & Co. v. Livingston*, 150 Ala. 562, 43 South. 840; *Ewart Lumber Co. v. American Cement Plaster Co.*, 9 Ala. App. 152, 62 South. 560; *Ala. Mid. Ry. Co. v. Brown*, 129 Ala. 282, 29 South. 548; *Winter & Loeb v. Judkins*, 108 Ala. 259, 17 South. 627.

[11, 12] A verdict and judgment was had for \$808; but upon the motion for a new trial appellee entered a remittitur of \$308, thus reducing the amount to \$500. A further insistence of the motion for a new trial is that the jury arrived at its verdict illegally, i. e., by means of a quotient verdict. A reading of the affidavit of Thomas E. Knight, of counsel for defendant, would very strongly convince one that such was the case; but one of the jurors testified in opposition to the motion and very positively denied that any agreement or understanding was entered into by the jury, and that, on the contrary, it was explained or mentioned in the jury room that such an agreement would vitiate the verdict. He did testify, however, that the amounts were set down by each juror and then the aggregate was divided by 12 to ascertain the quotient; but the juror testified that it was understood that this procedure should not be binding upon any of the jury, and, in fact, thereafter the matter was further discussed for some time before rendering the verdict. The test is a preconceived understanding or agreement to abide the result; and, as the trial judge heard the testimony, we are unable to say that he plainly erred in his conclusion upon the motion. *B'ham, Ry. Lt. & P. Co. v. Moore*, 148 Ala. 115, 42 South. 1024.

After careful consideration of this record, we find no reversible error, and the judgment of the trial court is affirmed.

Affirmed.

#### On Rehearing.

BROWN, J. [13] On the original consideration of this case, the writer entertained the view that the demurrers to the defendant's plea in abatement were properly sustained, and hence concurred in the conclusion that the judgment should be affirmed. The reasons impelling this conclusion are that the cause of action declared on is the breach of a contract, and the plaintiff's right of recovery is dependent upon his right to recover damages separate and distinct from such as may have resulted from mental anguish. *Blount v. W. U. T. Co.*, 126 Ala. 105, 27 South. 779; *W. U. T. Co. v. Krichbaum*, 132 Ala. 535, 31 South. 607. When the plaintiff establishes his right to recover damages for the breach of the contract, though it be only nominal damages, then damages for mental

pain and anguish "may be superadded." *Blount v. W. U. T. Co.*, supra; *W. U. T. Co. v. Rowell*, 153 Ala. 295, 45 South. 73.

This being true, the right to recover nominal damages in this case is the sine qua non of the cause of action; and the suit is, in theory and substance, an action on contract, and not an action for personal injuries within the meaning of section 6112 of the Code. The Constitution (section 232) fixes the venue of suits against foreign corporations that have qualified to do business in this state in this language: "Such corporation may be sued in any county where it does business."

The other members of the court concur in these views, and the application for rehearing is overruled.

Application overruled.

(15 Ala. App. 546)

**WESTERN UNION TELEGRAPH CO. v. ROYAL.** (3 Div. 237.)

(Court of Appeals of Alabama. Dec. 19, 1916. Rehearing Denied Jan. 12, 1917.)

**1. TELEGRAPHS AND TELEPHONES §73(2) — NONDELIVERY OF TELEGRAM—QUESTION FOR JURY—STIPULATION—CONTRACT.**

Where the telegram offered in evidence, which was written on a blank containing the stipulation against delivery outside a half-mile limit relied on by the defendant, was not positively identified as the original telegram which defendant undertook to transmit, and the only other evidence on that issue was the testimony of defendant's agent, which did not prove the stipulation literally as pleaded, nor show that the blanks referred to in his testimony contained the stipulation, the court could not say as a matter of law that the stipulation was part of the contract, but that was a question for the jury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76.]

**2. TELEGRAPHS AND TELEPHONES §73(1) — NONDELIVERY OF TELEGRAM — EVIDENCE — CUSTOM.**

In an action for failure to deliver a telegram, where the defense was that the addressee lived outside the limits within which the defendant undertook to deliver, evidence as to a custom for defendant to deliver outside those limits if it knew the residence of the addressee held sufficient to justify the refusal of the affirmative charge.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76.]

**3. TELEGRAPHS AND TELEPHONES §68(3) — NONDELIVERY OF TELEGRAM—LIABILITY FOR MENTAL ANGUISH — KNOWLEDGE OF COMPANY.**

Where a telegram company failed to deliver a telegram announcing that the sender would go to attend his son's funeral, after transmitting other telegrams which informed the company of the situation, its liability for the mental anguish caused by failure to attend the funeral is not defeated by the fact that the funeral was held, because of failure to hear from plaintiff, at an hour earlier than that stated in one of the delivered telegrams, since the company could not rely on the stated time for the funeral or assume that it would not be changed.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 70.]

**4. TELEGRAPHS AND TELEPHONES §74(1) — REQUESTED CHARGE—IGNORING ISSUES.**

In an action for failure to deliver a telegram, where the replication alleged a custom to deliver telegrams beyond its free delivery limit, a requested charge, that it was not the duty of defendant's agent to know the residence of parties living outside the delivery limits, was properly refused as ignoring the issue as to the custom.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 77.]

**5. TELEGRAPHS AND TELEPHONES §74(1) — REQUESTED CHARGE—IGNORING ISSUES.**

In an action for failure to deliver a telegram, where the plea set up a stipulation of the contract as contained in the blank on which the message was written against delivery outside certain limits, and a special replication thereto alleged a custom to deliver outside those limits, a requested charge that, if the operator in writing out the message on one of the blanks did so as the agent of the sender, the jury could not find for plaintiff, was properly refused.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 77.]

Appeal from Circuit Court, Montgomery County; W. W. Pearson, Judge.

Action by J. O. Royal against the Western Union Telegraph Company for damages for delay in the delivery of a telegram. Judgment for the plaintiff, and defendant appeals. Affirmed.

A telegram dated at Sprague, Ala., and addressed to A. B. Perdue at Hartford, Ala., "Will leave here in the morning for Hartford," was not delivered in a reasonable time. The complaint avers further that several telegrams had passed between the parties relative to the illness and death of plaintiff's son at Hartford, and that the telegram above set out was sent in order that Perdue might know that plaintiff was coming, and so delay the funeral until plaintiff could arrive; that all the telegrams were handled by the same operator, both at Sprague and at Hartford; and that defendant knew or had notice that a failure to deliver said telegram within a reasonable time would probably result in great grief and mental anguish to plaintiff.

The substance of plea 3 appears in the opinion. The replication to plea 3 was that, at the time said telegram was received by defendant at its Hartford office, it was the custom of defendant to deliver telegrams beyond the free delivery limit established by said defendant for the government of the Hartford office, and within limits within which said A. B. Perdue resided without requiring any previous request for the payment of any extra charge on the part of the sender. The oral charge of the court in this connection is as follows:

"If you reasonably find from the evidence here that Perdue lived three-quarters of a mile from the office, and that it was customary on the part of defendant to deliver messages of this sort free of charge, free of extra charge, within a radius of three-quarters of a mile, then the fact that the house was beyond the half-mile limit would not be a defense in this case."

It appears that the original hour of the funeral was 2 p. m., but that the funeral was changed and had at 10:30 a. m.; Perdue testifying that the funeral was changed because his brothers had come in during the night, and they were not expecting his father, as we had not then heard from him. The funeral was held on the 10th, the day following the filing of the telegram referred to.

The following charges were refused to defendant:

(2) If the jury believe the evidence in this case, they must not award plaintiff any sum on account of any mental pain or anguish that you may find from the evidence that plaintiff suffered by reason of the acts or omissions of defendant mentioned in the complaint.

(5) While, under the law, it was the duty of defendant's manager at Hartford to know the residence of those living within one-half mile of defendant's office there, it was not his duty to know the residence of parties living outside those limits.

(4) If you believe from the evidence in this case that the operator Johnson, in writing out the message on one of defendant's blanks, did so as the agent of Royal, the sender, you cannot find a verdict for plaintiff.

Rushton, Williams & Crenshaw, of Montgomery, for appellant. Hill, Hill, Whiting & Stern, of Montgomery, for appellee.

BROWN, J. [1] The telegram offered in evidence, dated, "Sprague, Ala., July 9, 1914," purporting to have been written on a blank containing the stipulation set up in the defendant's special plea 3, to wit:

"Telegrams will be delivered free within one-half mile of the company's office in towns of 5,000 population or less. Beyond these limits the company does not undertake to make delivery, but will without liability, at sender's request, as his agent and at his expense, endeavor to contract for him for such delivery at a reasonable price"

—was not positively identified as the original telegram which the defendant undertook to transmit and deliver for the plaintiff. The telegram not being positively identified as the original, its identity was left to inference, and hence was a question for the jury. The only other evidence touching the subject as to what the blanks used by the defendant contained was that of the defendant's agent Quillian, whose testimony does not prove literally the stipulation as pleaded; nor does his testimony show that the blanks referred to in his testimony contained the statement that the telegram had been taken by the telegraph company subject to the stipulation as averred in the plea. Therefore the court could not say, as a matter of law, had there been no replication to this plea, that the defense set up was sustained by the undisputed evidence.

[2] Furthermore, there was some evidence tending to sustain the plaintiff's special replication to the defendant's special plea 3. The defendant's agent, who testified that he had been in its employ for 20 years, further

testified to facts tending to show that it was a custom for the defendant's agent to deliver messages at Hartford outside of the free delivery limits when the residence of the sendee was known, and without extra charge; and the fact that the undisclosed purpose of the agent was for the accommodation of the patrons of the company would not change the effect of this evidence under the issues formed in this case. What we have said justified the court's refusal of the affirmative charge requested by the defendant, and in giving the instructions in the oral charge to which an exception was reserved.

[3] We cannot agree with the contention of appellant that the fact that the hour for the funeral service was changed without notice to it relieved it of liability for damages for mental anguish suffered by the plaintiff, when, if the message had been promptly delivered, the hour for the funeral might not have been changed and the damage averted.

The contract for the transmission of the telegram from Perdue to Royal, which was promptly transmitted and delivered, advising Royal of his son's death and the time fixed for the funeral, and the one with Royal for transmission and delivery of the telegram from Royal to Perdue advising when Royal would embark on his journey, were two separate and distinct transactions; and, while the fact of the sending of the first message was admissible as evidence showing that Royal's presence was desired at the funeral, it cannot be made a predicate to excuse the defendant's negligence in failing to promptly transmit and deliver the telegram from Royal to Perdue. When the defendant accepted this telegram, the contract which the law implies from the transaction imposed on it the duty to promptly transmit and deliver it to the sendee. It had no right to rely on the fact that the funeral was not to take place until 2 o'clock, or assume that the time would not be changed. As we have said, the fact that Perdue sent the first telegram to the plaintiff was evidence that his presence at the funeral was desired and clearly authorized the jury to draw an inference that the time of the funeral would not have been changed if the defendant had promptly transmitted and delivered the telegram in question. Charge 2 was therefore refused without error.

[4] Charge 4 ignores the issues presented by the special replication, and was properly refused.

[5] There was no error in refusing charge 5. *W. U. T. Co. v. Hawkins*, 70 South. 15, is overruled in *W. U. T. Co. v. Morrison*, 74 South. 88.

No error appearing in the record, the judgment is affirmed.

Affirmed.

(15 Ala. App. 550)

ROGERS et ux. v. WHITTLE. (7 Div. 390.)

(Court of Appeals of Alabama. Jan. 9, 1917.)

## 1. DETINUE ¶6—NATURE.

The gist of the action of detinue is the wrongful detention of the property of plaintiff by defendant.

[Ed. Note.—For other cases, see Detinue, Cent. Dig. §§ 10, 11.]

For other definitions, see Words and Phrases, First and Second Series, Detinue.]

## 2. DETINUE ¶5—TITLE AND POSSESSION.

To recover in detinue, plaintiff must not only show general or special property in the chattel, but he must be entitled to immediate possession.

[Ed. Note.—For other cases, see Detinue, Cent. Dig. §§ 5-9.]

## 3. JUDGMENT ¶235—ON TRIAL OF ISSUES—JUDGMENT FOR ONE OR MORE CO-PARTIES.

Where two parties join as plaintiffs in an action at law, both must be entitled to recover or neither can recover.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 414, 429.]

## 4. PLEDGES ¶26—RIGHT TO POSSESSION OF PLEDGED PROPERTY.

A written pledge recognizing pledgee's rightful possession of property delivered thereunder confers upon him the right to retain such possession as against the pledgor, if its terms are not breached.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 64-66.]

## 5. DETINUE ¶5—RIGHT TO POSSESSION—JOINT PLAINTIFFS.

Where a pledgee in possession of property is entitled to its possession as against one of two joint owners, the joint owners cannot recover the property in detinue.

[Ed. Note.—For other cases, see Detinue, Cent. Dig. §§ 5-9.]

## 6. WITNESSES ¶379(1)—IMPEACHING CREDIBILITY—INCONSISTENT STATEMENTS.

Where plaintiff in detinue testified as to value of the property, defendant could show on cross-examination that plaintiff had made a contradictory statement as to its value, in order to impeach plaintiff's credibility.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1209, 1247.]

## 7. CHATTEL MORTGAGES ¶82—CONSIDERATION.

The guaranty by third party of payment of rent by mortgagee of chattels if the mortgagor would give a mortgage to secure the payment of his debt already incurred to such mortgagee was sufficient consideration to sustain the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 78-82.]

## 8. EVIDENCE ¶215(1)—ADMISSION—MORTGAGE—EXISTING DEBT.

Even if a mortgage for a debt already incurred be regarded as without consideration, it is competent evidence as an admission by the mortgagor of the indebtedness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 754.]

## 9. TRIAL ¶84(1)—OBJECTION TO EVIDENCE—SCOPE.

The specification of objection to the admission of evidence that it is "irrelevant, illegal, and immaterial" is a waiver of all other grounds.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 211-213, 220, 221.]

## 10. EVIDENCE ¶596(1)—DEGREE OF PROOF REQUIRED.

The measure of proof necessary to determine an issue in civil trials is that the jury must be reasonably satisfied from the evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2446.]

## 11. APPEAL AND ERROR ¶1064(1)—HARMLESS ERROR—INSTRUCTION.

A judgment will not be reversed because a charge given for appellee on degree of proof required to establish his case was not technically correct, where it was, at most, calculated to mislead.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219; Trial, Cent. Dig. §§ 525, 553.]

Appeal from Circuit Court, De Kalb County; W. W. Haralson, Judge.

Detinue by Z. D. Rogers and wife against Joe Whittle for the recovery of certain personal property, restaurant fixtures. Judgment for defendant, and plaintiffs appeal. Affirmed.

The testimony of Rogers was that he rented the fixtures to Whittle at a rate of \$3 per month for the first month, and that Whittle was to pay \$5 the succeeding months. That Whittle paid the first \$3, and on the next month paid only \$3, when he told him he would have to come up on the rent, and that later Whittle came to him and told him he could not pay rent, but offered to give plaintiff credit on the notes that plaintiff was due Whittle, when plaintiff told him that the note was not yet due, and that he would have to have his rent. Rogers had executed Whittle a note for \$100, payable November 15, 1914, and in connection with the note executed to Whittle a chattel mortgage on the restaurant fixtures in question. The testimony as to the note was as follows:

Whittle went to Rogers, and said to him: "I want you to do something for me." And witness said: "What do you want me to do?" And Whittle and Judge Crowley went off and talked a while, and they came back, and Judge said: "Now, Doc, we want a mortgage for better security on this note; I will stay on it." Rogers then asked Whittle where the note was, and Whittle replied that he did not know, and Rogers said to Whittle: "Get up this note, and I will give you the mortgage." The mortgage was prepared, and I signed it, and Judge Crowley said he would vouch for the rent.

The evidence was in conflict as to whether the property was that of Rogers or of Rogers and his wife. Mrs. Rogers did not sign the mortgage or the note. The charge referred to as given at the instance of defendant was as follows:

If you believe from the evidence reasonably that defendant was to retain the property until the mortgage debt was paid, and you further find that the mortgage debt had not been paid, your verdict should be for defendant.

W. U. Jacoway, of Ft. Payne, and E. O. McCord, of Gadsden, for appellants. Hunt & Wolfes, of Ft. Payne, for appellee.

BROWN, J. [1-3] The gist of the action of detinue is the wrongful detention of the property of the plaintiff by the defendant; and to entitle the plaintiff to recover he must not only show general or special property in the chattel, but he must be entitled to the immediate possession. *Salter v. Pearce*, 4 Ala. 669; *Oliver v. McClellan*, 21 Ala. 675; *Reese v. Harris*, 27 Ala. 301. And where two parties join as plaintiffs in an action at law, both must be entitled to recover or neither can recover. *McLeod v. McLeod*, 73 Ala. 42; *McCall v. Jones*, 72 Ala. 373; *Lovelace v. Hutchinson*, 106 Ala. 425, 17 South. 623; *Prestwood v. McGowin*, 128 Ala. 277, 29 South. 386, 86 Am. St. Rep. 136; *Kelly v. Kelly et al.*, 9 Ala. App. 306, 63 South. 740.

[4, 5] While the evidence on the part of the plaintiffs shows that the property was the joint property of the plaintiffs, that offered by the defendant tended to show that the plaintiff Z. D. Rogers had pledged the property to secure a debt due from him to the defendant, and for this purpose the property was delivered to the defendant, with the agreement that defendant would pay a stipulated sum per month as rent therefor; that this pledge was subsequently embodied in a writing recognizing the defendant's rightful possession of the property. This pledge, if its terms were in no way breached, conferred upon the defendant the right to retain the possession of the property pledged, as against the pledgor, Z. D. Rogers. *Noles v. Marable*, 50 Ala. 366; *Bryan v. Smith*, 22 Ala. 534; *Snellgrove v. Evans*, 145 Ala. 600, 40 South. 567; 35 Cyc. 787. The defendant being entitled to the possession against Z. D. Rogers, the joint owner with Z. D. Rogers could not maintain an action of detinue for the recovery of the property. *Smith v. Rice*, 56 Ala. 417. What we have said is sufficient to show that proof of the indebtedness due from Rogers to the defendant was competent.

[6] The plaintiff Rogers testified as to the value of the property, and it was competent for the defendant to show on cross-examination of Rogers that he had made a contradictory statement as to its value. This evidence was admissible for the purpose of impeaching the credibility of the witness.

[7-9] The obligation of Judge Crowley guaranteeing the payment of the rent by Whittle if Rogers would give the mortgage was a sufficient consideration to sustain the mortgage, if any other consideration than the debt which it secured was necessary. Furthermore, conceding that the mortgage was without consideration, the paper was an admission by Rogers of the indebtedness, and was competent evidence. The ground of objection specified was that the paper was "irrelevant, illegal, and immaterial." This was a waiver of all other grounds. *McDaniel v. State*, 97 Ala. 14, 12 South. 241.

[10, 11] The rule as to the measure of proof

necessary to determine an issue in civil trials is that the jury must be reasonably satisfied from the evidence (*L. & N. R. R. Co. v. Sullivan & Co.*, 128 Ala. 103, 27 South. 760); and while the charge given at the instance of the defendant is not technically a correct statement of the rule, we are of opinion that the charge was, at most, calculated to mislead, and could have been properly refused. However, the judgment will not be reversed for giving the charge. *Daniel v. Bradford*, 132 Ala. 262, 31 South. 455.

Affirmed.

(15 Ala. App. 553)

NORTON v. BIRMINGHAM FERTILIZER CO. (4 Div. 435.)

(Court of Appeals of Alabama. Feb. 6, 1917.)

1. APPEAL AND ERROR  $\S$  1078(1)—WAIVER.

Where judgment is had against two defendants and summons is not issued to the defendant who does not join in the appeal, as required by Code 1907,  $\S$  2884, as amended by Acts 1911, p. 589, the irregularity is waived if the cause is submitted without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig.  $\S$  4256.]

2. HUSBAND AND WIFE  $\S$  235(2)—ACTIONS—QUESTIONS FOR JURY.

In action on a note, defense being that defendant signed as surety for the debt of her husband with whom she lived, and hence she was not bound under Code 1907,  $\S$  4497, conflicting evidence whether the debt was the husband's or defendant's made the question one for the jury.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig.  $\S\S$  589, 850, 982.]

3. HUSBAND AND WIFE  $\S$  25(5)—AGENCY OF HUSBAND FOR WIFE—RATIFICATION.

If a wife ratifies, by giving a note, a purchase of goods by her husband as agent for her, whether he was originally authorized or not, she is liable on the note.

4. TRIAL  $\S$  256(1) — INSTRUCTIONS — MORE SPECIFIC INSTRUCTIONS.

In action on a note claimed to have been given in ratification of purchase by agent, an instruction for plaintiff, omitting to deal with knowledge of the facts as essential to ratification, was not reversible error, since it could have been corrected by a proper explanatory charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig.  $\S\S$  628, 633.]

Appeal from Circuit Court, Barbour County; Judge S. Williams, Judge.

Action by the Birmingham Fertilizer Company against Katie Norton and another. From judgment for plaintiff, the named defendant appeals. Affirmed.

G. L. Comer, of Eufaula, for appellant. McDowell & McDowell, of Eufaula, for appellee.

BROWN, J. [1] This appeal is prosecuted from the judgment of the circuit court rendered in an action on a promissory note against the appellant and another; and while the record does not show that summons was issued to the defendant who did not join in the appeal as required by the statute (Acts

1911, p. 589, amending section 2884, Code 1907), yet the cause was submitted without this irregularity being noticed and this operated as a waiver of the irregularity (*Vaughan v. Higgins*, 68 Ala. 546).

[2] The only defense interposed by appellant was that she was a married woman living with her husband, that the note was given for his debt, and that she signed as his surety. Code 1907, § 4497.

The evidence shows that, at the time the indebtedness the consideration upon which the note was executed was contracted, the appellant owned a farm upon which she and her husband and codefendant resided; that the husband operated the farm and was the agent of the appellant in looking after the business connected with her farm; that the consideration of the debt was guano purchased and used on the appellant's farm. And there is evidence tending to show that the guano was sold on the wife's credit. This fact distinguishes this case from *Wilson v. Andalusia Mfg. Co.* (Sup.) 70 South. 140.

While the evidence offered by the appellant shows that the debt was that of the husband, and that she signed the note as his surety, it was a question for the jury as to whether the debt for which the note was given was appellant's debt or the debt of the husband, and the affirmative charge requested by appellant was refused without error.

[3, 4] If the appellant's husband acted as her agent in the purchase of the guano, whether it was within the scope of his authority or not, and she afterward ratified the transaction by giving the note therefor, she would be liable. While knowledge of all the facts is essential to ratification, charge 2 given at the instance of plaintiff does not deal with this phase of the case; and, while the charge may have misleading tendencies, this could have been corrected by a proper explanatory charge. The giving of the charge does not constitute reversible error. *Rogers et al. v. Whittle*, 74 South. 96, present term; *Daniel v. Bradford*, 132 Ala. 262, 31 South. 455.

Affirmed.

#### On Rehearing.

The appellant in the application for rehearing takes issue with the court as to the statement in the original opinion that, "there was evidence tending to show that the guano was sold on the wife's credit," and insist that the record does not sustain this statement. In addition to the facts stated in the original opinion tending to this conclusion, the appellant testified on cross-examination:

"That she was living on a plantation owned by herself, and that her husband was farming on the place, and that the fertilizer purchased was used on the place which was owned by her and operated by her husband, and as his wife she received the benefits of the farm, and her husband was her agent looking after the business."

The witness Zorn testified:

"That M. K. Norton, the defendant, and husband of the defendant Katie Norton, purchased the fertilizer from him, and that at the time he sold it he told the said M. K. Norton that he would not sell it to him, but would if his wife would buy it and his wife gave her note for it."

While this witness further testified that this was two months before the note was given and that appellant was not present, it further shows that she afterwards signed the note without question or objection; that her signature appears first on the note; that her husband's signature follows.

While the appellant testified that she did not purchase the guano and authorized no one else to purchase for her, there is nothing in the evidence to show that she was not fully informed as to the facts or to rebut the inference that she ratified the purchase by giving the note.

We reiterate, "there was evidence tending to show that the guano was sold on the wife's credit," and add, tending to show that she afterwards ratified the transaction by giving the note now in suit.

Application overruled.

(15 Ala. App. 556)

#### MINOR v. STATE. (8 Div. 298.,

(Court of Appeals of Alabama. Jan. 30, 1917.)

#### 1. CRIMINAL LAW § 363 — EVIDENCE — RES GESTÆ.

In a prosecution for homicide, testimony as to a difficulty between accused and deceased occurring in a saloon only a few minutes before accused, who had been followed, shot deceased outside of the saloon, is admissible as part of the *res gestæ*; this being particularly true where other testimony as to the matter was admitted without objection and accused admitted he shot deceased.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 804.]

#### 2. CRIMINAL LAW § 1186(4) — APPEAL — HARMLESS ERROR—EVIDENCE.

Under Supreme Court practice rule 45 (61 South. ix), the erroneous admission of evidence which was not prejudicial in view of accused's testimony and the other evidence is harmless.

#### 3. CRIMINAL LAW § 605(5) — APPEAL — OBJECTIONS TO EVIDENCE—SCOPE.

A mere general objection to evidence waives the objection that it was hearsay.

#### 4. CRIMINAL LAW § 820(1) — TRIAL — INSTRUCTIONS—REQUESTS—CHARGES ALREADY GIVEN.

The refusal of requested charges covered by those given is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

#### 5. CRIMINAL LAW § 789(17) — TRIAL—INSTRUCTIONS—REASONABLE DOUBT.

A charge that there may be a reasonable doubt as to defendant's guilt, which does not grow out of the evidence, but arises from a want of evidence, is argumentative and misleading.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1921, 1960, 1967.]

**6. CRIMINAL LAW §789(2) — TRIAL — INSTRUCTIONS—REASONABLE DOUBT.**

A charge that "a reasonable doubt is that want of repose and confidence which an honest man has in the correctness of a conclusion which he is about to make after he has given the question under consideration his best thought," is erroneous, and properly refused in a homicide case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1906, 1907.]

**7. CRIMINAL LAW §789(8) — TRIAL — INSTRUCTIONS—MORAL CERTAINTY.**

A requested charge that the state must satisfy the jury to a moral certainty before accused could be convicted is erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1913, 1960, 1967.]

**8. CRIMINAL LAW §778(2) — TRIAL — INSTRUCTIONS—BURDEN OF PROOF.**

A requested charge that the burden of proof is never on accused to establish his innocence or disprove the facts necessary to establish the crime for which he is indicted, but the burden is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime, is erroneous; the burden on the state being only to prove accused guilty beyond a reasonable doubt, and is not upon the prosecution from the beginning to the end.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847, 1848, 1960, 1967.]

**9. CRIMINAL LAW §778(2) — TRIAL — INSTRUCTIONS—BURDEN OF PROOF.**

Such charge was erroneous as tending to have the jury disregard any evidence other than that of the state in arriving at the guilt of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847, 1848, 1960, 1967.]

**10. CRIMINAL LAW §789(17) — TRIAL — INSTRUCTIONS—REASONABLE DOUBT.**

A charge that if the circumstances of the case could be explained reasonably and consistently with accused's innocence, the jury should acquit, is erroneous, not being confined to the evidence in the case; the jury not being entitled to consider circumstances not based on the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1921, 1960, 1967.]

**11. CRIMINAL LAW §789(18) — TRIAL — INSTRUCTIONS—REASONABLE DOUBT.**

A requested charge that if after subjecting the facts in the case to the test of reason there is still a doubt of guilt, the jury should acquit, is erroneous; the state being required to establish guilt only beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1848, 1927, 1960, 1967.]

**12. CRIMINAL LAW §815(1) — TRIAL — INSTRUCTIONS—EXCLUDING EVIDENCE.**

A requested charge treating only one phase of the evidence is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1986.]

**13. CRIMINAL LAW §809 — TRIAL — INSTRUCTIONS—COMPLETENESS.**

A requested charge that it is not enough that one phase of the testimony is consistent with the theory of the guilt of the defendant is incomplete, failing to state a proposition of law, and the meaning does not follow properly.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1961-1967.]

**14. CRIMINAL LAW §789(12) — TRIAL — INSTRUCTIONS—REASONABLE DOUBT.**

A requested charge that if the jury would not be willing to act upon the evidence if it were in relation to matters of the most solemn importance to their own interest, they should acquit, is bad and properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1917, 1960, 1967.]

**15. HOMICIDE §300(14) — TRIAL — INSTRUCTIONS—SELF-DEFENSE.**

A requested charge that the danger that will excuse one for killing another need not be real and actual, and if the jury believe that the appearance of danger surrounding defendant was such as to produce fear in the mind of defendant that his life was in danger or he was about to suffer great bodily harm, defendant, being without fault at the time, should be acquitted, is erroneous because premitting defendant's belief in his own danger.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 629.]

**16. HOMICIDE §300(14, 15) — TRIAL — INSTRUCTIONS.**

A requested charge that if the evidence showed that at the time of the killing the appearance of danger was such as to create a reasonable belief in the mind of defendant that his life was in danger or he was about to suffer great bodily harm and defendant was without fault in bringing on the difficulty, he should be acquitted, is erroneous because premitting defendant's belief in danger and also his duty to retreat could he do so safely.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 629, 630.]

**17. CRIMINAL LAW §763, 764(23) — TRIAL — INSTRUCTIONS—INVASION OF PROVINCE OF JURY.**

A requested charge in a homicide case that accused was without fault in provoking or bringing on the difficulty, and that if the conduct of deceased was such as to impress defendant that his intention was to take his life, defendant might act on the appearances, is erroneous, invading the province of the jury by instructing them as to defendant's freedom from fault.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1731.]

**18. HOMICIDE §300(12) — TRIAL — INSTRUCTIONS — SELF-DEFENSE — APPLICABILITY TO EVIDENCE.**

Where defendant admitted the killing, but relied on self-defense, a requested charge that the jury should acquit if the conduct of defendant on a reasonable hypothesis was consistent with his innocence, while correct as an abstract proposition of law, is properly refused, not being applicable to the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 627.]

**19. CRIMINAL LAW §789(15) — TRIAL — INSTRUCTIONS—REASONABLE DOUBT.**

A requested charge that the only foundation for a verdict of guilty is that the entire jury shall believe from the evidence beyond a reasonable doubt and to a moral certainty that defendant is guilty, to the exclusion of every probability of innocence, and every reasonable doubt of his guilt, is erroneous and properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1920, 1960, 1967.]

**20. CRIMINAL LAW §789(2) — TRIAL — INSTRUCTIONS—REASONABLE DOUBT.**

A requested charge that before the jury could convict they must be satisfied to a moral certainty not only that the proof is consistent

with guilt, but that it is wholly inconsistent with every other rational conclusion, and unless the jury are so convinced of guilt, that they would each venture to act upon that decision, upon matters of highest personal importance, they should acquit, is erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1906-1908.]

**21. CRIMINAL LAW**  $\S$ 789(2) — TRIAL — INSTRUCTIONS—REASONABLE DOUBT.

A requested charge that the requirement that juries must believe that defendant is guilty from the evidence beyond a reasonable doubt is not a fiction of law, but is intended as a substantial shield against conviction until that degree of proof is made which leads the jury to believe defendant cannot reasonably be guiltless, is argumentative and obscure.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1906-1908.]

**22. CRIMINAL LAW**  $\S$ 789(5) — TRIAL — INSTRUCTIONS—REASONABLE DOUBT.

A requested charge that if after subjecting the facts to the test of reason there is still a doubt of guilt, the jury should acquit, is erroneous in omitting the word "reasonable" before "doubt."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1960, 1967.]

**23. CRIMINAL LAW**  $\S$ 782(9) — TRIAL — INSTRUCTIONS—DEGREE OF PROOF.

A requested charge that it is not the duty of the jury to convict accused to vindicate the law or to improve public morals, unless the evidence is so convincing as to lead to the conclusion that accused cannot be innocent, is argumentative and bad.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1847.]

**24. CRIMINAL LAW**  $\S$ 789(4) — TRIAL — INSTRUCTIONS—REASONABLE DOUBT.

A requested charge that the presumption of innocence is intended to be a shield against conviction until accused's guilt is established, from credible evidence, beyond all reasonable doubt, and to a moral certainty, is faulty and incomplete.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1967.]

**25. CRIMINAL LAW**  $\S$ 782(7) — TRIAL — INSTRUCTIONS—DEGREE OF PROOF.

A requested charge that evidentiary facts must be proved, and the existence of none of them can be presumed, and that the circumstances upon which a conclusion depends must be fully established by proof, they are facts from which the main fact is to be inferred, is argumentative and misleading.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1960.]

**26. CRIMINAL LAW**  $\S$ 789(5) — TRIAL — INSTRUCTIONS—REASONABLE DOUBT.

A requested charge that good character, if proven, when taken in connection with the whole evidence may have the effect to generate such a doubt as to authorize acquittal is bad in omitting the word "reasonable" before "doubt."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1960, 1967.]

**27. HOMICIDE**  $\S$ 300(14, 15) — TRIAL — INSTRUCTIONS—SELF-DEFENSE.

A requested charge that if defendant was without fault in bringing on the difficulty, and if at the time of the homicide the peril was so apparent as to lead to the belief that there existed an imperious necessity to kill in order to save his own life, then accused had the right to kill, is erroneous because premitting ac-

cused's belief of the imminence of peril and his duty to retreat could he do so safely.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 629, 630.]

**28. HOMICIDE**  $\S$ 300(12) — TRIAL — INSTRUCTIONS.

A requested charge in a homicide case which used the collective word "self-defense," and failed to define the constituent elements thereof, is bad.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 627.]

**29. CRIMINAL LAW**  $\S$ 813 — TRIAL — INSTRUCTIONS.

Abstract instructions are improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979.]

Appeal from Circuit Court, Colbert County; C. P. Almon, Judge.

George Minor was convicted of manslaughter, and he appeals. Affirmed.

The following charges, noted in the opinion, and not covered by charges given, were refused to defendant:

(7) "There may be a reasonable doubt of defendant's guilt in your mind which does not grow out of the evidence, but which arises from a want of evidence."

(8) "A reasonable doubt is that want of repose and confidence which an honest man has in the correctness of a conclusion which he is about to make after he has given the question under consideration his best thought."

(9) "The state must satisfy your mind to a moral certainty that defendant is guilty before you can convict him."

(10) "I charge you that the burden of proof is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. The burden of proof is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime."

(11) "No matter how strong the circumstances of this case may be, if they can be explained reasonably and consistently with defendant's innocence, then the law demands an acquittal at their hands."

(12) "If, after subjecting the facts in this case to the test of reason, there is still a doubt of guilt, the jury should acquit."

(13) "It is not enough that one phase of the testimony is consistent with the theory of the guilt of defendant."

Unnumbered and unlettered charge: "I charge you that if you would not be willing to act upon the evidence in this case if it were in relation to matters of the most solemn importance to your own interest, then you must find defendant not guilty."

(22) "I charge you that the danger that will excuse one for killing another need not be real or actual. If the jury believe from all the evidence in this case that the appearance of danger surrounding defendant at the time of the killing was such as to produce a reasonable belief in the mind of defendant that his life was in danger or that he was about to suffer great bodily harm—defendant being without fault at the time—the law holds him harmless, and the jury should acquit."

(23) "The law is a reasonable master, and if the evidence shows you that at the time of the killing the appearance of danger surrounding defendant was such as to produce a reasonable belief in the minds of defendant that his life was in danger, or that he was about to suffer great bodily harm, and defendant was without



fault in bringing on the difficulty, the jury ought to acquit him."

(24) "I charge you that defendant was without fault in provoking or bringing on the difficulty, and if the conduct of deceased was such at the time of the killing as to reasonably impress the mind of defendant that his intention was to take his life or do him great bodily harm, then I charge you that the law did not require defendant to wait and see what would be the result of the appearances, but defendant was authorized to act upon the appearances, anticipate and avert the threatened danger, even to the taking of the life of his assailant."

(25) "The jury must find defendant not guilty if the conduct of defendant upon a reasonable hypothesis is consistent with his innocence."

(28) "The only foundation for a verdict of guilty in this case is that the entire jury shall believe from the evidence beyond a reasonable doubt and to a moral certainty that defendant was guilty as charged in the indictment, to the exclusion of every probability of his innocence, and every reasonable doubt of his guilt, and if the prosecution has failed to furnish such measure of proof, and so impress the minds of the jury of his guilt, they should find him not guilty."

(29) "Before you can convict, you must be satisfied to a moral certainty not only that the proof is consistent with the guilt of defendant, but that it is wholly inconsistent with every other rational conclusion, and unless the jury are so convinced by the evidence of defendant's guilt, that they would each venture to act upon that decision, in matters of the highest concern and importance to his own interest, you must find defendant not guilty."

(32) "The requirement that juries must believe that defendant is guilty from the evidence beyond a reasonable doubt is not a fiction of law, but is intended as a substantial shield against conviction until that degree of proof is made which leads the jury to believe that defendants cannot reasonably be guiltless under the evidence."

(33) "If, after subjecting the facts in this case, to the test of reason, there is still a doubt of the guilt of defendant, the jury should acquit."

(34) "It is not your duty to convict such defendant to vindicate the law or to improve public morals, unless the evidence is so convincing as to lead your minds to the conclusion that defendant cannot be innocent."

(C) "The presumption of innocence that the law throws around one who is charged with crime is intended to be a shield against conviction until his guilt is, from credible evidence, beyond all reasonable doubt and to a moral certainty."

(D) "Evidentiary facts must all be proved, and the existence of none of them can be presumed. The several circumstances upon which the conclusion depends must be fully established by proof, they are facts, from which the main fact is to be inferred, and they are to be proved by competent evidence, and the same weight and force of evidence as if each was itself the main fact in issue."

(35) "Good character, if proven, when taken in connection with the whole evidence may have the effect to generate such a doubt as to authorize an acquittal even when the jury was otherwise entertained thereby."

(36) "If defendant was without fault in bringing on the difficulty, and if he was in imminent peril, or reasonably appeared to be, of loss of life, or of suffering great bodily harm, then it was not his duty to retreat unless he could do so in safety."

(40) "The court charges the jury that if defendant was without fault in bringing on the difficulty, and if, at the time of the homicide, the peril appeared so apparent as to lead a reasonable mind to the belief that it actually ex-

isted, a present, impending, imperious necessity in order to save life, or in order to save himself from fatal bodily harm, to kill deceased, then he had a right to kill him, and the jury must acquit him on the ground of self-defense."

Kirk, Carmichael & Rather, of Tusculumbia, for appellant. W. L. Martin, Atty. Gen., and H. G. Davis, Asst. Atty. Gen., for the State.

BRICKEN, J. The defendant was indicted for murder in the first degree, and was convicted of the offense of manslaughter in the first degree, and sentenced to ten years' imprisonment in the penitentiary. From the judgment of conviction the present appeal is prosecuted.

[1] The defendant complains that errors prejudicial to him were committed on the trial in rulings of the court on evidence, and the refusal to give certain instructions to the jury requested by him in writing. The first ruling of the court complained of as error was in permitting John Middleton, a witness for the state, against the defendant's objection, to testify as to the particulars of that part of the difficulty between the deceased and the defendant which took place in Gambill's saloon, assigning as ground of objection, because not a part of the *res gestæ*, because illegal, irrelevant, and immaterial, and because remote and disconnected with the encounter which resulted in the killing. There seems to have been no objection as to the testimony of witness Wesley Reeder, who was examined as a witness for the state prior to the introduction of the witness John Middleton, the said witness Reeder having testified to substantially the same facts as did the witness John Middleton. Neither was there objection interposed as to the testimony along the same line of witnesses Josh Middleton, John Robertson, Henderson Gipson, and Jack Sherrod. All of these witnesses without seeming material conflict testified to the detailed facts relating to the commencement or the beginning of the difficulty out of which the homicide grew. The testimony is practically without conflict that the defendant and deceased mutually and willingly entered into a fight in Gambill's bar, and that the fight continued until they were forcibly separated; that deceased left the scene of the difficulty by going out of the back door of the saloon and was almost immediately followed by the defendant; and that the fatal shot was fired, as shown by the testimony, in one to three minutes thereafter. The defendant admits that he fired the shot which killed deceased, and the evidence is without conflict that the bullet entered the forehead of the deceased, striking him right in the center between the eyebrows. Under these circumstances, it can be clearly seen that the evidence of John Middleton was competent, and the ruling of the court in admitting it free from error. It was competent to show all that transpired at the time of the killing, and which occurred prior thereto leading up

to and explanatory of the tragedy. *Way v. State*, 155 Ala. 60, 46 South. 273. Acts or declarations are admissible as part of the *res gestæ* if they are substantially contemporaneous with the main fact under consideration and so closely connected with it as to illustrate its character. *Johnson v. State*, 94 Ala. 41, 10 South. 667; *Fonville v. State*, 91 Ala. 42, 8 South. 688. In the case of *Stitt v. State*, 91 Ala. 10, 8 South. 669, 24 Am. St. Rep. 853. It was held that, where it appears that defendant was knocked down by the deceased, and that defendant ran off and got a pistol and returned in about two to five minutes, and the quarrel was renewed and he shot and killed deceased, that the former difficulty was admissible as *res gestæ*. *Stitt v. State*, supra; *Jordan v. State*, 81 Ala. 20, 1 South. 577; *Ridgell v. State*, 1 Ala. App. 94, 55 South. 327.

[2, 3] Other rulings of the court on the evidence seem to be free from error, or, if error appears, it is not of that character as would probably injuriously affect the substantial rights of the defendant; especially is this true in the light of the testimony of the defendant himself, as well as all of the witnesses examined as to the facts in this case. Rule 45, Supreme Court Practice (175 Ala. xxi, 61 South. 1x). Furthermore, it would appear that if the testimony referred to was objectionable, it would be because of its having been hearsay, and as no objection was interposed upon the ground of it being hearsay testimony, but only a general objection having been made, it would be considered waived; and under the authority of *Elmore v. State*, 110 Ala. 63, 20 South. 323, it appears that the defendant has failed to make a proper objection to this testimony to make it available on review.

[4, 5] The court properly refused written charge 7, as said charge was substantially covered by charge 1, which was given. It is also argumentative and misleading. *Kirkwood v. State*, 8 Ala. App. 108, 62 South. 1011; *Hubbard v. State*, 10 Ala. App. 47, 64 South. 633; *Carwile v. State*, 148 Ala. 576, 39 South. 220.

[6] Charge 8 refused has been held bad in *Brown v. State*, 150 Ala. 25, 43 South. 194.

[7] Charge 9 refused was held to be erroneous in *Sykes v. State*, 151 Ala. 81, 44 South. 398. However, this charge was substantially covered in given charges 4, B, C, and 19.

[8, 9] Refused charge 10 was properly refused. The burden is upon the state to prove only that the defendant is guilty beyond a reasonable doubt, and is not upon the prosecution from the beginning to the end. But after a consideration of all the evidence in the case, for the defendant might introduce testimony that would supply an element necessary to convict the defendant. The tendency of this charge would be to have the jury ignore any evidence other than that of the

state in arriving at the guilt of the defendant. *Davis v. State*, 8 Ala. App. 147, 62 South. 1027.

[10] There was no error in refusing charge 11, for the reason that said charge was not predicated upon the evidence in this case. Circumstances not based upon the evidence would not authorize an acquittal, and should not be considered by the jury in its deliberations. *McClain v. State*, 182 Ala. 81, 62 South. 241; *Pate v. State*, 94 Ala. 14, 10 South. 665; *Thomas v. State*, 106 Ala. 22, 17 South. 460.

[11] Charge 12 was properly refused, as the measure of proof required in all criminal cases is a reasonable doubt. *Green v. State*, 168 Ala. 104, 53 South. 284; *Kirby v. State*, 151 Ala. 66, 44 South. 38.

[12, 13] There was no error in refusing charge 13, in that it treats only one phase of the evidence. It is also incomplete, and fails to state a proposition of law, and the meaning does not follow properly. *Bailey v. State*, 168 Ala. 4, 53 South. 296, 390; *N. C. & St. L. Ry. v. Blackmon*, 7 Ala. App. 535, 61 South. 468; *Mitchell v. State*, 94 Ala. 68, 10 South. 518.

[14] Refused charge, without number or letter, is bad. This identical charge was condemned in *Bailey v. State*, 168 Ala. 17, 53 South. 296, 390; *Phillips v. State*, 162 Ala. 14, 50 South. 194.

The refusal of charge 14 was without error. *Underwood v. State*, 179 Ala. 21, 60 South. 842. This charge is in effect substantially given in charges 3, 4, 6, 18, 31, 45, A, and C.

Charges 15 and 28 (which are identical) were properly refused. *Watts v. State*, 177 Ala. 24, 59 South. 270; *Davis v. State*, 8 Ala. App. 147, 62 South. 1027. This charge, however, was substantially covered by given charge 3.

Refused charge 16 is substantially covered by given charges B and 19.

There was no error in refusing charge 17, as this charge was substantially covered by given charge 30. *Way v. State*, 155 Ala. 53, 46 South. 273.

[18] Charge 22 is bad, in that it pretermits defendant's belief in his danger. This identical charge was condemned in *Watts v. State*, 177 Ala. 24, 59 South. 270.

[16] Charge 23 is also bad, and has been condemned in *Watts v. State*, supra. It pretermits belief in the danger and also duty to retreat if he could have done so safely.

[17] Charge 24 was defective and bad. As written, it was certainly an invasion of the province of the jury, in that it seeks to have the court charge as a fact that the defendant was free from fault in bringing on the difficulty. *Woods v. State*, 10 Ala. App. 19, 64 South. 644; *Watts v. State*, 177 Ala. 28, 59 South. 270.

[18] While charge 25 refused to the defendant has been approved as an abstract

proposition of law (*Brown v. State*, 118 Ala. 111, 23 South. 81), all charges must be construed in connection with the facts in the particular case; and the court cannot be put in error for refusing this charge when it is considered as applied to the evidence in this case, for the fact of the defendant's having killed the deceased was not a disputed fact resting on circumstances in which the conduct of the defendant was a matter of consideration as tending to show his guilt or innocence; but, on the contrary, the killing of the deceased by this defendant was an undisputed fact, admitted by this defendant himself, and the defendant relied for defense entirely on his plea of self-defense. Under this state of the evidence, the charge in question submitted to the jury in substance and effect only the question whether or not the conduct of the defendant upon a reasonable hypothesis was consistent with his having acted in self-defense. The charge as referred to the evidence submitted a question of law to the jury—i. e., whether or not the defendant acted in self-defense; and the court cannot be put in error for refusing such a charge.

There seems to be no objection to be taken to refused charge 26, as it states a correct proposition of law; however, there was no error in its refusal in this instance, for it is not error to refuse instructions substantially covered by instructions given, and it appears that this charge was substantially covered by given charges 1, 3, B. C. 18, 19, and 21.

Refused charge 27 was approved in *Brown v. State*, 118 Ala. 114, 23 South. 81, but there was no error in its refusal, for said charge was substantially covered by given charge 3.

[19] Refused charge 28 has been held in this opinion as not being proper. It is identical with charge 15, and there was no error in its refusal. *Watts v. State*, 177 Ala. 24, 59 South. 270.

[20] There is no merit in the contention that it was error to refuse charge 29, for the charge is bad and has been condemned in *Phillips v. State*, 162 Ala. 14, 50 South. 194; *Bailey v. State*, 168 Ala. 4, 53 South. 296, 390; *Smith v. State*, 161 Ala. 94, 49 South. 1029.

[21] Charge 32 was faulty, in that it was argumentative and also obscure in meaning. *Watts v. State*, 177 Ala. 24, 59 South. 270.

[22] Charge 33 was bad. The character of doubt which authorizes an acquittal is a reasonable doubt, and this charge is faulty, in that it omits the "reasonable" before the word "doubt." *Green v. State*, 168 Ala. 104, 53 South. 284; *Kirby v. State*, 151 Ala. 66, 44 South. 38.

[23] There was no error in refusing charge 34. It is argumentative, and is bad. Facts as brought out by the evidence in the case must govern the jury in its deliberations, and it is their duty to try cases according to the facts, and not according to whether pub-

lic peace and good order will be promoted by a conviction or an acquittal.

[24] Charge C was faulty and incomplete, and there was no error in its refusal.

[25] Charge D was argumentative, and was properly refused. It is also misleading, because of the word "circumstances." *Bailey v. State*, 168 Ala. 4, 53 South. 296, 390.

[26] Charge 35 is bad, as it omits the word "reasonable" as qualifying the word "doubt." *Green v. State*, 168 Ala. 104, 53 South. 284; *Kirby v. State*, 151 Ala. 66, 44 South. 38; *Ducett v. State*, 186 Ala. 34, 65 South. 351.

Refusal of charge 36 was without error, although a good charge, as it had been substantially covered by given charge A.

[27, 28] Refused charge 40 was bad in that it pretermits: (1) The defendant's bona fide belief that he was in imminent peril; and (2) the duty of defendant to retreat if he could have safely done so. It is objectionable otherwise in that it uses the collective word "self-defense," and fails to define the constituent elements thereof. *Ragsdale v. State*, 12 Ala. App. 12, 67 South. 783; *Plant v. State*, 140 Ala. 52, 37 South. 159. A charge incomplete in itself may be properly refused. *Jones v. State*, 13 Ala. App. 12, 68 South. 690.

[29] Refused charge 46 is bad. Charges of similar character have been condemned by the courts. This charge also appears to be abstract, there being no evidence in this case showing or tending to show any prejudice or ill feeling upon the part of any witness against the defendant. *Branch v. State*, 10 Ala. App. 94, 64 South. 507; *Jackson v. State*, 5 Ala. App. 306, 57 South. 594. This charge is substantially a duplicate of given charge 41.

Charge 00 is bad, in that it singles out the testimony of the defendant. However, this charge was otherwise properly refused, it having been substantially covered by given charges 2 and 49.

There being no reversible error, the judgment is affirmed.

Affirmed.

No. 22288.

(140 La. 793)

STATE v. NEJIN.

(Supreme Court of Louisiana. Jan. 15, 1917.)

(Syllabus by the Court.)

1. STATUTES  $\S$  118(1)—SUBJECT AND TITLE—CONSTITUTIONAL PROVISIONS.

Act No. 8 of 1915 (Ex. Sess.), in defining and prohibiting the keeping of a blind tiger, and providing for the search for, and seizure of, intoxicating liquors, does not contravene article 31 of the state Constitution, which declares that every law shall embrace but one object, and that shall be expressed in the title. The search for and seizure of the liquor is a means provided for the accomplishment of the one object of the act; i. e., to prohibit the keeping of blind tigers.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 158, 159; Dec. Dig.  $\S$  118(1).]

**2. CONSTITUTIONAL LAW**  $\S$  251—**SEARCHES AND SEIZURES**  $\S$  7—**CONSTITUTIONAL PROVISIONS—INTOXICATING LIQUORS.**

The act does not contravene article 7 of the state Constitution, which guarantees the people against unreasonable searches and seizures, and declares that no search warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized. The Fourth and Fourteenth Amendments to the Constitution of the United States are inapplicable in this case.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig.  $\S$  726, 727, 732; Dec. Dig.  $\S$  251; Searches and Seizures, Cent. Dig.  $\S$  5; Dec. Dig.  $\S$  7.]

**3. CONSTITUTIONAL LAW**  $\S$  296(1)—**EMINENT DOMAIN**  $\S$  2(1) — **INTOXICATING LIQUORS**  $\S$  15—**DUE PROCESS OF LAW—TAKING OF PRIVATE PROPERTY WITHOUT COMPENSATION.**

It contravenes no constitutional provision prohibiting the taking or destruction of private property, without due process of law, or without compensation to the owner.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig.  $\S$  826; Dec. Dig.  $\S$  296(1); Eminent Domain, Cent. Dig.  $\S$  3-8; Dec. Dig.  $\S$  2(1); Intoxicating Liquors, Cent. Dig.  $\S$  17, 18; Dec. Dig.  $\S$  15.]

**4. CONSTITUTIONAL LAW**  $\S$  208(2)—**DISCRIMINATORY LAWS—INTOXICATING LIQUORS—OFFENSES—TERRITORY.**

It contravenes no constitutional provision by reason of its application exclusively to "dry" or "prohibition" territory.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig.  $\S$  649; Dec. Dig.  $\S$  208(2).]

**5. STATUTES**  $\S$  77(4) — **"LOCAL OR SPECIAL LAW"—INTOXICATING LIQUORS.**

It applies in every community in the state where, in the exercise of the right of local option, the people have prohibited the sale of intoxicating liquor, and is applicable in every other community, in the sense that, should any other exercise the same right, it will come immediately under its dominion. It is not, therefore, a local or special law within the meaning of articles 48 and 50 of the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig.  $\S$  79, 80; Dec. Dig.  $\S$  77(4).]

For other definitions, see Words and Phrases, First and Second Series, Local Law.]

**6. STATUTES**  $\S$  75—**GENERAL LAW—REPEAL—CONSTITUTIONAL PROVISIONS.**

It does not violate article 49 of the Constitution by partially repealing a general law, in the sense of that article. The general law (relating to grog and tippling shops) became inoperative in territory which became dry, not by reason of the act in question, but by the vote of the electors.

[Ed. Note.—For other cases, see Statutes, Cent. Dig.  $\S$  77; Dec. Dig.  $\S$  75.]

**7. CRIMINAL LAW**  $\S$  1201—**STATUTES—SUBSEQUENT OFFENSES—CONSTITUTIONAL AND STATUTORY PROVISIONS—PENALTY.**

Section 974 of the Revised Statutes, which provides that additional penalties may be imposed for second, third, and fourth offenses, has not been repealed by article 159 of the Constitution, which requires the General Assembly to fix the maximum and minimum penalties for misdemeanors and minor offenses against the state. The section in question, and statutes fixing maximum and minimum penalties in particular cases, are laws in pari materia, and are to be construed together, and, so construed, the minimum penalties may be found in the statutes

and the extreme maximum penalties in the section.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  3254; Dec. Dig.  $\S$  1201.]

**8. CRIMINAL LAW**  $\S$  1202(1)—**PENALTY FOR SUBSEQUENT OFFENSE—JURISDICTION—CONSTITUTIONAL AND STATUTORY PROVISIONS.**

The Constitution declares that cases in which the penalty is not necessarily at hard labor (meaning imprisonment at hard labor in the penitentiary), or death, shall be tried by the courts, without juries; that the General Assembly may provide for the prosecution of misdemeanors on affidavits, and shall have power to create, in cities of a certain population, courts with criminal jurisdiction which shall not extend beyond the trial of offenses not punishable by imprisonment at hard labor, under the laws of the state; and the General Assembly, in the proper exercise of that power, created the city court of the city of Shreveport, and vested it with that jurisdiction, and other jurisdiction which it was competent to confer. The judge of that court is therefore vested with jurisdiction of offenses against the state, and is within the terms and intentment of section 974 of the Revised Statutes.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig.  $\S$  1202(1).]

**9. CRIMINAL LAW**  $\S$  1202(3, 7)—**SECOND OFFENSE—EVIDENCE.**

Where, in the prosecution, upon affidavit, of an offense required to be prosecuted in that way, the affidavit fails to charge that the offense is the second or third of the kind committed by the defendant, evidence of such fact, offered upon the basis of an unsworn statement to that effect, filed after the affidavit, in order that the penalty may be increased, as provided by Rev. St. 974, is inadmissible.

The defendant in such case is entitled to be fully informed, in the manner prescribed by law, concerning the charge that he is to meet, and such information carries with it the knowledge of the penalty that may be imposed upon him. And when the trial takes place before the judge without a jury, and the evidence mentioned has been admitted, and the increased penalty has been imposed, the conviction, as well as the sentence, will be set aside.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  3261, 3265; Dec. Dig.  $\S$  1202(3, 7).]

**10. CRIMINAL LAW**  $\S$  254—**WEIGHT OF EVIDENCE—REASONABLE DOUBT.**

It is elementary that in order, legally, to convict a person charged with a criminal offense, the trial judge must be convinced, beyond a reasonable doubt of his guilt, and it is error for him to refuse to be guided by a "proposition of law" to that effect, submitted in accordance with the provisions of Act No. 93 of 1916.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  537, 538, 543; Dec. Dig.  $\S$  254.]

**11. CRIMINAL LAW**  $\S$  280(11)—**APPEAL—JURISDICTION OF SUPREME COURT—EVIDENCE.**

Where, in a prosecution, under Act No. 8 of 1915 (Ex. Sess.) for keeping a "blind tiger," the trial judge refuses to be guided by the proposition (submitted agreeably to the provisions of Act No. 93 of 1916) that "the law does not denounce the possession of whisky or other intoxicating liquors; a man may keep on hand any quantity of such liquor, without violating any law, and the mere possession of such liquors does not even make out a prima facie case under the charges preferred," this court will not review his ruling, since it has no jurisdiction, in

a criminal case, to determine the effect that should be given to admissible evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 569-571, 586-589, 591; Dec. Dig. ¶260(11).]

**12. CRIMINAL LAW ¶666(1)—TRIAL—STATE'S PRESENTATION OF EVIDENCE.**

The state, in fairness to the accused, should present its case at the opening, but we know of no rule which requires that in so doing it must call to the stand any other witness than those whom the prosecuting officer considers necessary, or which justifies the presumption that those whom he does not call would testify unfavorably to the prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1587; Dec. Dig. ¶666(1).]

*(Additional Syllabus by Editorial Staff.)*

**13. SEARCHES AND SEIZURES ¶7—CONSTITUTIONAL PROVISIONS — "PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED AND THE PERSONS OR THINGS TO BE SEIZED."**

The language "particularly describing the place to be searched and the persons or things to be seized," as used in U. S. Const. Amend. 4, and Const. art. 7, is to be reasonably interpreted as meaning that the "place" is to be designated with sufficient accuracy to prevent the officer from searching the premises of one person under a warrant directed against those of another, and it does not necessarily require a minute and detailed description of the property to be seized.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. § 5; Dec. Dig. ¶7.]

Appeal from City Court of Shreveport; D. B. Samuels, Judge.

F. A. Nejin was convicted of keeping a blind tiger, his motions in arrest of judgment and for a new trial were overruled, and he excepts and appeals. Conviction and sentence appealed from annulled and set aside, and case remanded.

Charles F. Crane and Foster, Looney & Wilkinson, all of Shreveport, for appellant. A. V. Coco, Atty. Gen., W. A. Mabry, Dist. Atty., and S. I. Foster, Asst. Dist. Atty., both of Shreveport (Vernon A. Coco, of Marksville, of counsel), for the State.

MONROE, C. J. Defendant was charged with keeping a blind tiger and, some days later, the assistant district attorney filed an unsworn statement in the case to the effect that he (defendant) had previously been twice convicted of the same offense. Defendant moved to quash the charge, which motion was overruled, and, having been put on trial, he reserved several bills of exception, and, after conviction, filed motions in arrest of judgment and for new trial, which were also overruled. He was sentenced to pay a fine of \$1,000, and to serve 12 months on the public works of the city of Shreveport, and, in default of payment of the fine, to so serve 12 months more. The motions to quash and in arrest are predicated upon the averments that the charge against defendant is based upon Act No. 8 of 1915 (Extra Session), and that the act contravenes certain articles of the state and federal Constitutions, to wit:

[1] First. That the title expresses two objects which are also embraced in the text, in contravention of article 31 of the state Constitution, to wit: To define and prohibit the keeping of a blind tiger, and to provide for the search for and seizure of intoxicating liquors.

The search for and seizure of the liquors is a means provided for the accomplishment of the one object of the act, i. e., to prohibit the keeping of blind tigers, and, being germane to that object, it was unnecessary that it should have been mentioned in the title. It was so held in *State v. Doremus*, 137 La. 266, 68 South. 605. See, also, *City of Shreveport v. F. A. Nejin*, No. 22,287, 73 South. 996, and *Louisiana State Board, etc., v. Tanzmann*, No. 22,087, 73 South. 854, this day decided.

[2, 13] Second. That the act provides for unreasonable search and seizure, without requiring an oath particularly describing the persons or things to be seized, in contravention of article 7 of the state Constitution, and the Fourth Amendment to the Federal Constitution. Article 7 of the state Constitution is in the language of the Fourth Amendment to the Constitution of the United States, and both read:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Act No. 8 of 1915 (Extra Session) reads, in part:

"That any place suspected of being a 'blind tiger' shall be searched by an officer designated in a search warrant and any spirituous, malt or intoxicating liquor above described, found therein shall by such officer, be seized and brought before the court issuing such warrant. The warrant may be issued by any court having power of a committing magistrate upon the filing in said court of an affidavit reciting the fact that affiant believes a certain designated place to be a 'blind tiger,' together with such additional evidence as the court may require, in order to make out a prima facie case. The officer to whom the search warrant is directed shall make his return thereon within twenty-four hours after it is issued and shall bring into court any spirituous, malt or intoxicating liquor hereinabove described, he may have found, together with all persons found in the place where said liquors may have been found."

In a number of the states distinct statutes, known as "search and seizure" laws, have been enacted, to aid in the suppression of the unlawful traffic in liquors, by authorizing proceedings in rem against the illicit property itself.

"These statutes," say the authorities, "are not unconstitutional if they do not authorize unreasonable searches, and if they make due provision for hearing the claims of parties in interest." 23 Cyc. 292. In this state, as we have seen, the law prohibiting the sale of liquor, and that which authorizes the seizure

of liquor held for sale as a means of enforcing the prohibition, are embodied in the same statute, and, having held that the means so provided are germane to the object of the statute, we are also of opinion that the purpose in providing such means is reasonable. The complaint, however, is, not that it is unreasonable to authorize the seizure of liquor, as a means of stopping the traffic in that commodity, but that the seizure, as authorized by our statute, is unreasonable, in view of the requirements of the Constitution on that subject. Counsel for defendant say, in their brief:

"The act totally ignores these constitutional provisions upon which this government is based. It authorizes the issuance of the warrant without exacting a description of the persons to be seized or the property sought to be retained."

The act does not authorize any search for persons, but provides for a search for liquor, held for a purpose prohibited by law, and, incidentally, for the detention of those who may be found at the place when, and where, such liquor is discovered, until it can be ascertained whether they were present as mere bystanders or as participants in the offense, and it provides that the persons and the liquor shall be brought into court within 24 hours.

"At common law, it seems to have been necessary to the sufficiency of a search warrant to command that the goods, together with the person in whose possession they were found when taken should be brought before the magistrate, and, after an examination of the facts, disposed of according to law." 35 Cyc. 1257.

It may be that the provision of the statute, here in question, requiring the bringing into court of all persons found with the liquor, was placed there as a concession to the common law, but the requirement is not directed especially against the present defendant; nor, so far as we are informed by any of the pleadings in the record, has it been enforced against him, or any other person, and, that being so, he discloses no present interest in attacking its constitutionality.

Beyond that, the language, "and particularly describing the place to be searched and the persons or things to be seized," as used in the Constitution, is to be reasonably interpreted. It does not mean that the measurement, in feet and inches, of the lot, or the color of the paint, on the house, constituting the "place," are to be given, but that such "place" is to be designated with sufficient accuracy to prevent the officer from searching the premises of one person under a warrant directed against those of another. Nor does it necessarily mean a minute and detailed description of the property to be seized. The words "particularly describing" are to be differently interpreted as applied in different cases, for while in some cases, the identity of the property is the main issue, in others, its character is the only matter of concern. Thus where the purpose of the search is to find specific property, it should be so particularly describ-

ed as to preclude the possibility of seizing any other. On the other hand, if the purpose be to seize, not specified property, but any property of a specified character, which, by reason of its character and of the place where and the circumstances under which it may be found, if found at all, would be illicit, a description, save as to such character, place, and circumstances, would be unnecessary and, ordinarily, impossible; as, for instance, where a search is ordered for dies for the counterfeiting of money, or for opium, or gambling devices, or lottery tickets, or intoxicating liquors, alleged to be held in possession unlawfully, and the same is true though the illegality may consist in the intended use rather than the mere possession of the property.

"When the use of certain articles," say the authorities, "although treated as property and employed for lawful purposes, is considered harmful to the welfare of the community they may be forfeited and destroyed under proper statutory provisions, and where an attempt is made to secretly and clandestinely divert them to unlawful purposes, so that ordinary diligence cannot discover such attempt, in order that the law may declare the forfeitures, statutes authorizing searches and seizures have been held proper, and proceedings in rem may be enforced against such articles seized, even without the knowledge and consent of the true owner, and laws which provide for the search and seizure of articles and other things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, forged instruments, gambling devices, etc., have been upheld by the courts." 35 Cyc. 1268.

In other cases than as thus mentioned, it has been variously held that "goods, wares, and merchandise" is a sufficient description for the purposes of a search warrant (*Sandford v. Nichols*, 13 Mass. 286, 7 Am. Dec. 151, cited in 35 Cyc. 1267, note); that, "if a description is as particular as the circumstances of the case will ordinarily permit, it is sufficient to satisfy the constitutional requirement" (*State v. Markuson*, 7 N. D. 155, 73 N. W. 82, same note); that if the warrant direct the seizure of "certain intoxicating liquors," and then, under a *videlicet*, specifies certain particular kinds, the officer will not be justified in seizing any other kinds than those specified, for here the *videlicet* limits the general expression, preceding, by what follows (*Hallet v. Stevenson*, 26 Conn. 428; 23 Cyc. 296, note 66). From which it is to be inferred that, but for the *videlicet*, the court would have considered "certain intoxicating liquors" to have been a sufficient description.

We find, then, that the statute here in question contemplates a search for "spirituous, malt, or intoxicating liquors," held for illegal disposition; that it requires that the search shall be made under a warrant, to be issued

by a competent court to a designated officer, upon an affidavit to the effect that the affiant believes a designated place to be a "blind tiger" (which the statute defines as a place where such liquors are kept to be unlawfully disposed of), "together with such additional evidence as the court may require in order to make out a prima facie case"; and that the officer shall bring into court, within 24 hours, "any spirituous, malt, or intoxicating liquors, hereinabove described, he may have found, together with all persons found in the place where said liquors may have been found." And we conclude that the search thus authorized is not unreasonable within the meaning of the provision of the state Constitution which defendant invokes. The Fourth and Fourteenth Amendments to the Constitution of the United States, in our opinion, are inapplicable in this case.

[3] Third. That the act authorizes the taking and destruction of private property without due process of law, in violation of article 2 of the state Constitution and the Fourteenth Amendment to the Constitution of the United States, and authorizes the taking of property without compensating the owner thereof. The law upon the question thus presented is well stated as follows:

"The entire business of manufacturing and selling intoxicating liquors is completely within the control of the state, and there is nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether." 6 R. C. L. § 271.

"As has been seen, where property is used in violation of law in maintaining a public nuisance, its destruction, in the exercise of the police power of the state, is not a taking of property for public use, and does not deprive the owner of it without due process of law." Id. § 476.

"Property taken or destroyed for the purpose of abating a nuisance is not taken for public use, and accordingly there is no obligation to make compensation therefor." Id. § 478.

"The courts have generally recognized the right of a state to declare all places where intoxicating liquors are manufactured or sold to be common nuisances, and to provide regulations for their abatement as such, and liquors brought for sale into a district where such sale is prohibited may be summarily seized and destroyed without compensation." Id. § 480.

[4] Fourth. That the act discriminates against persons in "dry" in favor of those in "wet" territory.

The act merely prescribes a rule for the people of those sections of the state who have elected to prohibit the sale of intoxicating liquor, and the rule so prescribed necessarily differs, in so far as the sale of liquor is concerned, from that which obtains where such sale is authorized, since in the one case the prohibition of the sale is to be enforced, and in the other the privilege of selling is to be regulated as the proper authorities may see fit.

[5] Fifth. That the act in question is a special law and contravenes article 48 of the state Constitution, in that it relates to criminal actions, and violates article 50, in that

it was enacted without the notice required by that article.

The statute applies in every organized community in the state where, in the exercise of the right of local option, the people have prohibited the sale of liquor, and is applicable to every other community, in the sense that, should any other choose to prohibit such sale, it will come immediately under its dominion. It is not therefore either a special or a local law within the meaning of either of the articles invoked.

[6] Sixth. That it violates article 49 of the state Constitution, in that it is a partial repeal of a general law, to wit, the law relating to grog and tippling shops, which was of state-wide application, and is now applicable only in wet territory. The law applicable in "wet" territory became inoperative in territory which turned "dry," not by virtue of the act of 1915, but by reason of the votes of the electors exercising the right of local option.

[7] Seventh. In the event the act of 1915 be held constitutional, and in that event only, defendant alleges that section 974 of the Revised Statutes, under which the sentence authorized by that act was doubled, has been repealed by article 159 of the Constitution.

The section and article, respectively, read:

"Sec. 974. The judge shall have the power to sentence any person who may be convicted for a second or third offense to double and triple the penalty imposed by law, and for a fourth offense, the person so convicted may be sentenced to perpetual imprisonment."

"Art. 159. The General Assembly shall grade all misdemeanors and minor offenses against the state and shall fix the minimum and maximum penalties therefor."

The complaint is that if section 974 be applied, the fixing, by Act No. 8 of 1915, of the minimum and maximum penalty (for keeping a blind tiger), as required by the Constitution, must necessarily be ignored, and hence that the section can not be allowed to stand. But that involves a non sequitur, and ignores an elementary canon of construction. The act and the section are laws in pari materia; there is no necessary conflict between them; the one stops where the other begins; they must therefore be construed together; and, so construed, the minimum penalty for keeping a blind tiger is found in the act and the extreme maximum penalty, in case of a second, third, or fourth offense, is found in the section.

[8] Eighth. It is said that, if section 974 has not been repealed, the city court was without jurisdiction, and that defendant was entitled to be tried by a jury.

The matters of the jurisdiction of the city court and of the right to be tried by jury in cases such as this are regulated by the following constitutional and statutory provisions, to wit:

"Art. 9. In all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury: Provided, that cases in which the penalty is not necessarily imprisonment at hard labor, or death, shall be tried by the court without a jury, or by a jury less



than twelve in number, as provided elsewhere in this Constitution. \* \* \* Prosecutions shall be by indictment or information; but the General Assembly may provide for the prosecution of misdemeanors on affidavits. \* \* \*

"Art. 96. \* \* \* The General Assembly shall have the power to abolish justice of the peace courts in wards containing cities of more than five thousand inhabitants, and to create in their stead courts with such civil jurisdiction as is now vested in justices of the peace, and with criminal jurisdiction which shall not extend beyond the trial of offenses not punishable by imprisonment at hard labor under the laws of this state, and of violations of municipal and parochial ordinances, and the holding of preliminary examinations in cases not capital."

"Art. 116. \* \* \* All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury."

The city court of Shreveport was created by Act 103 of 1898, and its jurisdiction was conferred in, substantially, the language of article 96 of the Constitution. The act further provides that prosecutions shall be by affidavit, and that misdemeanors shall be tried summarily and without juries. Act 29 of 1900, amending Act 103 of 1898, provides for appeals to the district court by persons sentenced to fine or imprisonment, on their giving security, and that, in such cases, the trials shall be de novo and without juries.

In so far as it purports to allow appeals to the district court in cases where the fine actually imposed exceeds \$300, or the imprisonment, six months, the act has been decreed unconstitutional. *State ex rel. Hart v. Judge*, 113 La. 654, 37 South. 546; *Id.* 113 La. 845, 37 South. 845. It will be seen, therefore, that the power to try defendant, in the manner that he was tried, has been conferred upon the city court by the General Assembly, acting under a direct grant of authority from the Constitution. And as the city court is thus vested with jurisdiction of offenses against the laws of the state, as well as of offenses against the ordinances of the city, there is no reason why R. S. 974 should not apply to it as well as to any court vested with jurisdiction of the offenses to which that section relates.

[9] We now proceed to consider certain bills of exception, which were reserved on the trial:

Bills 2 and 3: Defendant excepted to the overruling of his objections to offers, by the state, of certain records of the city court, to show that he had previously been convicted of the offenses for which he was being tried, his objections being, in part: (1) That no such charge was contained in the affidavit on which the prosecution was based, and that the object of the offer was to prejudice the court against him; (2) that if the object was to support an unsworn statement which had been filed by the district attorney at some time subsequent to the filing of the affidavit, the evidence was irrelevant and inadmissible; (3) that the records offered did not show final convictions, but, to the contrary, showed that appeals had been taken; and that they

did not show convictions of the offense for which defendant was on trial.

The court overruled the objections, on the grounds:

"That it considered the statement referred to as a new count against the defendant, and, to all practical purposes, embodied in the affidavit against the accused, and they showed that the defendant had been twice convicted of operating a blind tiger, and this whole charge, including the previous convictions, was sworn to by the Assistant District Attorney, as one charge, and defendant was arraigned on said charge and pleaded not guilty thereto. \* \* \* The court held that the records produced were admissible and were sufficient to establish the prior convictions of operating a blind tiger and that, at least, the production of such records, showing these convictions, imposed upon the defendant the obligation of showing that the appeals in said cases had been successful and the judgments of the city court reversed, which was not done by the defendant."

The "statement" referred to appears in the transcript upon a typewritten slip, distinct from the form upon which the affidavit is inscribed, but is bound (in the transcript) with that form, as though intended to be identified with it. The signature to the affidavit, however, follows closely upon the text, and there is nothing upon its face to indicate any intention to incorporate the contents of the "statement" therein. The affidavit bears date September 13, 1916; the slip bears no date, nor is there anything to show that it was filed, but it is not disputed that it was filed some days after the affidavit.

The transcript nowhere shows that the "statement" in question was verified by oath, and we are of opinion that we should be governed by the record, as it appears in the transcript, and hold that the statement was unsworn.

The act creating the city court (section 6) declares:

"That prosecution of criminal cases before the city court shall be on affidavit stating briefly the nature" of the offense.

In *State v. Hudson*, 32 La. Ann. 1063, defendant assigned as error:

"That the court cannot condemn him and inflict extraordinary punishment, unless the indictment or information charges, and the state proves, previous convictions for the same offense."

In ruling upon the point, this court said:

"The information does not charge any previous conviction. From a statement of facts, prepared after trial and conviction, we perceive that the judge admits that no evidence was offered to the jury or to him to show previous convictions, but that he took official notice, as it were, of the same as the facts were of record before his court. We do not think that the previous convictions should have been charged in the information, as they were not essential ingredients constituting the offense charged, upon which the jury had to pass, and might prejudice the jury. \* \* \* The state can so inform the judge [of previous convictions] or the judge may, upon his own suggestion, act upon the existence of such facts after verdict, but in either case it is nothing but just that a proceeding should be taken against the defendant before sentence, to show cause why the fact of such previous convictions should not be brought to the knowledge of the court to enable



it to exercise its peremptory powers under section 974 of the Revised Statutes. The defendant would then be afforded an opportunity to show, if such be the fact, that the judgments an sentences in the cases referred to were arrested or reversed and annulled, or that he was pardoned."

The sentence which had been pronounced was therefore annulled, and the case remanded for sentence according to the views thus expressed and the law.

In the similar case of *State v. Compagno*, 125 La. 669, 51 South. 681, the decision thus rendered was categorically overruled, and it was said:

"Where a defendant claims the right to have the crime for which it is sought to convict him fully set forth in the act of accusation, his right to have a full statement cannot be denied to him on the ground that the state treats him with special leniency, and withholds a charge \* \* \* of prior conviction, for the reason that it may prejudice him before the jury. If the averment is essential, it should be made a ground in the affidavit. We are of opinion that it is essential. \* \* \* It enters into and makes part of the last offense. It is an aggravation which gives rise to an increase of the punishment. \* \* \* In other words, it becomes a part of the second offense. It is the basis of the sentence increasing the punishment. \* \* \* In other jurisdictions it is generally held that the previous offense must be charged, as before mentioned [citing authorities]. \* \* \* It follows that \* \* \* *State v. Hudson* is overruled."

And the sentence appealed from was annulled and the case remanded, with directions to the trial court to impose sentence in accordance with the statute under which the defendant was prosecuted. See, also, *Marr's Cr. Jur. of La.* p. 868 and note.

The instant case differs from those cited, in, that the matter of imposing upon him an extra sentence under R. S. 974, was called to defendant's attention during the trial. But he then objected that he was not charged with the prior offenses sought to be proved and his objections should have been sustained, as the law requires that prosecution in the city court "shall be on affidavit," and there was no affidavit charging him with an offense calling for the extra penalty authorized by that section. The case would have been the same if evidence of three convictions had been admitted, thus subjecting defendant to liability to perpetual imprisonment, in which event it would unquestionably have been his right to be fully informed upon that subject, in the manner required by law; and had he been tried before a jury, to have the jury determine all the facts upon which such a sentence could be imposed.

As the matter stands, the judge, who had the power to convict as well as to sentence, heard evidence which was inadmissible, and though we do not, for a moment, question either the ability or the singleness of purpose and high sense of judicial obligation of our learned brother, we cannot but feel that the evidence thus heard was in its nature so prejudicial to the interest of the defendant,

that the conviction, as well as the sentence, should be set aside.

Bills 4 and 5:

[10, 11] After the evidence had been heard, and before the argument, defendant submitted to the court the following propositions of law for its guidance in the rendition of judgment, to wit:

"To convict the accused of operating a blind tiger, as denounced by Act No. 8 of 1915, it is necessary that the proof should show, beyond a reasonable doubt, that on or about the date alleged, he kept liquors for sale, barter, exchange or habitual giving away, and not as to what might have occurred weeks prior thereto."

"The law does not denounce the possession of whisky or other intoxicating liquors; a man may keep on hand any quantity of such liquors without violating any law, and the mere possession of such liquors does not even make out a prima facie case under the charges preferred against him."

The bill reserved in each instance contains a recital to the following effect, to wit:

Which legal proposition was applicable to the facts, in that the sole proof produced by the prosecution was that three gallons of whisky were found, after a careful search of defendant's residence, by the police, and no evidence whatever was produced that said liquor was kept for sale, barter, exchange, or habitual giving away.

And the ruling of the court in each case was, substantially, as follows:

"The court refused to be guided by said propositions of law, for the reason that, in its opinion, the possession of three gallons of whisky in various sized bottles, and where a man was found drinking, as was the case in this instance, is, at least, a circumstance against the accused, and that defendant should offer an explanation if he has any, which he refused to do."

It was competent for the trial judge to determine the weight that he would give to any circumstance disclosed by the evidence, but no matter how many circumstances may have been thus disclosed, the defendant could not have been legally convicted unless the evidence, considered as a whole, established, beyond a reasonable doubt, that he was guilty, as charged.

The possession of liquor in "dry" territory is lawful or unlawful, as the intended disposition of it is lawful or unlawful, and the inference suggested to the mind of a trial judge, by the circumstances connected with the possession, in one case, may be different from that suggested in another case. Evidence of such possession is unquestionably admissible in a prosecution for keeping liquor for sale, barter, etc., and the effect of that evidence upon the mind of the trial judge is a matter for him to determine. The proposition above quoted is therefore too broadly stated. Both the rulings complained of were invoked and made agreeably to the provisions of Act 93 of 1916, which so provides in order to give defendants, tried without juries, opportunities to bring up for review questions of law which could not otherwise well be reviewed; and we find that there was reversible error in the ruling upon the proposition first above stated, but do not feel at liberty to review the ruling on the second

proposition, because to do so would be to assume the determination of the effect that should be given to admissible evidence.

Other propositions by which the judge refused to be guided, and which are here insisted on, are that:

"Where persons are present at a place suspected of being a blind tiger and are not put on the stand by the prosecution, although said witnesses are in the jurisdiction of the court, the presumption is that the evidence of such persons, or bystanders, is against the prosecution."

That:

"In order to convict the accused of keeping a blind tiger, the circumstance that he was found in the possession, or that whisky was found in his home, amounting to three gallons, is not, of itself, sufficient, but such circumstance must be strengthened and fortified by testimony that such liquor was kept for sale, barter, or exchange, or habitual giving away."

[12] The state, in fairness to the accused, should present its case in the opening, but we know of no rule which requires that, in so doing, it should call to the stand any other witnesses that such as the prosecuting officer may consider most available for that purpose, or which raises any presumption that those whom he does not call would give unfavorable testimony to the prosecution. If, in the instant case, the defendant indulged in any such presumption, it was open to him to call the witnesses to whom the bill refers.

As we have already stated, the amount and character of admissible testimony which a trial judge may require, or which may satisfy his mind, in a criminal case, is a matter for him, and not this court, to determine.

For the reasons thus assigned in our consideration of defendant's bill of exception Nos. 2, and 4, it is ordered and adjudged that the conviction and sentence appealed from be annulled and set aside, and that this case be remanded to be further proceeded with according to law and to the views expressed in the foregoing opinion.

(140 La. 811)

No. 20743.

STATE ex rel. VEITH v. CAPDEVIELLE,  
Auditor of Public Accounts.

(Supreme Court of Louisiana. Jan. 15, 1917.  
Rehearing Denied Feb. 12, 1917.)

(Syllabus by Editorial Staff.)

APPEAL AND ERROR  $\Leftrightarrow$ 380 — UNDERTAKING  
ON APPEAL—RESIDENCE OF SURETY.

Where the surety on the appeal bond has no domicile within the jurisdiction of the court, the appeal must be dismissed, in view of Act No. 67, of 1876, requiring the surety to be domiciled within the jurisdiction of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2023-2028.]

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Action by the State, on relation of Phillip G. Veith, against Paul Capdevielle, Auditor of Public Accounts. Judgment dismissing the petition, and relator appeals, and defendant moves to dismiss the appeal. Remanded for taking evidence.

Fred G. Veith, of New Orleans, for appellant. A. V. Coco, Atty. Gen. (Vernon A. Coco, of Marksville, of counsel), for appellee.

PROVOSTY, J. Appellee moves to dismiss the appeal on the ground that the domicile of the surety on the appeal bond is not "in the jurisdiction of the court" which rendered the judgment. If such be the fact, the appeal will have to be dismissed. Act 67, p. 109, of 1876. For taking evidence on that point the case is remanded.

(140 La. 812)

No. 20748.

PERRIN et al. v. STUYVESANT INS. CO.

(Supreme Court of Louisiana. Jan. 15, 1917.  
Rehearing Denied Feb. 12, 1917.)

(Syllabus by Editorial Staff.)

1. INSURANCE  $\Leftrightarrow$ 282(6)—FIRE INSURANCE—INTEREST.

Under fire policy conditioned to be void if interest of insured was other than unconditional and sole ownership, insured could not recover for a loss if at the time of issuing the policy and for some time thereafter the title stood in the state under tax sale, though the sale was subject to redemption.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 613, 614.]

2. INSURANCE  $\Leftrightarrow$ 146(2)—FIRE INSURANCE—CONTRACTS—CONSTRUCTION.

A fire insurance contract must be enforced as written.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 294.]

Appeal from Eighth Judicial District Court, Parish of Catahoula; Riley J. Wilson, Judge.

Action by Mrs. C. B. Perrin and husband against the Stuyvesant Insurance Company. Judgment for plaintiffs, and defendant appeals. Judgment set aside, and suit dismissed.

M. M. Boatner, of New Orleans, and M. C. Thompson, of Winnsboro, for appellant. R. M. Tallafarro and S. R. Holstein, both of Harrisonburg, and Perrin & Perrin, of Jena, for appellees.

PROVOSTY, J. [1, 2] This is a suit upon a fire insurance policy, and the defenses are, among others, that, by an express stipulation, the policy was to remain in force "only while" the house insured "was occupied by tenant as a dwelling," and that it was not so occupied at the time of the fire, nor for some days previously but was vacant, and, moreover, had not, when occupied, been used as a dwelling but as a boarding house or

hotel; and again, that, by another express stipulation, the policy should be void "if the interest of the insured be other than unconditional and sole ownership"; and that at the time of the issuance of the policy, and for some time thereafter, the title stood in the state of Louisiana by virtue of a tax sale. There is no denying that the tenant took in boarders, both permanent and transient; but it is said that the same thing was done in all the houses of the village, there being no hotel. Be that as it may, the facts on the other grounds of defense are undisputed, and are fatal to plaintiff's suit under well-settled law. These grounds of avoiding the contract appear narrow, but they are, all the same, perfectly solid. In *Jones & Pickett v. Insurance Co.*, 132 La. 847, 61 South. 846, the ground was that foreclosure proceedings had been instituted against the property since the issuance of the policy; and this was held fatal, although the foreclosure proceedings had been discontinued before the fire, and therefore had in no wise contributed to the fire. See, in the same sense, *D'Aigle v. Insurance Co.*, 136 La. 777, 67 South. 827; *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; *N. Y. L. Ins. Co. v. Murtagh*, 137 La. 762, 69 South. 165. In a word, the insurance contract has to be enforced as written. The tax sale to the state was subject to redemption, but it did not for that reason any the less convey the title; the title none the less stood in the state so long as the redemption had not taken place. *Baker v. Smith*, 44 La. Ann. 925, 11 South. 585. See brief of counsel, in this. *Baker v. Smith Case*, No. 9 of syllabus.

The judgment appealed from is set aside, and the suit is dismissed, at the cost of plaintiff in both courts.

(140 La. 814)

No. 21740.

**TARVER v. NATALBANY LUMBER CO., Limited.**

(Supreme Court of Louisiana. Jan. 15, 1917.  
Rehearing Denied Feb. 12, 1917.)

(Syllabus by Editorial Staff.)

**1. MASTER AND SERVANT §129(2)—INJURIES TO SERVANT—PROXIMATE CAUSE.**

Where a planing machine workman, in removing a board which clogged the machine, put his hand through an aperture left by a broken hood, which was not designed as a guard, and was injured, the master was not liable, where his negligence in permitting the opening to be enlarged did not contribute to the injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 258.]

**2. MASTER AND SERVANT §236(6)—INJURIES TO SERVANT—PROXIMATE CAUSE.**

In such case, the servant's gross recklessness in putting his hand in the aperture with a dangling sleeve, which caught a set screw and

drew his hand into the machinery, would prevent recovery.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 729.]

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Robert S. Ellis, Judge.

Action by William L. Tarver against the Natalbany Lumber Company, Limited. Judgment for defendant, and plaintiff appeals. Affirmed.

J. W. Cassidy and Clay Elliott, both of Amite, for appellant. William H. McClen-don, of Amite, and J. Zach Spearing, of New Orleans, for appellee.

PROVOSTY, J. [1, 2] While plaintiff, an experienced workman, was operating a planing machine in the mill of the defendant company, one of the pieces of board which he was planing got stuck in the machine, and for removing it he went from the head of the machine, where the operator stands, to the side, and extended his hand to take hold of the piece of board, when his sleeve caught upon a set screw on the fast revolving shaft, and his wrist was drawn into the machine and injured; and he brings this suit in damages. The case is so plainly with the defendant that we spare ourselves any elaborate statement of it. The only negligence attributed to the defendant is that a piece had been broken off from the hood over the part of the machine where this set screw was, whereby the opening near this set screw was somewhat enlarged. But this hood was not intended to serve as a protection against the set screw, or any other part of the machine, but simply and solely to catch the flying particles of wood; and, as a matter of fact, the enlargement of the opening in it contributed in no way towards the accident. And even if it had, plaintiff would still have been without right to recover, as his attempting to remove this piece of board in the manner he did was grossly reckless, and was rendered still more so by the fact that the sleeve which got caught was hanging loose, or dangling, ready to be caught.

Judgment affirmed.

(140 La. 815)

No. 20819.

**ROTHSTEIN v. SCHIMSKY.**

(Supreme Court of Louisiana. Jan. 15, 1917.  
Rehearing Denied Feb. 12, 1917.)

(Syllabus by the Court.)

**DIVORCE §37(9)—DECREE OF SEPARATION—ABANDONMENT—CONDITIONS PRECEDENT.**

No decree of separation from bed and board can be decreed on the ground of abandonment without a compliance with the requisites contained in article 145, Civ. Code.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 115.]

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Suit by Mrs. Ida Rothstein against Ike Schimsky, her husband, for separation from bed and board. Judgment for plaintiff, and defendant appeals. Judgment reversed, and judgment rejecting plaintiff's demand as in case of nonsuit.

P. L. Fourchy and Woodville & Woodville, all of New Orleans, for appellant. E. M. Cahn, of New Orleans, for appellee.

SOMMERVILLE, J. Plaintiff sued her husband, Ike Schimsky, for separation from bed and board on the ground that defendant abandoned her on the 1st day of October, 1909, and had not returned to the matrimonial domicile at the time of the filing of the suit, May 24, 1911.

"That, in addition to said abandonment, the said defendant has defamed and publicly abused the plaintiff herein, and that, under the circumstances, petitioner desires to obtain a separation from bed and board from her husband."

Plaintiff does not state in her petition how the defendant defamed and publicly abused her; and, on the trial of the cause, no evidence was offered to support this allegation.

One summons was issued to the defendant calling him to return to the matrimonial domicile, which was served May 25, 1911.

March 23, 1914, defendant answered, and denied "that he was ever married to the plaintiff in New York in 1898, or at any time; and specially denied that the relation of husband and wife has ever existed between them." He denied the other allegations contained in the petition.

The case was called for trial April 22, 1914, when plaintiff and defendant entered into the following stipulation:

"It is agreed by counsel for plaintiff, and counsel for defendant, that this case is being tried to-day between plaintiff and defendant, upon the issue of marriage vel non; and, should the court reach the conclusion that there is a marriage, the defendant waives the usual summons to return to the matrimonial domicile, and will not insist thereon."

There was judgment for the plaintiff declaring a separation from bed and board, and defendant has appealed. Defendant made no appearance in this court by oral argument or on brief.

The record contains evidence as to the validity of the marriage of plaintiff and defendant, and the district judge held that the

marriage between the parties had been established by competent evidence. But this is not a suit to establish a marriage; it is one to dissolve a marriage by declaring a separation from bed and board.

As there was no evidence offered to support the allegation in plaintiff's petition that "defendant has defamed and publicly abused the defendant herein," it would appear that that ground was abandoned.

The suit on the ground of abandonment was virtually abandoned, for there was but one summons to return to the matrimonial domicile issued and served on the defendant. It would appear, by the agreement quoted above between counsel, that defendant attempted to waive the usual summons to return to the matrimonial domicile, and not to insist thereon. But the law is specific to the effect that no judgment for separation can be decreed on the ground of abandonment without a compliance with the terms of article 145, C. C., which reads:

"The abandonment with which the husband or wife is charged must be made appear by the three reiterated summonses made to him or her from month to month, directing him or her to return to the place of the matrimonial domicile, and followed by a judgment which has sentenced him or her to comply with such request, together with a notification of \* \* \* said judgment, given to him or her from month to month \* \* \* three times successively.

"The summons \* \* \* shall be made to him or her at the place of his or her usual residence, if he or she lives in this state, and, if absent, at the place of the residence of the attorney who shall be appointed to him or her by the judge for that purpose, at the suit of \* \* \* husband or wife praying for separation from bed and board."

See Perkins v. Potts, 8 La. Ann. 14; Bienvenu v. Husband, 14 La. Ann. 387; Merrill v. Flint, 28 La. Ann. 194; Bursha v. Lane, 105 La. 112, 29 South. 712; Van Horn v. Arantes, 116 La. 180, 40 South. 592; Williams v. Nona Mills Co., Ltd., 128 La. 811, 55 South. 414.

A defendant cannot waive the summons to return to the matrimonial domicile in a suit for separation from bed and board based on the ground of abandonment. The requisites of the law in such case must be complied with.

It is therefore ordered that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment rejecting plaintiff's demand as in case of nonsuit; at her cost in both courts.

(113 Miss. 330)

ORLANSKY v. JOHNSON et al. (No. 18490.)

(Supreme Court of Mississippi, Division A.  
Feb. 26, 1917.)**1. BANKS AND BANKING** § 77(4)—RECEIVERSHIP — COMPOSITION WITH OFFICERS — EFFECT.

Where receivership proceedings are instituted against a bank on account of improper management by its directors, it is within the jurisdiction of the court to authorize a settlement by the receiver with such officers, and when it is accepted by such officers they are discharged from all liabilities to the bank or its stockholders or other creditors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 173, 174.]

**2. PLEADING** § 84(4)—CONSTRUCTION—PRESUMPTIONS.

Where a bill to recover from directors of a bank for mismanagement and loss of funds exhibited a settlement on order of court between the directors and the receiver and did not deny or controvert the making of a settlement, the court on appeal must accept as true the contents of the exhibit.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 74.]

**3. BANKS AND BANKING** § 54(1)—MISMANAGEMENT OF FUNDS—LIABILITY OF DIRECTORS.

Directors of a bank are not liable to stockholders for alleged mismanagement occurring prior to their respective incumbencies.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 92, 95, 96, 105.]

Appeal from Chancery Court, Leflore County; Joe May, Chancellor.

Suit by A. Orlansky against W. T. Johnson and others. Demurrers were filed by the defendants to the amended bill, and those of H. L. Walton, W. A. Swift, and R. V. Pollard, receiver, were overruled, and the others sustained. From the decree sustaining demurrers, the complainant appeals, and from the decree overruling their demurrers, Walton and Swift prosecute a cross-appeal. Affirmed on the direct appeal, reversed on the cross-appeal, and remanded.

M. B. Grace, of Birmingham, Ala., for appellant. Hill & McBee and Gwin & Mounger, all of Greenwood, for appellees.

SYKES, J. The appellant, A. Orlansky, filed an original bill in the chancery court of Leflore county against W. T. Johnson and certain other parties who were, or had been, directors and officers of the Bank of Leflore, and also against R. V. Pollard, receiver of said bank. Defendants filed demurrers to the original bill, which demurrers were sustained and an amended bill was then filed. Before the filing of this amended bill the complainant had petitioned the receiver of the bank to file this suit himself, and the receiver had declined to do so, giving his reasons therefor. Permission was then obtained from the chancellor to make the said receiver a party defendant to this suit. The gravamen of the amended bill is as follows: The complainant was a stockholder in the

bank at the time of its failure and filed the bill on behalf of himself and other stockholders who desired to join with him in the suit. The amended petition further alleged that the Bank of Leflore was a bank organized under the laws of the state of Mississippi, incorporated in 1902, and domiciled at Greenwood. It then names the directors elected in 1910 and the officers then elected by the directors. That complainant purchased his stock in February, 1910. At that time one Robert Wilson was cashier of the bank, but in January, 1912, Robert Wilson resigned, and G. L. Ray was elected cashier. At this same meeting in 1912 W. A. Swift and H. L. Walton, two of the defendants herein, were elected as additional directors of the bank. It alleges that before complainant purchased his stock the bank had suffered heavy losses, and its capital stock had been misappropriated, lost, and wasted until it was practically worthless; that the officers and directors knew of this fact, or should have known it, at the time he bought the stock; that he, the complainant, was ignorant of the financial condition of the bank; that before and at the time of the purchase of this stock the officers and directors of the bank held it out to the public as a safe and solvent banking institution and made false written reports of its condition; that the officers and directors of the bank had represented to complainant that the bank was solvent and that he believed this, when as a matter of fact it was all untrue; that before he purchased the stock, through certain sham manipulations, the bank purchased from one A. G. McLemore, who was then an officer and director of the bank, 523½ shares of the stock of the bank for which they paid more than \$100,000; that this transaction weakened the bank and rendered it practically insolvent, which fact was known to the officers and directors; that the bank sustained other heavy losses by making unlawful and improvident loans without adequate security; that when the bank was organized it adopted certain rules and by-laws which were in full force and effect when the bank failed; that these rules and by-laws were binding on the officers and directors of the bank; that under these rules the directors were required to appoint a committee to count the cash, compare the assets and liabilities, examine the books of the bank, and perform other duties; that the directors failed to carry out these rules and by-laws; that a short time before the bank failed certain of its officers and directors, knowing its weakened condition, and being heavy depositors in the bank, withdrew their deposits from said bank, thereby causing it to collapse; that, notwithstanding the insolvency of the bank caused by the unlawful McLemore deal, the directors declared large dividends each year; that it was the duty of the

directors to exercise care and skill in managing the affairs of the bank; that in January, 1913, the bank became insolvent and failed, and R. V. Pollard was appointed receiver; that the receiver had been requested by him to bring this suit in his capacity as receiver, but that the said receiver declined to do so, as is shown by a letter from the said receiver to the counsel for the complainant, together with a letter from Messrs. Gwin & Mounger, counsel for the receiver; both of these above letters are attached to the bill and made exhibits thereto; that permission was then obtained from the chancery court to join the receiver as a party defendant.

The complainant asked that the receiver in his answer show the condition of the bank on the date of the purchase of the stock of the complainant in the bank and show whether or not the officers and directors had perpetrated a fraud upon the complainant and the other stockholders and show how the bank was conducted and carried on from time to time. Along this line the bill, in short, asks that the receiver in his answer give an entire history of all of the transactions of the bank from the date of its incorporation to the date of its failure. The prayer for relief, after asking for all of the information from the receiver that he could obtain from an audit of the bank books by an expert accountant through its entire history, then prays that on final hearing complainant be awarded a personal decree against all of the officers and directors of the bank for the amount of the stock owned by him and other stockholders, parties to this suit, which was rendered worthless by reason of the insolvency of the bank by neglect, fraud, and unlawful action of the officers and directors (no other stockholders joined in the suit). It then stated the usual prayer for general relief. The letter of the receiver in which he declines to bring this suit and the letter from Messrs. Gwin & Mounger, both of which letters are made exhibits to the bill, show that the reason the receiver declined to bring this suit was that during the pendency of the receivership in the chancery court of Leflore county that court entered an order authorizing the receiver to make a settlement with certain of the officers and directors of the bank for the sum of \$77,500; that all of the parties defendant to the amended bill have made settlement under this decree of the chancery court except H. L. Walton and W. A. Swift. Demurrers were filed by all of the defendants to the amended bill. The demurrers of H. L. Walton, W. A. Swift, and R. V. Pollard, receiver, were overruled, and the demurrers of the other defendants were sustained. Complainant prosecutes this appeal from the decree sustaining these demurrers, and Messrs. Walton and Swift prosecute a

cross-appeal from the decree overruling their demurrers. No cross-appeal is prosecuted by the receiver.

[1] We think the action of the court below was correct in sustaining the demurrers of the appellees. The letter of the receiver and of his attorneys show that these appellees made a settlement with the receiver by virtue of a decree of the chancery court of Leflore county. There was no appeal from the decree authorizing this settlement to be made. It was within the jurisdiction of the court to authorize this settlement, and it is therefore a valid and binding one, and these appellees by accepting and making that settlement have been discharged from all liabilities to the bank or its stockholders or other creditors.

[2] That this settlement was made was shown by the exhibits to the amended bill, and was not denied or controverted in said bill; consequently we must accept as true the contents of the exhibits. *House v. Gumble*, 78 Miss. 259, 29 South. 71; *McNeill v. Lee*, 79 Miss. 455, 30 South. 821; *Weir v. Jones*, 84 Miss. 610, 37 South. 128; *McKinney v. Adams*, 95 Miss. 832, 50 South. 474.

[3] The gravamen of the bill is that the officers and directors and cashier of the bank were guilty of negligence and neglect of duty and misappropriation of the bank's funds all prior to the year 1912, when H. L. Walton and W. A. Swift became directors in the bank. There are no charges whatever in the bill of any negligence or mismanagement on the part of the directors from January 1, 1912, to the time the bank went into the hands of a receiver in January, 1913, or during the incumbency of office as directors of Messrs. Walton and Swift. There is neither a general nor specific charge of negligence, misappropriation, or neglect of duty on the part of either of these directors within that time. For this reason the court should have sustained their demurrers to the amended bill.

The case will be affirmed on direct appeal, reversed on cross-appeal, and remanded.

Affirmed on direct appeal, reversed on cross-appeal, and remanded.

(113 Miss. 233)

METROPOLITAN CASUALTY INS. CO. v. CATO. (No. 18793.)

(Supreme Court of Mississippi, Division A.  
Feb. 13, 1917. Suggestion of Error  
Overruled Feb. 28, 1917.)

1. INSURANCE—§291(1)—WARRANTY—BREACH—CHRONIC DISEASE.

A statement in an application for accident insurance that the insured was sound and whole and had never been subject to any chronic disease, even if it is a warranty, is not shown to have been false by evidence that some years before making the application insured suffered from facial paralysis which was temporary, and six or seven years before had suffered from malarial poisoning, from which he had recov-

ered, since neither of those was a chronic disease.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 681.]

## 2. INSURANCE §524—ACCIDENT INSURANCE—“TOTALLY DISABLED.”

Where a plantation manager accidentally broke his hip, as a result of which he became unable to ride horseback or to tend to his duties daily, and was forced to resign, but did occasionally when the weather was good ride in a buggy to a plantation owned by his daughters and give instructions to the foreman and consult with the foreman when the latter came to the house, but was unable to see that his instructions were carried out, or to keep the books regularly, his disability was total under a clause of an accident insurance policy giving a weekly indemnity if the injuries continuously and totally disabled and prevented insured from performing any and every kind of duty pertaining to his occupation, not partial, under a clause providing for only half that indemnity if the injury disabled him from performing some one or more important daily duty pertaining to his occupation, since, when insured is prevented by his injury from doing all the substantial acts required of him in his business, he is “totally disabled,” notwithstanding the fact that he occasionally is able to perform some single act connected with his occupation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1310.

For other definitions, see Words and Phrases, Second Series, Totally Disabled.]

Appeal from Circuit Court, Washington County; Frank E. Everett, Judge.

Action by William R. Cato against the Metropolitan Casualty Insurance Company. Judgment for the plaintiff, and defendant appeals. Affirmed.

See, also, 74 South. 118; 74 South. 118; 74 South. 119.

L. A. Smith, of Holly Springs, for appellant, cites *F. & C. Co. v. Getzendanner*, 22 Tex. Civ. App. 76, 53 S. W. 838, 55 S. W. 179; *Rayburn v. Casualty Co.*, 141 N. C. 425, 54 S. E. 283; *Coad v. Travelers*, 61 Neb. 563, 85 N. W. 558; *McKinley v. Bankers*, 106 Iowa, 81, 75 N. W. 670; *Spicer v. Com. Mut.*, 16 Pa. Co. Ct. R. 163; *Foglesong v. Brotherhood*, 121 Mo. App. 548, 97 S. W. 240; *Smith v. Supreme Lodge*, 62 Kan. 75, 61 Pac. 416; *Wolcott v. United Life & Acc. Ins. Ass'n*, 55 Hun. 98, 8 N. Y. Supp. 263; *Ford v. Accident Ass'n*, 148 Mass. 153, 19 N. E. 169, 1 L. R. A. 700; *Saveland v. Fidelity Co.*, 67 Wis. 174, 30 N. W. 237, 58 Am. Rep. 863; *Merrill v. Insurance Company*, 91 Wis. 329, 64 N. W. 1039; *Williams v. Association*, 91 Ga. 698, 17 S. E. 982; *Bylow v. Surety Co.*, 72 Vt. 325, 47 Atl. 1066; *Gracy v. Peoples Mutual*, 21 Pitts. L. J. (N. S.) 25; *U. S. Mut. v. Millard*, 43 Ill. App. 148; *Hollobaugh v. Peoples Ins.*, 138 Pa. 595, 22 Atl. 29; *Grand Lodge v. Orrell*, 109 Ill. App. 422.

Campbell & Cashin, of Greenville, for appellee, cite 5 Elliott on Contracts, § 4398; *Lobdill v. Ass'n*, 69 Minn. 14, 71 N. W. 696, 38 L. R. A. 537, 65 Am. St. Rep. 542; *Turner v. Fidelity Co.*, 112 Mich. 425, 70 N. W. 898, 38 L. R. A. 529, and note, 67 Am. St. Rep.

428; *Keith v. Chicago*, etc., 82 Neb. 12, 116 N. W. 957, 23 L. R. A. (N. S.) 352, and note, 130 Am. St. Rep. 655; *James v. Casualty Co.*, 118 Mo. App. 622, 88 S. W. 125; *Foglesong v. Brotherhood*, 121 Mo. App. 548, 97 S. W. 240; *Thayer v. Standard Life*, 68 N. H. 577, 41 Atl. 182; *Ind. Mut. Co. v. Hawkins*, 94 Ark. 417, 127 S. W. 457, 29 L. R. A. (N. S.) 635, and note, 21 Ann. Cas. 1029; *Brotherhood*, etc., v. Aday, 97 Ark. 425, 134 S. W. 928, 34 L. R. A. (N. S.) 126.

SYKES, J. William R. Cato instituted suit against the Metropolitan Casualty Insurance Company of New York in the circuit court of Washington county to recover accident benefits for a certain stated period as provided in a policy of insurance issued by the appellant to appellee. This insurance policy provides for the payment to insured of \$25 a week while insured is continuously and wholly disabled from performing any and every kind of duty pertaining to his occupation. Clause 3 of said policy provides for a payment of \$12.50 a week for a period, not exceeding 52 weeks if the insured is disabled from performing some one or more important daily duty or duties pertaining to his occupation. During the life of this policy Mr. Cato accidentally fractured his right hip, from which injury he never entirely recovered. The insurance company under this policy paid Mr. Cato the sum of \$200 and paid his doctor's bill of \$75. The policy provides that the weekly indemnity shall be paid at the end of each eight weeks if requested by the insured. Mr. Cato requested that his indemnity be paid in this manner. The insurance company, however, declined to pay him any further or other sum of money than the \$275. This suit is for the second, third, fourth, fifth, and sixth eight-week periods of disability, each period amounting to \$200 indemnity for total disability, or a total amount of \$1,000, with interest, said period expiring September 22, 1914. The defendant pleaded the general issue, and a special plea setting up the fact that in his application for insurance plaintiff warranted as follows:

“I am sound and whole, mentally and physically, I am neither deaf, deformed, nor suffer any impairment of vision of either eye, nor have I ever been subject to fits, epilepsy, vertigo, somnambulism, or any chronic disease, except (no exceptions)—when in truth and in fact the plaintiff, prior to the application for and the issuance of said policy, had a stroke of paralysis, and at divers times prior thereto had chronic kidney trouble and had been informed by physicians that he had Bright's disease.” A demurrer was overruled to this special plea, whereupon issue was taken upon same. There was also a special plea of a false warranty relating to the income of plaintiff, upon which issue was joined. The testimony did not sustain either of these spe-

cial pleas. The facts in the case necessary to be mentioned by us are as follows: In his application for insurance Mr. Cato stated that his occupation was a cotton planter, and that his duties were "superintending only." He also said that he was sound and well, mentally and physically, nor had he ever been subject to any chronic disease. This policy was issued to the appellee on January 13, 1913. Appellee fractured his hip on the 21st day of October, 1913. The testimony material to the issues in brief is as follows: The appellee testified that at the time of his injury he was a plantation manager employed to manage the place of McCutchen Bros., which had about 800 acres in cultivation, at a salary of \$1,000 a year and certain perquisites unnecessary to be noticed; that since his injury he has been unable to do anything and had to resign his position with his employers; that he has been able to write a little and ride around in a buggy a little since; that the principal reason he has not been able to perform any of the duties of a plantation manager is because he has been unable to ride horseback. He was confined to his house on account of the injury until some time in April, 1914, at which time he prevailed upon his daughters to have him put into a buggy and driven out to see some cotton planted on a 200-acre plantation which was rented by his daughters. He was not able to be out again for about a month. Some time in May, under the advice of his physician, he was driven around in a buggy by some of his family, and at a later period was able to drive himself. During the entire time, however, he was never able to be out every day, but in pretty weather he was sometimes able to be out once a week, and sometimes oftener. His hip pained him practically all of the time. He testified to the duties of a plantation manager or superintendent, and among other duties said it was necessary for him to keep the books of the plantation. Counsel for appellant asked him if he could not keep those books at the time of the trial, to which he replied that he could do a little of it. He was also asked if a part of his duties as superintendent was not to direct the hands how to work, and if he could not at least direct those on the place of his daughters that he could see from the road or from the turn rows where he could go in his buggy, to which he replied in the affirmative. The testimony further showed that Mr. Cato was given by his daughters a part of the proceeds of the crop raised on the place rented by them, which generally amounted to about \$500 a year; that this was a gratuity on their part. On this place they had a negro foreman who before the accident was under the control of the appellee. After the accident this foreman would come to the house and advise with Mr. Cato while he was confined therein as to the crop, and Mr. Cato would also direct and advise

him as best he could when he was able to ride out in a buggy to look at the crop. The appellee was never able to be out in his buggy every day. On damp or bad days he suffered severely with his hip and was confined to the house. He was never able to stay on the plantation all day and actually see to the proper management of it. He was not able daily to keep the books or was never able daily to perform any of the substantial duties of a plantation superintendent or manager. The testimony further showed that some years prior to the taking out of the policy herein sued on plaintiff suffered from facial paralysis, which is a disease of the sciatic nerve and which was temporary. His physician also testified that at one time, about six or seven years before the policy was issued, he suffered with malaria poisoning and may have had a trace of albumen in his urine, but that these had passed away. Clauses 2 and 3 in the policy are as follows:

"Clause 2. If such injuries shall not result as specified in clause 1, but, directly, solely, exclusively, and independently of all other causes, shall, within two weeks from the date of the accident, continuously and wholly disable and prevent the insured from performing any and every kind of duty pertaining to his occupation, the company will pay the insured the weekly indemnity above specified for the entire period of such total disability.

"Clause 3. If such injuries shall not result as specified in clause 1, but, directly, solely, exclusively, and independently of all other causes, shall, within two weeks from the date of the accident or immediately following total disablement, continuously disable and prevent the insured from performing some one or more important daily duty or duties pertaining to his occupation, the company will pay the insured one-half of the weekly indemnity above specified for the period of such partial disablement, not exceeding 52 weeks."

[1] It is also contended that under the policy the answers of appellee in his application for insurance are warranties. Conceding that they are for the purpose of this decision, there is no testimony whatever in the record of any breach of these warranties. There is no testimony that at the time of the taking out of this insurance policy the appellee was not sound and whole. There is no testimony in the record that he was ever subject to any chronic disease. The mere fact that he may have suffered from a facial paralysis or malaria would not avoid the policy. He was sound and well at the time the policy was issued. The facial paralysis, malarial poisoning, and trace of albumen in his urine had disappeared years before. The testimony shows that they were all temporary ailments from which a complete recovery was had; such ailments do not constitute a state of ever having been subject to any chronic disease. *Joyce on Insurance*, § 1849; *Cady v. Fidelity & Casualty Ins. Co.*, 134 Wis. 322, 113 N. W. 967, 17 L. R. A. (N. S.) 260.

At the conclusion of all the testimony the court instructed the jury to return a verdict for the plaintiff for the total amount sued for. This amount was based upon a total disabil-



ity during the periods stated in the declaration.

[2] The appellant contends that Mr. Cato was not totally disabled, but only partially disabled, and his recovery, if any, would be governed by clause 3, above quoted. Clause 3 provides that, if the injuries "continuously disable and prevent the insured from performing some one or more important daily duty or duties," etc., or, in other words, if the insured is able to perform some one or more important daily duty or duties, then his disability would only be partial. It is the contention of appellant that clause 3 explains and modifies clause 2. He also contends that in the reported cases on casualty insurance in the different states none of the policies there in question contains a clause similar to clause 3 in this policy. It is contended that, if the appellee was able at any time to do any work pertaining to the important duties of plantation manager, then his disability would be reduced from total to partial. As we understand his contention, if Mr. Cato could do any work whatever on any plantation books, say for one hour out of every two weeks, then his disability would be partial, or if he could be driven in his buggy to the plantation rented by his daughters and remain there for a short time one day out of one or two weeks, and while there give some instructions to the hands, then his disability will be reduced from total to partial.

In 5 Elliott on Contracts, § 4398, the author, in discussing policies of this character, has the following to say:

"The cases which have placed a construction upon the term 'total disability' might sometimes seem to be divided into two classes, viz., those which construe it liberally in favor of the insured, and those which construe it strictly against him. Any apparent conflict in the decisions may, however, be mostly reconciled in view of differences in the language of the policies, and of the different occupations under which the parties were insured. Of course, if the insured is so injured that he cannot do anything, it is a case of total disability. But the decisions go much further, and it is generally held that, if the insured is so injured that he cannot perform such work as he was engaged in at the time, or similar or remunerative work, it is a case of total disability, even though he may be able to do some slight act."

In the case of *Wolcott v. United Life, etc., Co.*, 55 Hun, 98, 8 N. Y. Supp. 263, the court says:

"Total disability must, from the necessity of the case, be a relative matter, and must depend largely upon the occupation and employment in which the party insured is engaged."

"One who labors with his hands might be so disabled by a severe injury to one hand as not to be able to labor at all at his usual occupation, where as a merchant or a professional man might by the same injury be only disabled from transacting some kinds of business pertaining to his occupation. \* \* \* There are a few propositions applicable to the construction of the policy under consideration which, under the evidence, are decisive of this case. The first is that total disability does not mean absolute physical inability on the part of the insured to transact any kind of business pertaining to his occupation. It is sufficient if his injuries

were of such a character that common care and prudence required him to desist from the transaction of any such business so long as it was reasonably necessary to effectuate a cure. This was a duty which he owed to the insurer as well as to himself. *Young v. Travelers' Ins. Co.*, 80 Me. 244 [13 Atl. 896]. The second is that under the particular terms of this policy, to wit, 'from transacting any and every kind of business pertaining to the occupation above stated' (merchant), inability to perform some kinds of business pertaining to that occupation would not constitute total disability within the meaning of the policy. \* \* \* But, fourth, the mere fact that he might be able, with due regard to his health, to occasionally perform some single and trivial act connected with some kind of business pertaining to his occupation as a merchant, would not render his disability partial instead of total, provided he was unable substantially or to some material extent to transact any kind of business pertaining to such occupation." *Lobdill v. Laboring Men's, etc., Ass'n*, 69 Minn. 14, 71 N. W. 698, 38 L. R. A. 537, 65 Am. St. Rep. 542.

The above quotation is peculiarly apt to the case at bar, because, taken most strongly for the appellant, the appellee here was only able "to occasionally perform some single and trivial act connected with some kind of business pertaining to his occupation," as superintendent of a plantation. He was never able to perform any one or more of the important daily duties pertaining to his occupation as a plantation manager. Being able to direct the hands upon a plantation without the ability to see that these directions are properly followed amounts to nothing and could not be considered an important duty. The important part, the *sine qua non*, is to see that these directions are properly executed. Being able occasionally to work on plantation books is not being able to perform one of the important daily duties mentioned in clause 3, but is a mere incident of the employment. The testimony shows that in order to be able to transact the important duties of managing a plantation the manager must be able to ride horseback and go all over the plantation. He must be with the hands from daylight until dark. *Turner v. Fidelity, etc., Co.*, 112 Mich. 425, 70 N. W. 898, 38 L. R. A. 529, and note, 67 Am. St. Rep. 428; *Keith v. Chicago, etc., Co.*, 82 Neb. 12, 116 N. W. 957, 23 L. R. A. (N. S.) 352, and note, 130 Am. St. Rep. 655. In the note to the latter case the rule is stated that:

"Ability to do some small act will not prevent recovery. Thus it is held that the 'total disability' contemplated by a benefit certificate does not mean a state of absolute helplessness, and the fact that assured walked to his physician's office was held not to prevent recovery where he was entirely incapacitated for work or business." *Mutual Benefit Ass'n v. Nancarrow*, 18 Colo. App. 274, 71 Pac. 423.

So the fact that a farmer is able to direct his business, and do some of the work himself, will not prevent his recovering as for total disability if he is wholly disabled from doing all the substantial and material acts necessary to be done. *Foglesong v. Modern Brotherhood*, 121 Mo. App. 548, 97 S. W. 240; *Thayer v. Standard Life, etc., Co.*, 68 N. H.

577, 41 Atl. 182. In the latter case the court has the following to say:

"As long as one is in full possession of his mental faculties, he is capable of transacting some parts of his business, whatever it may be, although he is incapable of physical action. If the words 'wholly disable him from transacting any and every kind of business pertaining to the occupation under which he is insured' were to be construed literally, the defendants would be liable in no case unless, by the accident, the insured should lose his life or his reason. \* \* \* It is certain that neither party intended such a result."

See, also, the case of *Industrial Mutual Indemnity Co. v. Hawkins*, 94 Ark. 417, 127 S. W. 457, 29 L. R. A. (N. S.) 635, and note, 21 Ann. Cas. 1029; *Brotherhood of Locomotive Firemen & Engineers v. Aday*, 97 Ark. 425, 134 S. W. 928, 34 L. R. A. (N. S.) 126. The correct rule, and the rule announced by the great weight of authority in this country, is well stated in 1 *Corpus Juris*, p. 464, as follows:

"But when the insured is prevented by his injury from doing all the substantial acts required of him in his business, he is within such a provision of the policy, notwithstanding the fact that he occasionally is able to perform some single act connected with some kind of business pertaining to his occupation."

Practically all of the authorities bearing upon this matter are cited in the able briefs of counsel for appellant and appellee, and we will not further quote from them. In conclusion we will say that the plaintiff was never able to perform any one or more important daily duty as superintendent of a plantation. It therefore follows that the peremptory instruction was correct, and the case is affirmed.

**Affirmed.**

#### METROPOLITAN CASUALTY INS. CO. v. CATO. (No. 18795.)

(Supreme Court of Mississippi, Feb. 13, 1917.  
Suggestion of Error Overruled  
Feb. 26, 1917.)

Appeal from Circuit Court, Washington County; Frank E. Everett, Judge.

Action by William R. Cato against the Metropolitan Casualty Insurance Company. Judgment for the plaintiff, and defendant appeals. Affirmed.

See, also, 74 South. 118.

L. A. Smith, of Holly Springs, for appellant. Campbell & Cashin, of Greenville, for appellee.

**PER CURIAM. Affirmed.**

(113 Miss. 303)

#### METROPOLITAN CASUALTY INS. CO. v. CATO. (No. 19030.)

(Supreme Court of Mississippi, Division A.  
Feb. 26, 1917.)

#### 1. INSURANCE — 640(2) — ACTION ON POLICY — PLEA — BREACH OF WARRANTY — TEMPERATE HABITS.

A plea in an action on an accident insurance policy which alleged that plaintiff when he made his application was an habitual user of intoxi-

cating liquor does not show a breach of a warranty that insured's habits of life were correct and temperate, since a person can habitually use intoxicating liquor and at the same time be temperate.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1617, 1618.]

#### 2. INSURANCE — 640(2) — ACTION ON POLICY — PLEA — BREACH OF WARRANTY — "DISEASE."

In a plea in an action on an accident insurance policy alleging a breach of warranty of sound health, because insured was at the time suffering from a disease of the kidneys, the term "disease" must be given the same meaning as it would be given in construing the policy, and means a serious ailment having a tendency to impair health and shorten life, not merely a temporary or trivial ailment, and the plea was therefore sufficient.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1617, 1618.]

For other definitions, see Words and Phrases, First and Second Series, Disease.]

Appeal from Circuit Court, Washington County; Frank E. Everett, Judge.

Action by William R. Cato against the Metropolitan Casualty Insurance Company. Judgment for the plaintiff, and defendant appeals. Reversed and remanded.

L. A. Smith, of Holly Springs, for appellant. Campbell & Cashin, of Greenville, for appellee.

SYKES, J. This is a companion case to the two cases bearing the same style decided two weeks ago by this division. 74 South. 114, 118. This suit is for subsequent installments on the same insurance policy. For a history of the litigation reference is made to the opinion delivered in the first one of this series of cases. At the conclusion of the testimony a peremptory instruction was given in favor of plaintiff for the amount sued for. In the suit at bar the insurance company filed the following special plea:

"And for a first special plea to the declaration comes the defendant, by its attorneys, and says that the plaintiff ought not to recover, for that the plaintiff, in his application for the policy sued upon, which application is copied into said policy, warranted that: 'I am sound and whole, mentally and physically. I am neither lame, deaf, deformed, nor suffer any impairment of vision of either eye, nor have I ever been subject to fits, vertigo, somnambulism, or any chronic disease, except (no exception)'—but in truth and in fact the plaintiff at the time of making said application was not sound and whole, mentally and physically, but in fact and in truth then had a disease of the kidneys, which was well known to him. And defendant says that such warranty was material to the risk assumed by it, and that said risk would not have been assumed and said policy issued had it known of the said disease of the kidneys, and that this unsoundness and disease of the kidneys was unknown to this defendant until long after it had paid him \$275 under said contract, and the amount so paid him is far in excess of all premiums paid by the plaintiff to the defendant for or on account of said policy sued upon. Wherefore defendant says that, by reason of said false warranty, said policy is void, and that plaintiff ought to be barred; and this the defendant is ready to verify."

As a second special plea it filed the following:

"Comes the defendant, by its attorneys, and for a further and second plea to the declaration filed herein against it says that the plaintiff ought not to recover, for that the plaintiff, in his application for the policy sued on, represented, which representation was a warranty, that, 'My habits of life are correct and temperate,' but defendant says that the habits of the plaintiff at the time of said application and said representation, were not correct and temperate, but, on the contrary, the plaintiff was then an habitual user of intoxicating liquor, viz. whisky, and this was unknown to the defendant, and was material to the risk assumed by defendant, and had this defendant been apprised of the truth in regard to said representation it would not have assumed the risk and would not have issued said policy. Wherefore defendant says that, by reason of said false representation, said policy is void, and the plaintiff ought to be barred, and this the defendant is ready to verify."

[1, 2] Demurrers were sustained to each of these pleas. So far as the second special plea is concerned, we think the court was correct in sustaining the demurrer to it. Mr. Cato may have been an habitual user of intoxicating liquor, viz. whisky, and at the same time have been temperate in the use of same. The first special plea, however, is to the effect that in the written application Mr. Cato warranted that he was sound and whole, mentally and physically, when as a matter of fact at the time of making this warranty he was not sound and whole, but had a disease of the kidneys, which fact was well known to him. It is the contention of the appellee that the demurrer was well taken because the appellee made no especial warranty that he did not have a disease of the kidneys. He further claims that the plea should have alleged that the plaintiff had a chronic disease of the kidneys at the time the application was made. The terms "sickness" and "disease" in warranties of this character in insurance policies have a clear and well-defined meaning as construed by the decisions of the different states. As it is expressed in *Joyce on Insurance*, § 1849:

"The decisions seem to agree that the terms 'sickness' and 'disease' do not mean a trifling illness nor occasional physical disturbances resulting from accidental causes, and not permanent in their effects, nor a temporary illness which readily yields to professional treatment and leaves no permanent physical injury or disorder calculated or having a tendency to shorten life; that an inquiry as to certain diseases must refer to that alone, and not to one not included within the term nor connected therewith in symptoms or effect upon the system. If, however, the assured has actual knowledge as to the fact that the state of his health is such as to materially affect the risk and increase the hazard, it must be disclosed."

See, also, *Archibald v. Mutual Life Ins. Co.*, 38 Wis. 542, from which opinion we quote as follows:

"In his application for the insurance Mr. Archibald represented, among other things, that his kidneys were in a healthy state and free from any tendency to disease. On behalf of the

defendant the court was asked to instruct the jury that, 'if the assured was ailing of any disease of the kidneys at the time of the application, and concealed it from the examining surgeon or from the company, it avoids the policy.' We are inclined to think that there was some testimony tending to prove that the assured was then suffering from a disease of the kidneys and knew the fact. If so, the instruction should have been given."

It is the duty of the court to give the same construction to these terms in a plea that it gives to them when construing the insurance policy. In the case of *Meyer v. Fidelity & Casualty Co.*, 96 Iowa, 378, 385, 65 N. W. 328, 330, 59 Am. St. Rep. on page 378, the court, in construing similar terms, has the following to say:

"As used in this policy, we think the words 'disease' and 'infirmary' mean practically the same thing. When speaking of an 'infirmary,' we generally mean the state or quality of being infirm physically or otherwise, debility or weakness; and by the use of the word 'disease' we desire to convey the impression of a morbid condition, resulting from some functional disturbance or failure of physical function which tends to undermine the constitution. We do not, as a general rule, apply either term to a slight and temporary disorder, or to the imperfect working of some function, which is over in a short period of time, and which, when recovered from, leaves the body in its normal condition. In using either of the words, we do not, as a rule, refer to a slight and mere temporary disturbance or enfeeblement."

See, also, *Preferred Accident Ins. Co. v. Muir*, 126 Fed. 926, 61 C. C. A. 456; *Logan v. Provident Savings Life Assurance Society of N. Y.*, 57 W. Va. 384, 50 S. E. 529; *Cady v. Fidelity & Casualty Co. of N. Y.*, 134 Wis. 322, 113 N. W. 967, 17 L. R. A. (N. S.) 260.

The term "disease of the kidneys," as used in the special plea, does not mean that he was suffering from any temporary or trivial ailment, but rather from a serious ailment having a tendency to impair health and shorten life. It therefore follows that the court erred in sustaining the demurrer to this plea.

Reversed and remanded.

(113 Miss. 312)

METROPOLITAN CASUALTY INS. CO. v. CATO. (No. 19480.)

(Supreme Court of Mississippi, Division A. Feb. 26, 1917.)

JUDGMENT  $\S$  143(11) — SETTING ASIDE DEFULT—ABSENCE AT TRIAL—EXCUSE.

Where counsel for defendant was in attendance at court, but was absent from the courtroom when the case was called for trial because he had been informed by counsel for plaintiff, who was engaged in the preceding case, that that case would occupy at least six hours, and that there were several other intervening cases, and his absence was for the purpose of conferring with his associate as to an agreement to try the case before a special judge, he had a sufficient excuse to entitle him to set aside a judgment nil dicat against defendant on his motion made within an hour after the rendition of the judgment, and while plaintiff was still in

court ready for trial, in which motion he alleged a defense on the merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 282.]

Appeal from Circuit Court, Washington County; Frank E. Everett, Judge.

Action by William R. Cato against the Metropolitan Casualty Insurance Company. Judgment *nili dicit* for the plaintiff, and defendant appeals. Reversed and remanded.

L. A. Smith, of Holly Springs, for appellant. Campbell & Cashin, of Greenville, for appellee.

SYKES, J. This is the fourth and last of a series of cases appealed from judgments of the circuit court of Washington county. For a history of the litigation reference is made to an opinion delivered by this division two weeks ago. 74 South. 714. The leading counsel for the appellant insurance company resides at Holly Springs, and was attending the term of the circuit court in Washington county ready to assist in the trial of this case. A motion had been made by the attorneys for the appellant, defendant in the court below, to strike certain allegations from the declaration. From the record it appears that the docket was rather congested. Both the plaintiff and the defendant were ready to try the case, and it had been set for trial for a day certain of a previous week of court, but had not been reached. A number of other cases were set for trial ahead of this one, and it seemed rather doubtful to counsel on both sides whether or not they would be able to get a trial in regular course. The night before the judgment was taken counsel on both sides had conferred and discussed the matter of trying the case by agreement before a special judge, but had arrived at no definite understanding about the matter. Mr. Smith, the leading counsel for appellant, that same afternoon or night also talked to the presiding judge about the possibility of getting a trial before him. It seems that the judge at that time was rather uncertain about it, but informed Mr. Smith that he would try to give him some idea the next morning or the next day. When court adjourned that afternoon there was on trial a case in which counsel for appellee was engaged. This counsel told Mr. Smith that the case on trial would consume at least six hours the following morning. There were a number of other cases on the docket to be tried in their regular order before this case would be reached.

Instead of going to court promptly upon its convening the next morning, Mr. Smith went to the office of his associate to discuss the tentative agreement relating to trying this case before a special judge. While he and his associate were so engaged, the case on trial in the circuit court was compromised, the judge called the docket, and for one reason or another the intervening cases were passed, dismissed, or continued until the

Cato case was reached. When this case was called counsel for plaintiff announced ready, but no counsel answered for the defendant. Pursuing his rule, which, however, was unknown to Mr. Smith, the circuit judge asked counsel for plaintiff what order he would take. The attention of the judge was called to the motion to strike certain allegations from the declaration. The court then overruled this motion, and at the request of counsel for plaintiff rendered judgment *nili dicit* in favor of plaintiff for the amount sued for. An attorney who happened to be in the courtroom, in a few minutes after the judgment was taken, notified Mr. Smith and his associate of that fact. They at once repaired to the courthouse and prepared and filed a motion to set aside the judgment. (The record indicates that this occurred within about an hour after the judgment was rendered.) Mr. Cato, the plaintiff, who seems to have been the only witness in his case, was present in the courtroom at the time the attorneys for the defendant filed this motion. The defendant's attorneys had not filed any pleas in the case, but were waiting for their motion above mentioned to be disposed of. However, they had already furnished opposing counsel a copy of the pleas they would file after the court had acted upon their motion. In their motion to set aside the judgment and for a new trial they allege that they had a meritorious defense to the cause of action. The circuit judge followed his rule in disposing of a case when it was reached on the docket. While we fully realize that it is necessary for a proper and efficient administration of justice that the trial judges have and exercise great latitude relating to the dismissal of suits and giving default judgments, at the same time we also appreciate the severe penalty thus sometimes visited upon a party litigant. In this case counsel for both parties were anxious and willing to try the case. They had previously tried two cases between the same parties involving practically the same questions in litigation. Mr. Smith was absent from his home in Holly Springs attending this court in Greenville solely for the purpose of trying it. While it is ordinarily the duty of attorneys, when the day their cases are set for trial has arrived, to be present all during the sessions of court in order to represent their clients when their cases are called, at the same time in this case the reason why Mr. Smith was not present was because of the fact that the case then on trial promised to last at least six hours, as stated to him by Judge Cashin, who was engaged in the case on trial, and also counsel in the instant case, and of the further fact that there were a number of other cases pending for trial set ahead of it. The reason why both counsel for defendant were not present in court was because of an honest belief that the case would not be reached for several hours, and that they were discussing the ad-

visability of a trial before a special judge. In view of all of the circumstances in the case we do not think counsel were guilty of any negligence in the premises. Plaintiff could have been in no way injured by reinstating the case on the docket upon the arrival of Mr. Smith and associate counsel in the courtroom. The plaintiff was still in the courtroom ready for trial. The defendant was also ready for trial. On the other hand, it was a hardship visited upon this appellant and upon his counsel to overrule the motion. In proper instances where parties or counsel are guilty of negligence or neglect in failing to attend court and look after their litigation, this negligence or neglect of duty should be punished. In the case at bar, however, the excuse of counsel was a good one, and the court should have set aside the noli prosequi judgment, allowed the pleas to be filed, and given the defendant a trial of the cause upon its merits.

Reversed and remanded.

(113 Miss. 315)

**THOMAS v. SOUTHERN RY. CO.**  
(No. 18830.)

(Supreme Court of Mississippi, Division B.  
Feb. 19, 1917.)

**RAILROADS §—446(10) — KILLING ANIMALS —  
NEGLIGENCE—QUESTION FOR JURY.**

In an action for loss of plaintiff's cow, killed by defendant's train in the state of Alabama, in view of Code Ala. 1907, §§ 5473, 5476, respectively, declaring that an engineer, on perceiving any obstruction on the track, must use all means within his power known to skillful engineers to stop the train, and that a railroad company is liable for all damages done to persons or stock resulting from its engineer's failure to comply with such section, and that when an injury occurs the railroad has the burden of showing the absence of negligence, testimony by the engineer that he could not have stopped after seeing the object which he struck, not definitely shown to be plaintiff's cow, was not sufficient to warrant a peremptory instruction for defendant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1637.]

Appeal from Circuit Court, Tishomingo County; Claude Clayton, Judge.

Action by J. W. Thomas against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

W. T. Bennett, of Iuka, for appellant. W. H. Kier, of Corinth, for appellee.

**ETHRIDGE, J.** J. W. Thomas filed suit against the Southern Railway Company in the circuit court of Tishomingo county for killing a cow belonging to the plaintiff, valued at \$60. The proof for the plaintiff showed that the cow was killed by the train of the railroad company just across the line of Alabama, and the law of Alabama covers the liability in this case. The proof showed that the cow had her horn knocked off, her hind

legs broken, was otherwise bruised, and was found by the railroad track in this condition; that she was buried by the section crew of the railroad company. There were no eye-witnesses introduced by the plaintiff, and the plaintiff relied on the killing by the train to prove his claim. When the plaintiff rested its case, the railroad company introduced R. B. Taylor, the locomotive engineer, to exculpate itself of negligence in the killing. He testified he was going east on the night of the 5th of January, the date the killing was shown to have occurred, and that just after they passed Bear Creek Bottom, over in Alabama, he hit an object but did not know what it was. It was colored white. He was asked how far ahead was the object when it appeared on the track, and answered that, at the speed he was going, "I judge 30 to 50 yards." He was then asked the question, "Would it have been possible for you to have stopped in that distance?" and answered: "No, sir; not going the speed I was." He stated: That he did not know whether it was Mr. Thomas' cow he struck or not; that he hit something; he didn't know what it was; "just a bulk of some kind." He was then asked, "A man going as fast as you were going, on a dark night, can't always tell what he has hit?" and answered, "No, sir." Asked as to the time, he stated it was about 2:30 in the morning. This was all the proof introduced to exculpate the defendant, and on this proof the trial court gave a peremptory instruction, which is assigned as error.

We think it was error for the trial court to give the peremptory instruction, under the law of Alabama. See Code of Alabama 1907, §§ 5473 and 5476; Southern Ry. Co. v. Parkes, 10 Ala. App. 318, 65 South. 202, and authorities there cited; Southern Ry. Co. v. Blankenship (Ala. App.) 69 South. 591. The concluding sentence of section 5473, Code of Alabama 1907, reads:

"He [the engineer] must also, on perceiving any obstruction on the track, use all the means within his power, known to skillful engineers, such as applying brakes and reversing engine, in order to stop the train."

Section 5476, Code of Alabama, reads:

*"Railroad Liable for Injuries; Burden of Proof.*—A railroad company is liable for all damages done to persons, or to stock or other property, resulting from a failure to comply with the requirements of the three preceding sections, or any negligence on the part of such company or its agents; and when any person or stock is killed or injured, or other property destroyed or damaged by the locomotive or cars of any railroad, the burden of proof, in any suit brought therefor, is on the railroad company to show a compliance with the requirements of such sections, and that there was no negligence on the part of the company or its agents."

In the case of Southern Ry. Co. v. Parks, supra, 10 Ala. App. page 321, 65 South. page 203, it is stated:

"It is the duty of the railroad company to keep a lookout and to frighten away stock in dangerous proximity to the track, as well as to

run them off of the track, or from dangerous proximity thereto."

We think the proof on the part of defendant in this case fails to meet the requirement of the law of Alabama, and the cause is therefore reversed and remanded.

(113 Miss. 263)

**CITY OF HAZLEHURST v. SHOWS.**  
(No. 18742.)

(Supreme Court of Mississippi, Division B.  
Feb. 19, 1917.)

**MUNICIPAL CORPORATIONS §819(6)—DEFECTS IN STREETS—FRIGHTENING HORSE—NOTICE OF DEFECT.**

In an action for the drowning of a horse, which, while being driven along a street which crossed the dam of a lake, shied at a boiler on the slope of the dam, and fell into the lake, where there was no showing that the city had any knowledge of the presence of the boiler, or that it was within the limits of the streets, and it appeared that the boiler, though left there some time before by an individual, had been so covered with weeds and rubbish as to be unnoticeable until the weeds were burned away a day or two before the accident, and that the slope of the dam, while too steep for a buggy, was not too steep for a horse, there was no liability on the part of the city shown.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1741.]

Appeal from Circuit Court, Copiah County; J. B. Holden, Judge.

Action by P. M. Shows against the City of Hazlehurst. Judgment for the plaintiff, and defendant appeals. Reversed, and judgment entered for defendant.

H. J. Wilson, of Hazlehurst, for appellant. M. S. McNeil, of Hazlehurst, for appellee.

ETHRIDGE, J. P. M. Shows filed suit in a justice of the peace court against the city of Hazlehurst on the following account:

"Account sued on. City of Hazlehurst, Dr., to P. M. Shows: To one horse drowned in Lake Hazle—\$150.00."

The record shows that a horse being driven by P. M. Shows was drowned in Lake Hazle, a lake situated in the corporate limits of Hazlehurst and belonging to the city. Shows was driving along a highway over an embankment constituting the dam of the lake, when his horse shied, made a plunge down the embankment, which sloped into the water, and was there drowned. The dam or roadway was 22 feet wide at the crown or face, and from 70 to 100 feet at the base. It seems that a boiler was lying against the bottom of this dam or road embankment, which was within the city limits of Hazlehurst, and had been for some six or seven months, but seems to have been covered with rubbish, trash, and sage, to such an extent that it had not been noticeable, so far as the record shows, by any person traveling the highway until a day or two before the accident in question, when the grass, straw,

and rubbish was burned and left the boiler exposed. It seems that the boiler had been moved by a private party from another point in the city because it was an unsightly object, offensive to the aesthetic sense of the ladies of the city. The party moving the boiler along this highway testified that his wagon broke down at the point opposite where the boiler was lying, and the boiler rolled off the wagon and down the embankment, which the proofs shows was somewhere between 4 and 12 feet below the surface of the road, and was left there by this party. The boiler was originally moved from another point in the city at the request of the street commissioner, but the party was not directed where to carry the boiler, and there is no proof in the record that the location of the boiler was actually known to the city authorities, nor is there any proof that the boiler as situated prior to the burning had any tendency whatever to frighten horses of ordinary gentleness. There is no proof in the record that after the burning, the location and condition of the boiler was ever brought to the attention of the city, but, on the contrary, the street commissioner testifies positively that he had no knowledge of the boiler being where it was prior to the accident. The width of the street owned by the city is not shown, but prior to the extension of the city limits the road had been laid out and constructed by the board of supervisors; and our statute provides the width of a county right of way for a highway as 30 feet. It does not appear satisfactorily in the record that the boiler was within this right of way. The plaintiff shows that he was going along the road at a lively trot, in a buggy, and that the horse made two plunges before he could get his lines up, and that after he got his lines the horse was too far down the embankment to turn him and check him. It appears that the slope on the lake side of the road was a gradual slope, and that in constructing the dam the teams and wagons hauled dirt up the embankment to the surface of the road, but that the embankment was too steep for a buggy to go up or down, but a horse could be ridden up and down it with safety. It was also contended by the plaintiff that the city should have had a fence between the highway and the lake to prevent stock running into the lake. The plaintiff testifies that he had been along the road numbers of times prior to the accident, and that his horse had never noticed the boiler, and that he himself had never noticed it prior to the burning of the rubbish. The testimony of numerous witnesses is to the same effect, and it seems that no complaint or trouble had ever arisen on account of the situation of the boiler.

Under the facts shown in this record, we are of the opinion that there was no lia-

bility upon the city for the injury; and, having reached this conclusion, it is unnecessary to consider any assignment except the refusal of the peremptory instruction requested by the city and refused by the court.

The judgment is accordingly reversed, and judgment entered here for the city.

Reversed and remanded.

(113 Miss. 272)

**ILLINOIS CENT. R. CO. v. SHORT.**  
(No. 18838.)

(Supreme Court of Mississippi, Division B.  
Feb. 19, 1917.)

**EVIDENCE §568(7) — OPINION EVIDENCE — DAMAGES—WRIGHT.**

In an action for damages to cattle during a shipment, where the only evidence as to the damage was plaintiff's guess or estimate as to what they should have weighed, except for the detention, and he was not shown to have had experience in weighing cattle before and after they were penned up, it was error to allow recovery of more than nominal damages.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2394.]

Appeal from Circuit Court, Lafayette County; H. K. Mahon, Judge.

Action by Louis Short against the Illinois Central Railroad Company. Judgment for the plaintiff, and defendant appeals. Reversed and remanded.

Mayes, Wells, May & Sanders, of Jackson, for appellant. L. C. Andrews, of Oxford, for appellee.

**ETHRIDGE, J.** Louis Short sued the Illinois Central Railroad Company for damage to a lot of cattle, alleged to have been inflicted on them by keeping them penned up at Oxford, Miss., for about a day and a half because the railroad would not give a clear bill of lading, to which the plaintiff did not consent. It is also contended by the railroad company that the cattle were not properly loaded in conformity to the rules of the Interstate Commerce Commission, this being an interstate shipment. This contention, however, is disputed, and was for the jury to pass upon. The damage claimed was shown to be established by the testimony of Short on his estimate or guess as to the amount or loss of weight sustained by the cattle during this period of time. His estimate or guess was that the cattle would have weighed 21,700 pounds. They actually weighed, when sold, 19,100 pounds. In one of his answers to questions, he says:

"Of course, these weights are only guesswork. I am giving you my best judgment."

He was asked:

"How much did these cows weigh? A. I don't know. Q. Give your best judgment—you got any way to find out? A. No, sir; not what each one would weigh. Q. Well, what would all of them together weigh? A. I can't tell you, because I don't know."

Plaintiff does not show that he has had experience in weighing cattle before and after being penned, nor is there anything to show that his guess was based on experience tested by weighing cattle, nor was there any other legal method employed in proving this damage, if he was damaged at all by the delay; and if the railroad company was liable for the damage at all. Nothing more than nominal damage is shown in this record, and the jury rendered a verdict for \$75.20 in favor of Short. There being no standard by which the jury could legally arrive at this result, the evidence is insufficient to support the verdict, and the case is reversed and remanded.

(112 Miss. 266)

**SPARKS v. STATE. (No. 19414.)**

(Supreme Court of Mississippi, Division B.  
Feb. 19, 1917.)

**1. HOMICIDE §20—PARTICIPATION IN CRIME —PROOF OF CONSPIRACY.**

Where there was ample evidence that defendant was an active participant in the shooting for which he was indicted with another for murder, proof of conspiracy between the two was not necessary to convict.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 47.]

**2. HOMICIDE §208(1)—DYING DECLARATION —COMPETENCY.**

Where, during the shooting, deceased told one defendant not to shoot any more because he had already killed him, and thereafter, in answer to question, accused that defendant of shooting him, upon trial of the other defendant such latter statement held not competent as a dying declaration.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 430.]

**3. HOMICIDE §212, 216—DYING DECLARATIONS—ADMISSIBILITY.**

A dying declaration is admissible on behalf of defendant, accused of murder, as well as for the state; but in either case proper predicates for its admission must be laid.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 428, 457.]

**4. HOMICIDE §208(1)—DYING DECLARATION —FEELING OF HOPELESSNESS.**

To make a dying declaration admissible, full inquiry must show a settled feeling of hopelessness on the part of declarant when the statement was made, because of lack of sanctity of oath and absence of opportunity for cross-examination of the declarant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 430.]

Appeal from Circuit Court, Tippah County; J. L. Bates, Judge.

Dan Sparks was convicted of murder, and appeals. Affirmed.

Spight & Street, of Ripley, for appellant. Ross A. Collins, Atty. Gen., for the State.

**ETHRIDGE, J.** Dan Sparks and Jess Brumley were jointly indicted in the circuit court of Tippah county for the murder of one Lon Clark in May, 1916. There was a severance granted, and Sparks, the appellant, was placed on trial and convicted of

murder and sentenced to the penitentiary for his natural life.

[1] It was the theory of the appellant below that Brumley did the killing, and he contends that there was no conspiracy to connect him with the act of Brumley; also contends that the court below erred in refusing to admit the dying declaration alleged to have been made by Clark between the time of the shooting and his death. The proof for the state tended to show that Sparks did the shooting, and we think there is ample evidence to show he was the joint actor and active participant in the shooting to make him liable as a joint actor in the killing, regardless of whether or not he fired the fatal shot. The proof of a conspiracy in such a case would not be necessary to connect him with the killing.

[2, 3] It appears from the evidence for the appellant that, during the shooting, the deceased cried out to Brumley not to shoot him any more as he had already killed him, or words to that effect. It was sought to prove on behalf of the defendant that subsequent to the shooting, and after this declaration, some one asked Clark who shot him, and he responded that Brumley did. While a dying declaration is admissible on behalf of the defendant as well as on behalf of the state, we think the proof in this case fails to make the alleged dying declaration competent for either party.

[4] The rule for determining the admissibility of this class of evidence is clearly stated in *Bell v. State*, 72 Miss. 507, 17 South. 232; and it is incumbent on a party relying on a dying declaration to prove the same according to the standard laid down in that case, regardless of whether it be offered by the defendant or by the state. It requires these requisites to make the evidence admissible as evidence at all, because of the lack of the sanctity of an oath and the absence of the opportunity of cross-examination, so well calculated to develop the truth as to the entire transaction.

We think there is no error in the instructions by the court or in the admission or exclusion of evidence, and the case is, accordingly, affirmed.

(113 Miss. 224)

**FIRST NAT. BANK OF COLLINS et al. v. WARREN.** (No. 18840.)

(Supreme Court of Mississippi, Division B. Feb. 19, 1917.)

**1. EQUITY §430(3)—SETTING ASIDE DECREE—PLEADING.**

A bill to set aside a decree adjudging title to property in defendants, but requiring defendants to make monthly payments to plaintiff for her support in accordance with a previous agreement between the parties, and directing defendants to give security for the making of such payments, held to sufficiently allege fraud requiring the setting aside of the decree or the preservation of plaintiff's rights by requiring the

giving of the security provided for, as to which the defendants had made default.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1042-1046.]

**2. JUDGMENT §443(1) — IMPEACHMENT — FRAUD IN PROCUREMENT.**

Fraud in the procurement of a judgment will authorize chancery court to set it aside.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 785, 836.]

Appeal from Chancery Court, Covington County; D. M. Russell, Chancellor.

Bill by J. L. Warren, guardian, against the First National Bank of Collins and others. From a judgment overruling a demurrer to the bill, defendants appeal. Affirmed and remanded.

M. U. Mounser and G. H. Merrell, both for Collins, for appellants.

**ETHRIDGE, J.** Mrs. Hattie L. Cockran filed her bill in the chancery court of Covington county against Mrs. Hattie L. Bradshaw and others, setting forth that she had inherited \$3,700, and that, being an aged person, she made an arrangement with Hattie L. Bradshaw and J. W. Bradshaw by which they were to take \$3,662 and invest it for her, and for the use of such money they should support and take care of her as long as the arrangement was mutually agreeable, that the Bradshaws invested some of the money in real estate described in the bill, taking the title in the name of Mrs. Hattie Bradshaw, and that the Bradshaws loaned H. A. Davis and P. M. Davis, cashier and assistant cashier of the First National Bank of Collins, a portion of the money, taking note in the name of Mrs. Hattie L. Bradshaw, and that in doing this they conspired with Davis and amongst themselves to deprive the complainant of her property fraudulently, and alleging that the Davises and the Bradshaws all had knowledge of her rights in the property and in the money, and that they had conspired and colluded together for the purpose of defrauding her out of her rights, and that after getting the land titles in Mrs. Bradshaw and the note in her name she was turned out of the Bradshaw home and they refused to support her, and alleged that in truth and in fact the property they purchased was in reality the property of the complainant, and praying for a decree to have the same so adjudged by the chancery court. This bill was not answered, but before decree was taken the parties appeared in court and entered a consent decree by which it appears that upon the consideration that the defendant Hattie L. and J. W. Bradshaw was to pay \$30 per month for the support of Hattie L. Cockran during the balance of her natural life, and the said Bradshaws would pay all the costs, including an attorney's fee, etc., the title to the land and the \$1,000 note were to be declared and decreed to Mrs. Hattie L. Bradshaw. The



court then decreed the property in accordance therewith with the following clause:

"And that the said J. W. Bradshaw and Hattie L. Bradshaw obligate and bind themselves to pay Mrs. Hattie L. Cockran the sum of \$30 per month or its equivalent for her support and maintenance during the balance of her natural life beginning on this date, and they execute such security to be approved by her for said purpose."

This decree was signed on the second day of September, 1913. Afterwards Mrs. Hattie L. Cockran, the original complainant, filed a bill in the chancery court reciting and charging that this decree was entered by consent on the understanding and agreement that they were to execute security on the said lands and property to Hattie L. Cockran for the purpose of securing her support of \$30 per month during her natural life, and the decree was not to become effective until such security was given satisfactory to herself, that J. W. Bradshaw went to the First National Bank for the purpose of executing the security, and that the Bradshaws and Davises and the bank through Davis entered into a conspiracy not to execute the security as required, but that the bank and Davis would furnish \$30 a month for a time to keep her satisfied, that she was then in bad health, and that the reason for consenting to the decree was that she believed that their purpose was, in good faith, to take care of her during her natural life, and that she was then in bad health and without home, and that the parties, Bradshaw and wife, were her nephew and niece, and that, desiring a home with them where she could be cared for, and believing they intended in good faith to carry out the contract, she consented to the decree, but that it was known to all of the parties to the record that the decree was to become effective only on giving the security. A *lis pendens* notice was filed in the original suit and is in the record. The defendant to the last bill demurred, and the court overruled the demurrer and granted an appeal to settle the principles of the case.

[1, 2] It is contended by the appellants that it is incompetent to impeach the agreement recited in the decree in the first suit, and that the appellee (who is the guardian of Mrs. Hattie L. Cockran, who since the filing of the suit has become non compos mentis) is confined to a suit personam against J. W. and Hattie L. Bradshaw. The bill alleges that the status is the same now as it was when the bill was filed. We think the chancellor was correct in overruling the demurrer, and that the recitals of the decree show that security was to be given to the complainant and obligations to be executed, and that she had by reason of the decree, and the *lis pendens* notice, an equity chargeable against the property involved in the suit. The allegations are sufficient to charge fraud, and even a judgment may be impeached for fraud in its procurement. If the al-

legations of the bill are true, the chancery court would give appropriate relief setting aside the entire transaction if it found it was tainted with fraud from the beginning, or charging the property described in the bill, with the \$30 per month, from the date of the decree originally rendered, during her natural life, with provision for the execution and sale of said property and a lien thereon to satisfy such judgment if it found the fraud arose after the original decree was entered. Of course, if the proof showed that there was no fraud, the chancellor could dismiss the bill. We think the bill charges adequately a case entitling the complainant to relief if the allegation of the bill be true.

The case is therefore affirmed, and remanded for further proceedings in the court below.

Affirmed and remanded.

(113 Miss. 274)

WILKINSON v. POSEY, Constable, et al.  
(No. 18807.)

(Supreme Court of Mississippi, Division B.  
Feb. 19, 1917.)

HUSBAND AND WIFE  $\Leftrightarrow$  129(3)—CONVEYANCE  
—LIABILITY OF WIFE FOR DEBTS OF HUSBAND.

A husband bought land taking title in his own name and thereafter in improving the property made purchases from defendant. The value of the land was considerably improved, and after making the purchases the husband conveyed the property to his wife; it being claimed that the wife paid the original consideration for the land. *Held* that, as defendant had made the sale on the husband's apparent ownership, the wife could not defeat defendant's execution against the land.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 470.]

Appeal from Chancery Court, Neshoba County; J. F. McCool, Chancellor.

Bill by Mrs. Lizzie Wilkinson against M. C. Posey, Constable, and another. From a decree for defendants, complainant appeals. Affirmed.

Earl Richardson, of Philadelphia, and O. A. Luckett, of Kosciusko, for appellant. G. E. Wilson, of Philadelphia, for appellees.

ETHRIDGE, J. Mrs. Lizzie Wilkinson filed bill in the chancery court of Neshoba county to enjoin M. C. Posey, constable, from selling certain lands under an execution sale on a judgment in favor of A. J. Patterson and against the husband of Lizzie Wilkinson. A constable levied upon the property as the property of the husband, and the facts are about as follows: J. N. Wilkinson, the husband, bought the land in question in December, 1910, taking title in his own name and using and controlling the lands until about the 5th of January, 1912, when he made the deed to his wife reciting a consideration of \$200, but no money at that time was paid him by the wife. She seeks to uphold the

consideration on the theory that her money was used in the purchase of the land, and she is supported in this proof by her brother, who is the cashier of a bank at Philadelphia. In 1911, J. N. Wilkinson made an account with Patterson, who is a merchant, by which he obtained supplies, etc., on credit; Patterson testifying that he extended him credit because Wilkinson owned the land. A portion of the account was paid, but a balance of about \$82 was unpaid, and on the 1st of January Patterson sent his agent to see Wilkinson, and Wilkinson promised to pay it within a few days. Not complying with the promise, the agent was again sent about the 1st of February, when Wilkinson stated that he had "sulled" on the matter, and that when Patterson got right that he would settle with him. Patterson testifies that he went to see him and tried to ascertain what the trouble was, but could get nothing out of Wilkinson except that he had "sulled." He thereupon filed suit and obtained judgment against J. N. Wilkinson which was enrolled in April, 1912.

The proof shows that J. N. Wilkinson made improvements on the land which increased the value thereof \$400 or \$500, and that a portion of this expense was included in his account and paid by the judgment creditor. We think it contrary to equity and good conscience for the complainant to retain these benefits without paying the creditor whose claim antedated the conveyance, and the judgment is affirmed.

Affirmed.

(113 Miss. 154)

**RICHLAND PLANTING CO. v. YAZOO & M. V. R. CO. (No. 18734.)**

(Supreme Court of Mississippi, Division A. Feb. 26, 1917.)

**1. RAILROADS §482(1) — OPERATION — SETTING FIRES—EVIDENCE—SUFFICIENCY.**

Evidence held insufficient to sustain judgment for railroad in action by property owner for damage to buildings by fire set by a locomotive of the railroad.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1730.]

**2. RAILROADS §453 — OPERATION — SETTING FIRES—LIABILITY.**

Laws 1912, c. 151, establishing liability of railroads for losses by fire caused by their engines, is a rule of liability, and, where it is shown that a fire was caused by sparks from an engine, the railroad is liable regardless of whether it was negligent.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1657-1660, 1667.]

Appeal from Circuit Court, Warren County; E. L. Brien, Judge.

Action by the Richland Planting Company against the Yazoo & Mississippi Valley Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Green & Green, of Jackson, and N. Vick Robbins, of Vicksburg, for appellant. Bar-

bour & Henry, of Yazoo City, and Mayes, Wells, May & Sanders, of Jackson, for appellee.

**HOLDEN, J.** The Richland Planting Company, appellant, brought this suit against the Yazoo & Mississippi Valley Railroad Company, appellee, to recover damages sustained by it for the destruction by fire of a barn upon its plantation, claiming that the appellee railroad, while operating one of its north-bound engines and freight trains on February 17, 1914, negligently threw sparks from its engine and set fire to the roof of the storehouse occupied by W. E. Davidson immediately east of the right of way of appellee and from which building, so set on fire, the fire was communicated by sparks and embers to appellant's barn and destroyed it. There was a jury verdict, and judgment, in favor of the railroad company, from which judgment the Richland Planting Company appeals here. The appellant assigns a large number of errors of the lower court, but we consider it necessary to notice but one of them, and that is whether or not the lower court erred in overruling the appellant's motion for a new trial on the ground that the verdict of the jury was contrary to the great weight of evidence in the case.

It appears from the record that the plaintiff in the court below proved by several reliable eyewitnesses that the appellee's engine, when it passed close by the building which was set on fire, was throwing burning sparks, with the aid of a strong wind, on the building in question, and that it threw the burning sparks and cinders not only on the roof of the building that was ignited, but that the burning sparks were thrown even 70 feet beyond the roof of this building and fell upon the bare neck of one of the witnesses, a lady, burning her to the extent of causing her to retire into her house for relief. The witnesses present at the time stated positively that there was no fire in the stoves or in or about the building at the time and there had been none for several hours; that when they first discovered the fire on the roof of the store building it was on the south side near the top at a place that was exposed to the burning sparks that had been thrown from the passing engine and which fell on the roof and also fell as far as 70 feet beyond the roof. The testimony of these witnesses shows that the strong wind coming from the southwest caused the fire to spread rapidly on the roof and blew the smoke and fire in a northerly direction in and through the roof between the ceiling and the shingles. It is further shown beyond dispute, and practically conceded to be a fact, that burning shingles from this storehouse were blown onto the barn in question, set it afire, and destroyed it.

The appellee railroad company introduced

the testimony of the engineer and conductor of the train, who had, after passing the store building with their engine and train, stopped 400 or 500 feet north of the building to do some switching, and they discovered the fire on the roof of the store building some 20 or 30 minutes after they had passed the building and while switching that distance away north of it. The only testimony of these witnesses, that tends to substantially dispute or contradict the testimony of the witnesses of the appellant as to how and where the fire first started on the store building, is the testimony of Conductor Campbell, who testified that when he first noticed the fire the smoke was coming out of the roof on the north side of the building, and that when he got down to the building some 20 minutes after the fire had started he did not observe any fire on the south side of the building, but that it was on the north side near the top of the roof. However, he does not state positively that there was no fire on the south side of the roof near the top of the building, at which place the other witnesses stated the fire had started. The smoke that he saw coming through the shingles of the roof on the north side of the building was evidently blown through by the strong wind from the south, indicating clearly from his testimony that the fire started near the top of the roof on the south side as testified to by all of the other witnesses in the case. We think it doubtful as to whether or not the testimony of this witness is sufficient to raise a material conflict in the evidence. It does not seem to rise to the dignity of substantial proof in conflict with the proof offered by the appellant as to how, when, and where the fire started.

[1] From a careful reading and consideration of all the testimony introduced in this case, it clearly appears to us that the verdict of the jury was unsupported by the testimony, was contrary to the great weight of evidence, and is manifestly wrong. The proof shows conclusively, and is not materially disputed, that the engine threw the burning sparks upon the roof of the building, and that a few minutes thereafter the roof was seen on fire on the outside, near the top, where the witnesses say the burning sparks had been falling. There was no source or cause from which the fire could have come except the locomotive. There were no fires in or about the building, and there had been none from which the building could have been set on fire for several hours before that time. The blaze could not have started from a smoldering fire in the ceiling, sometimes caused by defective flues, because the proof shows that the fire here started on the outside of the roof, and must have come from an outside source; and the positive proof is that there was no other outside source from which it could have come but the engine which, it is shown, was

throwing burning sparks over and on the roof and for quite a distance even beyond the building. Nobody disputes the fact that a strong wind was blowing directly from the engine to the roof of the building and blew burning sparks upon the roof of the building. It seems to be a case made out so conclusively by circumstantial proof that it amounts to positive, direct proof of an actual fact. There was no efficient cause of the fire present except the engine and the burning sparks thrown therefrom. We notice in the testimony of the engineer he admits that his engine would throw burning sparks. He says that an engine that does not throw small burning sparks will not generate steam, and would be a useless locomotive. There can be no question about the engine on this occasion throwing burning sparks, as the appellee's witnesses admit it, and the plaintiff's witnesses testified that they saw and felt them.

[2] Chapter 151 of the Laws of 1912, establishing the liability of railroads for losses caused by fire thrown from their engines, is a rule of liability, and, where it is shown that a fire was caused by sparks thrown from an engine, the railroad becomes liable for the loss, regardless of whether it was negligent.

In view of the above conclusions, we hold that the verdict and judgment of the lower court is contrary to the overwhelming weight of the evidence, and is manifestly wrong, and should have been set aside by the lower court, and for this error the judgment is reversed, and the case remanded.

Reversed and remanded.

(112 Miss. 301)

CLARK v. STATE. (No. 19425.)

(Supreme Court of Mississippi, Division B.  
Feb. 19, 1917.)

1. HOMICIDE  $\S$  145—BURDEN OF PROOF—INTENT.

In a prosecution for assault with intent to kill and murder, the burden is on the state to show the intent beyond all reasonable doubt.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 262-264.]

2. HOMICIDE  $\S$  269—EVIDENCE—ASSAULT WITH INTENT TO MURDER.

In a prosecution for assault with intent to murder, evidence held not to warrant submitting to the jury the issue of defendant's intent to murder, there being no evidence to support a finding of deliberation or premeditation, though there was sufficient evidence to support a finding of assault and battery committed in the heat of passion.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 563.]

3. CRIMINAL LAW  $\S$  706—MISCONDUCT OF PROSECUTOR—CROSS-EXAMINATION.

In a prosecution for assault with intent to murder, where the difficulty occurred at a Masonic meeting and grew out of charges of embezzlement preferred by the prosecuting witness against the brother of accused, questions asked by the district attorney on cross-examination, in which he assumed the guilt of the brother and ridiculed the attempt of accused to re-

sent such charges and laid stress on the un-Masonic conduct of accused, were improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1661.]

Appeal from Circuit Court, Claiborne County; E. L. Brien, Judge.

T. F. Clark was convicted of assault and battery with intent to kill and murder, and he appeals. Reversed and remanded.

Appellant was convicted by the circuit court of Claiborne county of assault and battery with intent to kill and murder Dr. E. P. Jones. He was sentenced to a term of three years in the state penitentiary, and from this judgment prosecutes an appeal. The assault occurred at a regular meeting of the Masonic Lodge at Hermanville, and was provoked by discussion of certain charges presented by the committee on complaints and offenses against J. W. Clark, the brother of appellant. It appears that Dr. E. P. Jones, the party assaulted, had been president of the Bank of Hermanville while J. W. Clark, brother of appellant, had been cashier of this bank; that the bank had failed and gone into the hands of a receiver; that the cashier, J. W. Clark, had been indicted, once convicted by the circuit court, had appealed his case and obtained a reversal, and upon a second trial the jury had been unable to agree and a mistrial had been entered. Shortly after the mistrial upon the indictment charging J. W. Clark with embezzlement, Dr. Jones, as chairman of the committee on complaints and offenses, presented to the Masonic Lodge the report hereinafter copied in full. It appears that the Masonic Lodge building had burned, and the meeting at which the difficulty occurred, by special dispensation, was being held in the Presbyterian Church in Hermanville. The report is as follows:

"To the Worshipful Master, Wardens, and Members of Pattona Lodge, No. 232, A. F. & A. M.:

"The committee of the above-named lodge, on complaints and offenses, having received information that Brother John W. Clark, a member of this lodge, has been guilty of un-Masonic conduct, have investigated the same as required by rule No. 8 on Masonic discipline, and file the following specifications and charges:

"We find that prior to February 1, 1914, for a long time the said Brother John W. Clark was cashier of the Bank of Hermanville, and as such received money for deposit in said bank, and paid the same out on the checks of the depositors, and that a large number of people deposited money in said bank from time to time.

"We find that this lodge was a depositor in said bank, and that quite a number of members of this lodge were depositors in the said bank, and that a large number of women, and school teachers were also depositors in the said bank.

"We further find that on the 14th of March, 1914, the said Bank of Hermanville closed its doors, on account of lack of funds with which to do business, and has ever since been out of business.

"We find further that the reason the said bank was forced to close its doors and go out of business, was because the said John W. Clark, while cashier of the said bank, embezzled the funds of the said bank, including the deposits of all of the

above-named depositors, and that the grand jury indicted him, the said John W. Clark, for embezzling the funds of the said bank to the amount of more than \$18,000.00, whereby the said bank and its depositors have lost a great deal of money.

"Wherefore, we, the said committee on complaints and offenses, charge: That the said John W. Clark has been and is guilty of un-Masonic conduct, in this, that he has embezzled money belonging to the Bank of Hermanville.

"That he has and is further guilty of un-Masonic conduct, in the said embezzlement by appropriating to his own use money that was on deposit in the said bank, as the funds and property of Pattona Lodge No. 232, to the amount of \$1,000 and some odd cents.

"That he, the said John W. Clark, was and is further guilty of un-Masonic conduct, by appropriating to his own use money that was on deposit in said bank by individual members of said lodge, thereby cheating, wronging, and defrauding brother master Masons.

"That he, the said Brother John W. Clark, was and is further guilty of un-Masonic conduct, by appropriating to his own use money that was on deposit by widows and orphans in the said bank, and thereby violating the cardinal virtues of our ancient and honorable institution, by such un-Masonic and disreputable conduct.

"And therefore your committee recommend that the said Brother John W. Clark be brought to trial on these charges.

"Very respectfully submitted, this 16th day of March, A. L. 5916, A. D. 1916."

In the regular order of business this report was read by Dr. Jones. When Dr. Jones had finished reading the report, Dr. A. L. Chapman, the professional partner of Dr. Jones and a brother-in-law of appellant, arose and addressed the lodge, urging that the charges be dropped pending a final decision by the court as to the guilt or innocence of J. W. Clark and pleading for harmony amongst all members of the lodge. Dr. Jones thereupon arose and responded to the pacific speech of Dr. Chapman and, to employ the exact language of Dr. Jones himself, stated: "I don't think there is a Mason in the sound of my voice that doesn't know he is guilty of these charges." This statement appears to have been first resented by a Mr. Torrey, who remarked: "I don't know whether I believe it or not, Doctor," and thereupon Frank Clark, the appellant, stated, "It's a lie." Dr. Jones concluded his remarks in a few words and then advanced around the stove, which seems to have been between him and the place where appellant was sitting, and in going over in the direction of appellant addressed Mr. Clark and asked: "What did you say, Frank?" Clark then arose and stated, "I said that was a damn lie." Jones, still advancing, said, "You can't talk to me that way," at the same time gesticulating with his right hand and pointing his index finger at appellant. The testimony is conflicting as to just how much, if any, appellant advanced towards Jones. The parties met near the seat upon which Frank Clark had been sitting, and, as they did so, appellant struck Dr. Jones in the side of the neck with a penknife and inflicted a serious wound. Jones shoved appellant back upon

the seat where he had been sitting, and at that time fellow Masons interfered, separated the parties, and found that Dr. Jones had been cut. Dr. Chapman thereupon took charge of Dr. Jones and led him out of the lodge room to their office for medical attention. It appears that the church was dimly lighted by means of two coal oil lamps, one sitting upon an organ by which Dr. Jones stood to read his report, and the other stationed upon a small table in front of the master. The evidence is conflicting as to the distance between the front pew upon which Dr. Jones had been sitting and the station or seat occupied by appellant. Witnesses estimate this distance from 10 to 20 feet. It appears that Dr. Jones, instead of returning to the place where he had been sitting, proceeded toward appellant in the opposite direction and around the stove and behind the table at which the master of the lodge was sitting. There is evidence that the blood which spurted from the wound left its imprint upon the floor immediately in front of the bench on which appellant was seated.

It was the contention of the state that Dr. Jones was simply performing his Masonic duty in presenting the report, and that in approaching appellant Jones had no intention of doing Mr. Clark any bodily harm whatever, but that Jones expressly stated as a part of the *res gestæ*, "This is no place for a difficulty." It is the theory of the defense that Dr. Jones assaulted and struck at appellant, and that appellant acted in self-defense and in apprehension of danger. It is the further contention of the defense that unnecessary remarks of Dr. Jones, assuming the guilt of John W. Clark of embezzling the funds of widows, orphans, and Masons, provoked the difficulty, and that appellant acted under the impulse of the moment and while aroused over what he regarded as an insult to his brother.

Numerous witnesses testified for and against the defendant, and the court submitted to the jury the issue of intent to kill and murder. The small knife used by appellant on this occasion was introduced in evidence and transmitted with the record of this appeal for the inspection of the justices of this court. The knife is a small, one-bladed, rather worn, and weak-backed instrument. The principal point relied upon by appellant is the alleged error of the court in submitting to the jury the question of intent to murder, it being the contention of appellant that no malice or deliberation whatever is shown by the proof.

Complaint is made also of the language and conduct of the district attorney in cross-examining some of the witnesses, and especially to the following questions and answers propounded to one of the witnesses for the defense:

"Q. You mean turn loose a man that cuts another man's throat? Is that your idea of justice? Cut another man's throat after he called him a liar twice in a Masonic Lodge and you

want to turn him loose; is that your idea of justice? (Objection. Overruled. Exception.) Witness: Repeat that, please. Q. Your idea of justice is to let a man cut in the Masonic Lodge—you are a Mason? A. Yes, sir. Q. For a man to go in a Masonic lodge and another brother Mason prefer charges which it was his duty to do and he was required to do, and he makes charges not against one man but against his brother in an orderly, respectful, and perfectly proper manner, and his brother jumps up and calls him a liar twice, he says, 'What did you say, Frank?' and he calls him a liar again, and, because he walks over to him, he cuts his throat and you want him turned loose on the ground that it is justice? (Objection. Overruled. Exception.) \* \* \* Q. Did Dr. Jones say anything to Frank Clark—this bad man you are talking about? A. He charged his brother with stealing. Q. He ain't the only person that ever charged his brother with stealing? A. I don't suppose so. Q. If Frank Clark killed all the people that charged his brother with stealing for the last two years, he would depopulate this whole county, would he not; about kill everybody down here? A. They are not all Frank's brothers. (Objection. Overruled. Exception.) Q. I say, if Frank Clark, the defendant here, would undertake to cut every man's throat in Claiborne county who had brought charges in connection with that bank failure against his brother, John Clark, he would kill a good many people in this county would he not, and good men too? A. If they would all try to jump on Frank. \* \* \* Q. Now, if Frank Clark would undertake to cut the throat of everybody in Claiborne county that accused his brother of speculation with that Bank of Hermanville, he would mighty near clean out this community, would he not? (Objection. Overruled. Exception.) Q. Two grand juries here accused his brother of doing it, didn't they? (Objection. Overruled. Exception.) Q. Two grand juries of this county charged his brother with taking \$18,000 of that bank's money? (Objection. Overruled. Exception.) A. I know he was indicted, but I don't know the sum involved. Q. He was indicted for doing it? (Objection. Overruled. Exception.) A. Yes, sir. Q. Did he ever cut any grand juror's throat? (Objection. Overruled. Exception.) A. I never heard of it. Q. Did he ever accuse any grand juror of being a liar? A. Not that I know of. (Objection. Overruled. Exception.) Q. You have been here at a couple of trials against his brother where witnesses got the books and said he got the money? (Objection. Overruled. Exception.) A. I was not here at the trial. Q. He has not tried to cut any of those witnesses' throats? A. I don't know. Q. Mr. Clark is not the only man the Masons have brought charges against? A. I have heard of others, but no Pattona. \* \* \* Q. You never heard of a Mason before where the lodge was in regular order, where the grievance committee brought a charge against a brother Mason, that he went over and called a man a liar and undertook to cut his throat, in your life? (Objection. Overruled. Exception.) A. No, sir. Q. Is that Mason conduct? Is that Masonic conduct to call him a liar? (Objection. Overruled. Exception.) A. No, sir; it is not Masonic for either party to do as they did. Q. Was it Masonic for Dr. Jones to prefer the charges as a member of the committee? A. Yes, sir. Q. Wasn't it his duty? A. I don't know, but he did."

There are other questions propounded along the same line and of like character. There is evidence that appellant weighed 158 pounds and had been suffering from rheumatism and was not physically a strong man. There is evidence, also, that Dr. Jones

is a somewhat heavier man and at times high-tempered.

J. T. Drake and R. B. Anderson, both of Port Gibson, and Flowers, Brown, Chambers & Cooper, of Jackson, for appellant. J. McMartin, of Port Gibson, for the State.

STEVENS, J. (after stating the facts as above). We have not and shall not undertake to detail all the evidence in this case. To do so would be a tedious and useless task. We have briefly outlined in the statement of facts that part of the testimony tending to shed light upon the main question which we shall discuss in this opinion, and that is: Whether the proof offered by the state warranted the submission to the jury of the question of felonious intent to kill and murder, and whether the verdict of the jury convicting appellant of a felony should be sustained. The court, under usual instructions, authorized the jury to say by their verdict that appellant, at the time he committed the assault, intended to take Dr. Jones's life. The evidence is conflicting on the issue of self-defense—whether appellant was justified in inflicting the wound under the belief that Dr. Jones was endeavoring to do appellant great bodily harm. Under all the testimony on behalf of the state, the jury was fully warranted in believing that appellant was in fault and wrongfully assaulted Dr. Jones. If appellant therefore had been convicted of assault and battery, we would unhesitatingly say that the proof justified the verdict. But what of the more serious element of the offense—the intent to kill and murder Dr. Jones? Does the proof justify the finding by the jury that appellant intended to take life?

[1, 2] In arriving at a correct solution of this question, it is well to remember the burden of proof was upon the state to show the intent to kill and murder and to show this beyond all reasonable doubt. It is argued by counsel specially employed in the prosecution of this case that appellant attended the meeting of the Masonic Lodge in company with other members of his family with the purpose of making trouble. The proof, as we see it, does not justify any such inference. There is no sufficient showing of a conspiracy between appellant and his brother, John W. Clark, or any of his brothers-in-law. There is a strong intimation that appellant had knowledge of the purpose of the grievance committee to prefer some kind of charges against appellant's brother. The nature of these charges could not be accurately known in advance. The specifications were for the first time disclosed when Dr. Jones read the committee's report in open session of the lodge. It will be observed that this report is languaged in most emphatic terms. It really does not so much submit charges as conclusions already reached by the members

of the committee. The language of the committee is that "we find." The committee therefore, without an opportunity to John W. Clark to be heard in defense, finds the facts against him. These conclusions of the committee are also very far-reaching and the charges very caustic. The committee finds that John W. Clark has embezzled the funds of the bank, the funds of depositors, the funds of helpless widows and orphans, the funds of Pattona Lodge No. 232, and the funds of individual brother Masons. When these most sweeping charges were being read by Dr. Jones, appellant said nothing. It was only when Dr. Jones, in addressing the entire membership present and in answering the pacific speech of Dr. Chapman, made the unnecessary statement, "I don't think there is a Mason in the sound of my voice that doesn't know he is guilty of these charges," that appellant resented the remarks and attitude of Dr. Jones. It is true that appellant used intemperate language—words which he should not have employed. However, there certainly would have been no difficulty if Dr. Jones had resumed his seat without following up this wrongful remark of appellant, but when appellant stated, "It's a lie," Dr. Jones, in a very human fashion, resented the words employed by Clark and in doing so practically made an assault upon him. Dr. Jones proceeded in the direction of appellant and around behind the master's table and both spoke and acted in a manner that amounted to a demonstration of his indignation. The evidence is conflicting as to whether he struck at appellant. According to the state's evidence, he made no effort to hit Clark, but was wrongfully stabbed by appellant just as Dr. Jones turned his head to address the master of the lodge. The undisputed testimony shows, however, that the anger of both men was kindled by intemperate language employed by each of them; and, under all the circumstances, we are firmly of the opinion that when appellant struck at Dr. Jones he did so under the impulse of the moment, while his blood was hot and his anger and passion aroused. This is manifest from the entire setting and all the circumstances surrounding the assault. Dr. Jones is a reputable citizen and distinguished physician. The proof indicates that Mr. Clark is a member of a good and worthy family and a man of previous good character and standing in the community. Appellant's interest in his brother would be most natural and human. The sweeping charges and the caustic remarks of Dr. Jones would very naturally arouse appellant's feelings. Appellant's resentment of these charges and the statement that every Mason in the lodge knew the charges were true was most natural, regardless of the guilt or innocence of John W. Clark. It is a plain and simple case where two reputable and red-blooded men became aroused under the impulse of

the moment, and where unfortunately appellant acted hastily and wrongfully. In doing so, however, he did not act with that deliberation, that design, that malice aforethought which indicates an intent to commit murder. We think therefore it was error on the part of the trial court to submit the issue of intent to kill and murder to the jury. There is not sufficient proof to sustain the felony part of the charge. There is here no evidence whatever of previous threats, malice, or ill will. Dr. Jones himself says, "I was not looking for anything" in the way of trouble; and, at another place in his testimony: "I didn't know he wanted to hurt me. \* \* \* I had nothing in the world against Frank Clark and never had in my life." The witnesses for the state justify the conclusion that Dr. Jones was excited when he approached appellant and, whether intentional or not, actually made a demonstration. Mr. Bridger, one of the witnesses for the state, says, "Bob Herrington was with Dr. Jones and had hold of him." Mr. Flowers, another witness for the state, says, "He started toward Frank shaking his finger or hand at him," and also that Dr. Jones "is pretty high-tempered."

If there was no premeditation and malice, there would have been no murder in the event the wound had proved fatal. It is stated by Mr. Wharton that:

"Provocation in law is used in the ordinary acceptance of the word, and means that treatment of one person by another which arouses anger or passion.

"By mitigation, it may reduce the grade of an offense, but it never justifies a crime. In homicide it negates the idea of premeditation and malice, because the hot blood engendered by provocation produces a temporary suspension of the reflective faculties, and the passion aroused excludes the idea of deliberation. Hence, the rule as to the measure of proof is, after the evidence has been submitted on both sides, 'Is it sufficient to cast a reasonable doubt on the essential averments of the indictment? If it is sufficient for this, the defendant is entitled to an acquittal.'" 1 Wharton's Criminal Evidence, p. 679.

[3] We are constrained to hold, also, that the learned district attorney, by his method of interrogating the witnesses and in referring to the embezzlement charges against John W. Clark, exceeded the bounds of legitimate examination and inquiry. It appears that there had been a bank failure at Hermanville, and that John W. Clark, cashier, and brother of appellant, had been indicted for embezzlement growing out of this failure. The district attorney assumed the guilt of John W. Clark and ridiculed the idea that appellant, the brother, should attempt to resent any charge of John W. Clark's guilt. Much stress is also laid by the district attorney upon the un-Masonic conduct of appellant. The tendency of the examination copied in the statement of facts was an appeal to very natural prejudices and impulses

of the jurors. It was largely a reliance for conviction upon the honor of Masonry and the dishonor of a bank failure.

Reluctant as we are to upset the findings of a jury, we are compelled to set aside the judgment of conviction and to remand the cause for a new trial. It is not so much a question of guilt or innocence of any crime, as a question of the grade of offense committed. A white man of previous good character and reputation has been sentenced to the state penitentiary. The finding of the trial court brands him as one who intended to do murder. An assault and battery under the heat of passion is a very different thing from a premeditated design to take life.

Reversed and remanded.

(113 Miss. 255)

### PATE v. TROLLINGER. (No. 18819.)

(Supreme Court of Mississippi, Division B.  
Feb. 19, 1917.)

#### **LIBEL AND SLANDER** ~~§~~ 123(8)—**ACTIONS—JURY QUESTION.**

Code 1906, § 10, declares that all words which from their usual construction and common acceptance are considered as insults, shall be actionable, and a plea, exception, or demurrer shall not be sustained to preclude a jury from passing thereon, who are the sole judges of the damages sustained. When a fraternal organization was attempting to settle differences between plaintiff and defendant, defendant stated to members that plaintiff had been guilty of perjury, and it did not clearly appear that such statement was made in rebutting charges against defendant. *Held* that, in view of the statute, the statement could not be deemed privileged as a matter of law.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 362.]

Appeal from Circuit Court, Tishomingo County; Claude Clayton, Judge.

Action by W. L. Pate against A. J. Trollinger. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

T. A. Clark, of Belmont, and W. L. Elledge, of Iuka, for appellant. J. A. Cunningham, of Booneville, for appellee.

**ETHRIDGE, J.** This is an appeal from a judgment of the circuit court of Tishomingo county granting a peremptory instruction for the defendant. The appellant filed a declaration based on section 10, Code of 1906, on actionable words, charging that Trollinger used language of and concerning Pate calculated to lead to a breach of the peace, the alleged words being that Trollinger stated that "Pate swore a lie down here in the courts of our land and I can prove it," on one of the occasions, and on another that "W. L. Pate swore a lie as black as hell down here in the courts of our land, and I can prove it," alleging that said words are, by their use, construction, and common acceptance, insults and calculated to lead to a breach of the peace. The defendant filed

the general issue, and gave notice that on the hearing he expected to prove that the statements made by him about the appellant were and are the truth; the said notice not stating that the words were uttered with justifiable motives. Defendant also gave notice under the general issue that he would prove on the trial that what he said of and concerning Pate at the times and places alleged, or at all, were uttered by him as privileged communications, but does not state in said plea the nature of the privilege that he would claim.

The plaintiff introduced W. M. Perry, who testified that Trollinger said that Pate had sworn a lie, and he (Trollinger) could prove it. On cross-examination Perry was asked who was with him at the time, and he answered, "Wright and Byram." The question was then asked:

"All members of the same fraternity? A. Yes, sir."

To this answer objection was made and an exception taken. The question was then asked:

"You were appointed by that fraternal order to go and interview Brother Trollinger, were you not, on the law committee, weren't you? A. Yes, sir. Q. Those things were stated to you in the course of that investigation? A. We went over there to try to compromise the thing."

He was asked:

"At the second time when this man made this statement, were you at that time engaged on a mission in behalf of some fraternal organization? A. Well, I was talking to him to see if we couldn't get him— Q. Were you representing the lodge at that time? A. Yes, sir; I was on a committee."

J. W. McDonald, as a witness for the plaintiff, stated that he heard Trollinger say "Pate swore a lie as black as hell or as black as his hat, I disremember, and he could prove it"; that there were three of them together at that time; that this conversation was made some time in the latter part of the summer or fall, and was made at Belmont, Tishomingo county, Miss. On cross-examination he was asked where this conversation occurred, and answered:

"Well sir, we were coming from the lodge hall down in town, me and Mr. Trollinger and another man, I don't remember the man, I don't recollect who it was, and he was talking to him. Q. You are a member of the lodge there with Brother Trollinger? A. Yes, sir. Q. Wasn't Brother Trollinger in the lodgeroom at the time? A. No, sir; we were not in the lodgeroom. We were near Dr. Goyer's drug store. Q. Brother Trollinger had a charge preferred against him, didn't he? A. Yes, sir. Q. He was discussing the charge preferred against him by the brethren? A. Of course it was, but it was all done settled, though."

Thereupon plaintiff rested, and the defendant moved to exclude the evidence on the ground that they were fraternal brethren, talking in privacy of and concerning a charge against Trollinger in which his fraternal

standing was questioned, and that they were privileged communications, which motion the trial judge sustained. The plaintiff excepted, and prosecutes this appeal.

Section 10 of the Code of 1906, on actionable words, reads as follows:

"*Certain Words Actionable.*—All words which, from their usual construction and common acceptance, are considered as insults, and calculated to lead to a breach of the peace, shall be actionable; and a plea, exception or demurrer shall not be sustained to preclude a jury from passing thereon, who are the sole judges of the damages sustained; but this shall not deprive the courts of the power to grant new trials, as in other cases."

We think the trial court erred in striking out the evidence and holding the communications to be privileged. The record does not disclose fully the circumstances, and does not show what the charge preferred, if any, was, nor does it show that the committee was taking evidence on the charge preferred against Trollinger, though, if we assume that this was the case, still it would be a question for the jury to determine whether the statements made were necessary, under the circumstances, and whether or not they were made maliciously for the purpose of injuring plaintiff. The mere fact that two men belong to the same fraternal organization, and that such organization is trying to settle some differences between them, does not authorize one of the parties to denounce the other as a perjurer in the courts of the land, even to fraternal brethren. Under section 10 of the Code, above recited, it is especially provided that a plea, exception, or demurrer shall not be sustained to preclude a jury from passing thereon, and the jury are the sole judges of the damages sustained.

Reversed and remanded.

(112 Miss. 899)

STEVENSON v. YAZOO & M. V. R. CO.  
(No. 18836.)

(Supreme Court of Mississippi, Division B. Feb. 19, 1917.)

TRIAL §237(3)—INSTRUCTIONS—DEGREE OF PROOF.

In an action for damages to plaintiff's pasture by fire, started on a railroad right of way, where the defense was that the fire originated elsewhere, an instruction that, if the jury was in doubt as to the origin of the fire, and could not say of a certainty which fire was the cause of the damage, they should find for defendant, is erroneous, as placing on defendant a greater degree of proof than the law requires.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 548.]

Appeal from Circuit Court, Tallahatchie County; E. D. Dinkins, Judge.

Action by D. B. Stevenson against the Yazoo & Mississippi Valley Railroad Company. Judgment for the defendant, and plaintiff appeals. Reversed and remanded.



Ward & Ward, of Sumner, for appellant. Mayes, Wells, May & Sanders, of Jackson, for appellee.

**ETHRIDGE, J.** This is an appeal by D. B. Stevenson from a judgment of the circuit court of the Second district of Tallahatchie county rendered in favor of the appellee, who was defendant below. The suit was for trespass for damage to the pasture and premises of the plaintiff caused by a fire which occurred in November, 1914. On the plaintiff's testimony, and some other witnesses introduced by him, it was shown or contended that a section crew of the railroad company set grass on fire upon the right of way of the railroad that burned over and spread to the premises of the plaintiff and burned off the grass and cane growing in his pasture doing damage to the same. It was in proof by the defendant, and by some other witnesses both for the plaintiff and defendant, that there was fire near the complainant's premises, and that there was a general burning in the community; in other words, that the leaves and grass were burning over considerable portions of the community, and the defendant's proof showed that what burning it did on its right of way was to fight against the fire, which was raging without fault of the railroad company, and that the fire was blown across the railroad track and right of way and spread upon the defendant's premises without fault or negligence on the part of the railroad company and its employes; in other words, there is proof in the record to support a verdict for either party if there was no error in the instructions. In this condition of the evidence the court gave instruction No. 3 for the defendant, which is complained of as error here, which reads as follows:

"The court instructs the jury for the defendant in this case that, if you believe from the testimony that on the day in question fire swept the pasture lands of plaintiff and destroyed the grass and cane on the same, came from the south and off the way lands of the defendant and was blown across the tracks by the wind, or was fire that was burning on the same side of the track on which plaintiff's lands are located and was swept by the wind down towards the plaintiff's pasture and on same, and that this fire the defendant had nothing to do with and did not originate, then it is immaterial whether fire started on defendant's right of way by section hands in protecting defendant's right of way property escaped onto the lands of plaintiff and burned same off as testified by the witnesses, because the damage the plaintiff complains of must have been due solely to fire started by defendant's employes and permitted by them to escape onto the property of plaintiff; and further the court charges you that, if you are in doubt about this proposition and cannot say of a certainty which was the cause of the damage, then it is your duty under the law to return a verdict for the defendant."

This instruction placed a greater degree of proof upon the plaintiff than the law requires, and constitutes reversible error. It is stronger than the instruction condemned in the case of *Gentry v. Gulf & Ship Island*

*R. R. Co.*, 109 Miss. 66, 67 South. 849. In that case the instruction was in the following language:

"The court instructs the jury, for the defendant, that if they are in doubt as to whether plaintiff was injured or not in the derailment of the train, and this doubt cannot be removed by a clear preponderance of the evidence in the case, the verdict of the jury should be, 'We the jury, find for the defendant.'"

Judge Cook, speaking for the court, says:

"This instruction imposes on a plaintiff a greater burden than the law imposes on the state in a criminal trial. In a criminal trial the state must prove its case beyond all reasonable doubt. By this instruction the plaintiff must remove all doubt from the minds of the jury—and that is not all; the plaintiff must remove all doubt—'by a clear preponderance of the evidence.' The plaintiff must establish his right to recover by a preponderance of the evidence. Whenever the jury is satisfied that the plaintiff has proven his case, the plaintiff is entitled to recover. The law imposes on the plaintiff no burden to remove all doubts from the minds of the jury."

The instruction in this case not only requires all doubt to be overcome by the plaintiff by a preponderance of the testimony, but by it the jury must say "of a certainty" which kind of fire caused the damage.

But for this erroneous instruction the case would have been affirmed, but the giving of it is reversible error, and the cause is therefore reversed and remanded.

Reversed and remanded.

(113 Miss. 219)

# HIGGINBOTTOM v. VILLAGE OF BURNSVILLE. (No. 18809.)

(Supreme Court of Mississippi, Division B. Feb. 19, 1917.)

## 1. MUNICIPAL CORPORATIONS ⇨821(3)—INJURY FROM DEFECTIVE STREET—QUESTION FOR JURY.

Where evidence showed that plaintiff riding horseback at night sustained injuries by the horse stepping into a gully near municipal bridge, existence of which was known to the municipality, and also to plaintiff, who thought he had passed the place, *held* that peremptory charge for defendant was not justified.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1747.]

## 2. MUNICIPAL CORPORATIONS ⇨819(7)—INJURY FROM DEFECTIVE STREET—CONTRIBUTORY NEGLIGENCE.

Evidence showing that plaintiff, riding horseback at night, sustained injury by horse stepping into gully, near municipal bridge, plaintiff knowing of its existence, but thinking he had passed the place, *held* to show that plaintiff exercised due care.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1742.]

## 3. MUNICIPAL CORPORATIONS ⇨763(1) — CONDITION OF STREET—CARE REQUIRED.

Municipalities are not insurers of the safety of their streets, but are obliged to keep them in reasonably safe condition, for persons traveling in the usual way and exercising due care, and no part of the street should be neglected.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1612.]

**4. MUNICIPAL CORPORATIONS** ¶763(2) — **CONDITION OF STREET—CARE REQUIRED.**

While size of municipality and amount of traffic may be considered in determining municipality's negligence in maintaining defective streets, these circumstances will not relieve it from liability for injuries resulting from its negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1613, 1614.]

**5. MUNICIPAL CORPORATIONS** ¶821(5) — **DEFECTIVE STREET—QUESTION FOR JURY.**

The question of whether a street in the suburb of a village is defective is for submission to the jury upon proper instructions.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1748.]

Appeal from Circuit Court, Tishomingo County; Claude Clayton, Judge.

Action by R. M. Higginbottom against the Village of Burnsville. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

W. J. Lamb, of Corinth, for appellant. W. C. Sweat, of Corinth, for appellee.

STEVENS, J. [1] Burnsville, in Tishomingo county, is a village duly incorporated. Fulton or Jefferson street leads from the center of the town in a northerly direction. Across this street near the corporate line was a bridge or culvert, duly placed by the municipal authorities. At one end and on the south side thereof was a large hole, or depression, that had been washed out and of considerable size. It is difficult to gather from the evidence the exact measurements of this gully. It appears, however, that the "straight down part" was 11½ inches deep, and that from the top of this perpendicular portion the depression gradually sloped several inches upward to the main level of the street. This gully was about 2 feet wide and extended across about one-third of the 20-foot street. It appears, further, that the little bridge or culvert had become very much dilapidated, broken, and worn, and at the south side some of the plank were broken off. It seems that the passageway for the water had become filled with dirt and other obstructions, and the water had been forced to break over on the side of the culvert, and thereby to wash out the gully referred to. In November, 1914, about 6:30 or 7 o'clock in the evening, and just after it became dark, appellant, in company with two friends, was riding south on this street coming into the village. Appellant testifies that he was perfectly familiar with the defect in the street, but on the night of the injury complained of thought he had passed the danger point. The horse upon which he was riding stepped into the hole or onto the broken place on the bridge and fell, throwing appellant some 8 or 10 feet and breaking his arm, and otherwise severely injuring him. As a result of this injury appellant was unconscious for a day or so, was confined to his bed for a week,

and for a long time unable to do any kind of labor. The defective bridge had been in this condition for several months before the injury, and the existence of this broken culvert and hole in the street was well known to the municipal authorities, so much so that one party had requested and insisted upon the authorities repairing the defect. At the conclusion of plaintiff's testimony, appellee moved to exclude the plaintiff's evidence and to grant it a peremptory instruction. This motion was by the court sustained, and from the judgment entered in pursuance of this instruction appellant prosecutes this appeal.

[2] Counsel for appellee frankly concede that the defect in the street which caused the injury complained of had existed for several months, and that the municipal authorities were charged with notice thereof. The only way in which appellee justifies the propriety of the peremptory instruction granted by the trial court is the contention that the plaintiff was not in the exercise of due care and caution for his own safety. It is contended by appellee that before plaintiff can recover he must show that at the time of his injury he was exercising due care, especially when he knew of the admitted defect over which he was to travel. In view of this argument we have carefully examined the testimony of plaintiff and his witnesses, and find the positive testimony of plaintiff himself that his horse was in a "slow trot," and that plaintiff thought he had passed the dangerous place. Plaintiff and his two companions were each riding horseback, and at the time of the injury almost abreast. Plaintiff says:

"I thought we had passed it; but it was a little dark and I turned out to the right of this young man, and it was between me and the other one a little bit," and "it was tolerable dark."

The testimony further shows that wagons and other vehicles could not cross this ditch or gully into which plaintiff's horse stepped, but were compelled to go around to one side and somewhat out of the beaten way. The proof is abundant to show that plaintiff's horse did step into the hole and fell. The fact that a good saddle horse did in fact stumble or fall by reason of the defect is a strong circumstance that the street was in bad condition. The proof is also abundant to show that plaintiff was seriously and permanently injured.

While the sole point stressed by counsel for appellee in his brief is the alleged want of due care on the part of plaintiff, in the oral argument counsel relied on *City of Meridian v. Crook*, 109 Miss. 700, 69 South. 182, L. R. A. 1916A, 482. The facts make the particular case; and the facts of the instant case are altogether different from the facts that controlled the *Crook* Case.

[3] While municipalities are not insurers of the safety of their streets, there can be no question about their duty to keep streets

in reasonably safe condition for persons traveling in the usual way and exercising due care for their safety. In meeting this obligation the municipality should not neglect any portion of the street, but should see that the street from side to side is reasonably safe.

[4] It is true that the village of Burnsville is a small place. Counsel assert that it has only 350 or 400 inhabitants. While the size of the municipality and the amount of travel and traffic over the streets are circumstances which the jury may well consider in determining the negligence of the corporation, these circumstances would not relieve the village of liability under the case made by this record.

[5] Generally the question of whether the street in the suburbs of a village like this is or is not defective must be regarded as a question of fact for the jury, deliberating under proper instructions from the court. It was accordingly error on the part of the learned circuit judge in excluding the plaintiff's evidence and granting the peremptory charge.

Reversed and remanded.

(113 Miss. 153)

ILLINOIS CENT. R. CO. et al. v. ARCHER.  
(No. 18598.)

(Supreme Court of Mississippi, Division A.  
Feb. 26, 1917.)

1. **COMMERCE**  $\S$  27(5) — **RAILROADS—NATURE OF EMPLOYMENT—"INTERSTATE COMMERCE."**

Where a railroad carpenter was killed by train as he went across the track to buy a newspaper, he was not then engaged in interstate commerce, and action for his death was not within provisions of federal Employers' Liability Act April 22, 1908, c. 49, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657-8665).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. **MASTER AND SERVANT**  $\S$  137(5) — **OPERATION OF RAILROADS — MODE OF BACKING TRAIN—"PART OF A TRAIN."**

Where deceased was killed near depot by backing train shoving oil car against coal car as he passed between latter and box car, the coal car was "part of a train" within meaning of Code 1906, § 4047, prescribing maximum speed near depot and requiring a servant to precede backing train, and providing that contributory negligence will not be considered in case of injury resulting from violation of its provisions, such act applying to employes by provision of Laws 1908, c. 194, abolishing fellow-servant rule.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 274, 277, 278.]

For other definitions, see Words and Phrases, First and Second Series, Train.]

3. **MASTER AND SERVANT**  $\S$  137(5) — **OPERATION OF RAILROADS — MODE OF BACKING TRAIN—"DEPOT."**

A brick walk, intended for passenger's use on entering and leaving trains, was part of the "depot" within meaning of Code 1906, § 4047,

prescribing regulations for backing trains near depots.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 274, 277, 278.]

For other definitions, see Words and Phrases, First and Second Series, Depot.]

4. **MASTER AND SERVANT**  $\S$  137(5) — **OPERATION OF RAILROADS — MODE OF BACKING TRAIN.**

The fact that car which killed decedent was not backed more than 5 feet did not relieve railway company from having it preceded by a servant, as required by Code 1906, § 4047.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 274, 277, 278.]

5. **MASTER AND SERVANT**  $\S$  228(2) — **INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE.**

Where backing car which killed decedent as he attempted to pass between it and another was not preceded by a servant, as required by Code 1906, § 4047, although decedent was contributorily negligent, a peremptory instruction should have been granted against the railroad company in view of Laws 1910, c. 135, abolishing defense of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 671.]

6. **MASTER AND SERVANT**  $\S$  310 — **INJURY TO PERSON ON RAILROAD TRACK — SERVANT'S LIABILITY.**

The servants of a railroad company in charge of train backed in violation of regulations of Code 1906, § 4047, is responsible for damages caused thereby, as well as the company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1235.]

7. **MASTER AND SERVANT**  $\S$  310 — **INJURY TO PERSON ON RAILROAD TRACK — SERVANT'S LIABILITY.**

Where conductor was in charge of backing train not preceded by servant, as required by Code 1906, § 4047, causing decedent's death, and engineer merely obeyed his signals, the conductor was liable for damages, but not the engineer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1235.]

8. **NEGLIGENCE**  $\S$  141(12) — **COMPARATIVE NEGLIGENCE—INSTRUCTION.**

Instruction that deceased's contributory negligence was no bar to recovery for his death was not erroneous, where it did not preclude jury from diminishing damages "in proportion to the amount of negligence attributable to deceased," as provided by Laws 1910, c. 135.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 397-399.]

9. **MASTER AND SERVANT**  $\S$  228(2) — **INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE—INSTRUCTION.**

An instruction that recovery could not be had for decedent's death where he should have known that a train was being backed was improper, in view of Laws 1910, c. 135, abolishing defense of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 671.]

Appeal from Circuit Court, Panola County; E. D. Dinkins, Judge.

Action by Mrs. Jennie Archer against the Illinois Central Railroad Company and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded as to defendant Thomas, and affirmed as to defendant railroad company and defendant Weir.

Sivley & Evans, of Memphis, Tenn., and Mayes, Wells, May & Sanders, of Jackson, for appellants. Wm. C. McLean, of Grenada, for appellee.

SMITH, C. J. Robert Archer was struck and killed by one of the trains of the Illinois Central R. Co. on November 7, 1911, and this suit was instituted by the appellee, his widow, against the company and its conductor and engineer in charge of the train which killed him, to recover damages therefor. This appeal is from a judgment in the widow's favor.

Archer was a carpenter in the employ of the railroad company at the town of Durant. The railroad tracks at this place run north and south. The yards of the company extend some distance both north and south of its depot building. A street known as "Mulberry street" crosses the tracks at right angles immediately north of the depot, and another, known as "Madison street," crosses the tracks at the same angle some distance north of Mulberry street. Along the west side of and parallel with the main track of the railroad is a brick walk, which was constructed and is owned by the appellant company, beginning at the depot building and extending north 431 feet to Madison street. East of the railroad tracks, and immediately south of Madison street, is located the company's carpenter shop, which is surrounded by a high board fence, the gate to which fence is 90 feet south of Madison street, and from which there is a walk parallel with the fence and tracks leading to Madison street. Between the brick walk extending north from the depot building and the fence surrounding the carpenter shop there are three railroad tracks, the one nearest the walk being the main line, the next being known as the "passing track," and the third, which is 8 feet from the fence and within 50 feet from the brick walk, is used for storing north-bound freight cars and the passenger coaches of the Aberdeen Branch. On the west side of this brick walk are two other tracks, one of which is parallel therewith and on which the passenger train of the Tchula Branch stands when receiving and discharging passengers. This brick walk is used by passengers getting off and on the main line and Tchula Branch trains. There was evidence on behalf of appellants to the effect that, although the longest south-bound main-line trains extend the entire length of this brick walk, the furthest point north at which such trains are opened for receiving and discharging passengers is two car lengths south of Madison street. On the 7th day of November, 1911, there were on the third track from the brick walk, the Aberdeen train, an oil tank car, a coal car, and a box car. The box car was opposite the gate leading into the yard surrounding the carpenter shop. The coal car was several feet south of the box car and the tank car

was south of, but, according to the evidence for appellants, coupled to, the coal car; and the Aberdeen train, which would shortly leave for Aberdeen, was standing opposite the depot building. The Standard Oil Company maintains an oil depot east of the railroad tracks, just north of Mulberry street. The conductor of the Aberdeen train was requested to back up to the oil car and move it south to a point opposite the oil spout, so that the oil therein could be transferred to the tanks of the oil company. Archer on the day before had been working on some timbers to be used in constructing a depot of the railway company at Malone, a station some distance north of Durant, which depot was to be used by the company in aid of both its inter and intra state traffic. On the morning in question he arrived at the shop some time after 6 o'clock. His orders were to continue at work upon the timbers for the Malone depot, but before beginning the same, he cleared the shavings and debris from around his place of work and then stated to a fellow employé that he would go across to a south-bound passenger train, which had just then arrived, and get a newspaper. He left the yard through the gate opposite the tracks, walked south a few feet to the end of the box car, and attempted to pass between it and the coal car. The Aberdeen train, for the purpose of switching the tank car as hereinbefore stated, was, at the time Archer attempted to cross, backing north along this track. According to appellants' evidence this train came practically to a stand just prior to coming into contact with the tank car, when the engineer on the signal of the conductor caused the wheels of the engine to make one backward revolution, thereby backing the train 16 or 17 feet, resulting in the tank and coal cars being backed 4 or 5 feet. Whether this backing train, after picking up the tank and coal cars, came in contact with the box car is not clear from the evidence, but if it did, the contact was very slight, and was insufficient to move it at all. Archer was struck by the coal car, knocked down, and killed. According to the evidence for appellants, the train, when it came in contact with the tank car, was moving at the rate of about one mile an hour, but according to that for appellee, it was moving at the rate of between three and four miles an hour. This backing train was preceded by two servants of the railroad company, according to appellants' evidence, until it came in contact with the tank car, but not thereafter. At the time Archer was killed both of these servants were south of the coal car, and neither of them saw, nor could have seen, him from where they were then standing. The point at which Archer was killed was 381 feet north of the depot building, and, according to the evidence of the company's agent at Durant, about 60 feet south of the northernmost point where the doors of

south-bound passenger trains were opened for receiving and discharging passengers.

One of the instructions granted appellee which is complained of by counsel for appellants is, as follows:

"No. 10. Although the jury may believe from the evidence that Robert Archer was guilty of such conduct as proximately contributed to his injury and death, yet this is no bar to finding for the plaintiff."

By the only instruction granted appellants, the court charged the jury that:

"If they believe from the evidence in this case that Robert Archer walked from the shop, onto the track of defendant immediately north of the coal car and was knocked down and killed by it when it was backed up by the Aberdeen branch train coupling to the tank car, at a time when he knew, or by the reasonable use of his faculties could have seen, that the train was backing up they should find for the defendant."

In response to the various contentions of counsel for appellants, we will say that:

[1] 1. Archer was not employed in interstate commerce at the time he was killed. The cause, therefore, is not within the provisions of the federal Employers' Liability Act.

2. Section 4047, Code of 1906, imposes two separate and distinct duties upon railroads: (a) Not to back cars or engines into or along a passenger depot at a greater rate of speed than three miles an hour; and (b) to cause a train of cars, part thereof, or an engine backing at any rate of speed into or along a passenger depot, upon a track passing within 50 feet thereof, for at least 300 feet before it reaches or comes opposite thereto, to be preceded by a servant on foot, not exceeding 40 nor under 20 feet in advance, to give warning.

[2] 3. The car which and when it struck Archer was a part of a train of cars within the meaning of section 4047, Code of 1906, which section, since the enactment of chapter 194, Laws of 1906, protects railroad employees as well as other persons.

[3] 4. The brick walk from end to end was intended for the use of passengers entering and leaving trains, consequently the whole of it is a part of appellant company's passenger depot (Railroad Co. v. Causey, 106 Miss. 36, 63 South. 336), so that Archer was struck and killed by a car which was then being backed along such a depot.

[4, 5] 5. The fact that the distance this car was backed may not have exceeded 4 or 5 feet, and that probably it could not have been backed more than that distance before striking another car, did not relieve appellant company from the duty of having it preceded by a servant to give warning; and, since it was not preceded by such a servant, it necessarily follows that appellee, because of our concurrent negligence statute (chapter 135, Laws of 1910), was entitled as against appellant company and its conductor, to an instruction peremptorily charging the jury

to return a verdict in her favor. Consequently, excepting that numbered 10, any errors, if any there are, in the instructions granted by the court below to appellee were, as to the company and its conductor harmless.

[6, 7] 6. The servants of a railroad company in charge of a train which is being backed in violation of section 4047 of the Code are themselves, as well as the company, responsible for any damages caused thereby. On the occasion in question, the train was in charge of the conductor, who preceded it to the point of contact with the tank car. The backing was being done in response to his signals, and it does not appear—if the fact be material—that the engineer knew, or had cause to suspect, that obeying the conductor's signals would result in the train or a part thereof being backed without being preceded by a servant of the company on foot to give warning. Consequently, he did not participate in the violation of the statute, and it cannot be invoked against him.

[8, 9] 7. The granting of appellee's instruction No. 10 was not an error, in so far as the appellant company and its conductor are concerned, for the reason that it did not preclude the jury from diminishing the damages "in proportion to the amount of negligence attributable to" Archer. It is true that this instruction is in conflict with the only instruction granted appellants, but they cannot complain thereof, for the reason that the instruction granted to them should not have been given; contributory negligence, because of chapter 135, Laws of 1910, being no longer a bar to a recovery in this class of cases.

It follows from the foregoing views that as to appellant Thomas, the engineer, the judgment of the court below must be reversed and the cause remanded, and it is so ordered; but as to the railroad company and its conductor, Weir, the judgment must be and is affirmed.

(113 Miss. 238)

LOCKARD, County Superintendent of Education, v. HOYE. (No. 18803.)

(Supreme Court of Mississippi, Division A.  
Feb. 12, 1917.)

APPEAL AND ERROR  $\S$  781(4)—DISMISSAL—WANT OF CONTROVERSY—MANDAMUS.

Where a woman, selected by the trustees of a school as teacher for a scholastic year, petitioned for writ of mandamus against the superintendent of education of the county to compel him to contract with her, but the scholastic term for which she was elected to teach expires before the superintendent's appeal from judgment for her is heard, the appeal will be dismissed, since rights already lost and wrongs already perpetrated cannot be corrected by mandamus.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig.  $\S$  3122.]

Appeal from Circuit Court, Yazoo County; W. H. Potter, Judge.

**Petition for writ of mandamus by Mattie L. Hoyer against W. W. Lockard, Superintendent of Education of Yazoo County.** From a judgment for plaintiff, defendant appeals. Appeal dismissed.

**Earle N. Floyd, Asst. Atty. Gen., for appellant.** Henry & Brown and E. L. Brown, all of Yazoo City, for appellee.

**SYKES, J.** The appellee, who was plaintiff in the lower court, filed a petition for a writ of mandamus against W. W. Lockard, superintendent of education of Yazoo county, in which petition she alleged that she had been duly and lawfully selected by the trustees of Antioch Public School as teacher of same for the scholastic year beginning the 18th of October, 1915; that she held a first-grade license, and that it was the duty of the superintendent to contract with her as said teacher, at a salary of not less than \$25 a month, under section 4522, Code 1906; that said superintendent refused to contract with her, as provided in said section, but only offered her the sum of \$20 per month. The prayer of said petition is that a writ of mandamus issue, directing the said county superintendent to contract with petitioner.

A demurrer was interposed to this petition and overruled by the court. Defendant below declined to plead further, and judgment was entered against him, from which this appeal is prosecuted without bond.

The scholastic term to which the appellee was elected to teach has long since expired. Therefore there is no practical question before this court for decision. Rights already lost, and wrongs already perpetrated, cannot be corrected by mandamus. *McDaniel v. Hurt et al.*, 92 Miss. 197, 41 South. 381; *Pathausen v. State ex rel. Lopusser*, 94 Miss. 103, 47 South. 897.

The appeal is therefore dismissed.

(113 Miss. 165)

#### MAIN v. MAIN. (No. 18818.)

(Supreme Court of Mississippi, Division B.  
Feb. 18, 1917.)

#### 1. MARRIAGE $\Leftrightarrow$ 60(7)—ANNULMENT—DEGREE OF PROOF—DURESS.

Marriage is not only a contract between the parties affecting their personal rights, but is a legal status affecting the public; and though, like all other contracts, it is not valid without the assent of both parties, a marriage ceremony, performed with all the requisites of those rites, will not be annulled for duress unless the proof is clear and convincing.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 131.]

#### 2. MARRIAGE $\Leftrightarrow$ 60(7)—ANNULMENT—SUFFICIENCY OF EVIDENCE—DURESS.

In an action by a husband to annul the marriage on the ground of duress, evidence held not sufficient to sustain the decree of the chancellor annulling the marriage.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 131.]

**Appeal from Chancery Court, Adams County; R. W. Cutrer, Chancellor.**

**Suit by Albert T. Main against Lillian T. Main to annul a marriage.** Decree for complainant, and defendant appeals. Reversed and remanded.

**Lillian T. Main**, the appellant, appeals from a judgment of the chancery court of Adams county annulling a marriage between herself and Albert T. Main, on a proceeding for annulment of marriage filed against Lillian T. Main by Albert T. Main. The bill alleged that the complainant, Albert T. Main, was coerced into the marrying of Lillian Lehman, alias Main, in the town of Tracy, in the state of Minnesota, in January, 1903; that by reason of the duress and force and fraud used there was in reality no marriage contract; that, at the time of the alleged marriage, the defendant was a resident of the town of Tracy, in said state, and the daughter of one Fritz Lehman, a man of reputed violence; that Fritz Lehman and his son armed themselves with deadly weapons and accused the complainant of having gotten the defendant pregnant, and made threats against his life if he refused to marry her; that he was then a young man only 20 years of age; that he never cohabited with her, left her at once after the marriage ceremony, and repudiated the marriage, and has never lived with her since. The prayer was for the annulment of the marriage.

The defendant filed a motion for alimony pendente lite, and asked for suit money with which to defend the suit. She denied in an affidavit filed with the motion the allegations of the bill, and averred that she was lawfully married to Albert T. Main, and that as the result of the said marriage a son was born, and prayed allowance of suit money and temporary alimony. This motion was overruled by the chancellor for the time being. Appellant then furnished \$25 to her counsel for suit money and fees, which was all the money she was able, on the statement shown in the record, to furnish. Thereupon an answer was filed, denying the allegations of the bill, denying that the marriage was void, and denying that the complainant left her immediately after the marriage, and averring that she and her said husband, Albert T. Main, lived together for over two years after their marriage, when he left her on account of business troubles and went South and assumed the name of Robert T. Dale, under which name he was known in Natchez, Miss., and alleging that as the fruit of the marriage there was born a child, then 12 years of age, residing with her and supported by her with her own labor, and denying that the complainant was entitled to relief, alleging that he does not come into court with clean hands, and that he has, by living with her, ratified the marriage contract even

if the court should find it was entered into under duress and threats.

The answer was also made a cross-bill, in which the defendant and cross-complainant alleges the duty of the plaintiff to support her and the child; that he is a man of good business ability and earns a salary sufficient to enable him to support a wife and child in modest comfort; and praying for the allowance of a reasonable sum to pay her solicitors for defending the suit, and for a decree fixing and allowing permanent alimony.

Albert T. Main testified in his own behalf: That he lives in Natchez and is engaged in the insurance business and has been for nearly eight years. That he came to Natchez from New Orleans, and to New Orleans from Tracy, Minn. That he first met the defendant in the summer of 1902, and "of course, as young people will do, we became familiar. At the time she was visiting a brother-in-law of hers who was estranged from his wife, and I knew this. Of course, I knew that certain things went on; knew as much as a person could know without witnessing the performance." That "she was a woman of loose character, and the whole family had that reputation." That the relations between them developed into what her brother advised complainant was a state of pregnancy; "at least, that they laid it at my door." That he had not seen the girl for nearly two months and had been firing an engine on the Chicago & Northwestern Railroad and was out of Tracy during that time and had practically forgotten the incident. That, about the last day of December, Lillian's brother took him over to her father's saloon and told him she was in a state of pregnancy and that he was responsible, which he denied, and, after they explained the circumstances, the appellant's brother, who was older and larger than the appellee, told him it would be up to him to marry the girl, and that he took a pistol that "looked like one of these German 42 centimeters" and poked it at his stomach and said: "It won't do you any good to run because I will follow you to the end of the world and kill you." That he had nobody to advise with him. That his father was in ill health and in a sanitarium. That the whole thing was a "nightmare for the next two or three days." That at first he refused to marry her, but the next day they hunted him up and kept after him for about three days. That he did not know what was pending, and the whole thing terrorized him in the belief that they would kill him, and that he married under that condition. That the marriage ceremony was performed about 8:30 at night, at the home of the defendant. That her father and mother, the preacher, and the family doctor of both families were present, and that he left immediately after the ceremony and has never since had anything to do with her. That the condition they imposed on the marriage was that he should

only marry her, and no mention was made of living with her. He also testified that the defendant had a brother who was a half-wit and who, every time he passed him, menaced him, carrying a knife around with him. On cross-examination he stated that he went to the county seat, 18 miles distant from Tracy, to procure the marriage license; that under the law of Minnesota it was necessary that he should go to the county seat to obtain the license. He testified that his recollection was that some member of the family of the defendant went with him; that they were at the depot, but he won't say that they accompanied him; that he does not remember as to whether or not they did or did not; that he stayed there about two hours and came back on the next train; that his father was an attorney, but that he did not seek his advice; that the marriage occurred the next night after the license was obtained. He testifies that Dr. Workman of Tracy, Minn., was the physician, but, when asked as to a conversation had with Dr. Workman, replied that he did not care to answer, as "it was a little hazy"; that no one went with him to the home of the defendant the night of the marriage and that he went alone, through the snow; that his father is now dead but lived about 2½ years after the marriage ceremony; that he did not talk to his father about an annulment of the marriage; that he remained in Tracy about 30 days after the marriage and went from there to Minneapolis, and remained there about 9 or 10 months, and then went to Dakota and stayed there about 7 months and returned to Minneapolis, and was away, altogether, about 2 years; that he remained in Tracy about two years after he returned, before coming South. He testified that he is now earning about \$20 per week in the insurance business at Natchez. He admits writing some letters appearing in the record, requesting the appellant, who was living at Missoula, Mont., to institute proceedings against him for divorce, and that he would pay the expense of obtaining a divorce and she might place the divorce on any ground that she desired. He also conducted negotiations through these letters to find how much money she would take to release him from his obligations to her.

The complainant introduced Harry Rogers to support his statements in reference to the said marriage. Rogers testifies that he did not know Albert T. Main personally prior to January, 1903, but knew him following that date for a period of years, and that he knew Lillian Main for 2 or 3 years after her marriage, but had not seen her for 4½ years; that he did not attend the wedding, knew nothing of his own personal knowledge, and testified only from hearsay and what he considered reliable authority; that from this he testifies that Albert T. Main left Tracy immediately, but Mrs. Main remained several

years; that he cannot state from personal knowledge, but that it was a well-known fact that Albert Main left immediately and did not return for several months, and, subsequent to his return, witness and Albert T. Main became intimate friends. This is the substance of all the testimony for the complainant.

This testimony is contradicted by deposition of Mrs. Main, who testified that complainant married her voluntarily and lived with her for about three years after the marriage; is contradicted by Frank C. Lehman, brother of the appellant, who testifies that they did not use any duress or coercion, and that Albert Main lived with Lillian Main for about two years after the marriage, living as members of his father's family, and that they treated him as a member of the family and were kind and considerate to him.

Dr. Workman, the physician of both families, testifies that he had a conversation with Albert Main prior to the marriage and advised him to marry the girl, and that Main admitted to him that he alone was responsible for her condition and that he consented to marry; that he was present at the marriage between the parties, and it was entered into voluntarily, from all appearances; that Albert Main remained at the residence, joined in the conversations, and was apparently satisfied with the marriage; that Main lived there for some time afterwards, and he saw them together at different times, but did not know whether they cohabited as man and wife or not. He also testifies that the reputation of the Lehmans for peace and violence is good; that they were regarded as good, law-abiding citizens, and were in good standing in the community; that he had treated Lillian, the defendant in the suit, about two years prior to the marriage, and at that time she was a virgin, having an unperforated hymen; that he had observed her conduct throughout her life, having been her neighbor, the family physician, and a trustee of the school; and that he saw nothing in her conduct that was improper.

H. F. Selter, a citizen of Tracy, Minn., 56 years of age, a banker and real estate man by occupation, testified for the defendant that he had known defendant since her birth; that he knew her father; that her father was an honest, law-abiding, and conscientious man; that the Lehmans were never known to have a fight or show any tendency to do so; that he knew the complainant as Allie Main, but did not know his initials; that the father of Lillian talked with him about her condition a short time before the marriage, and he (Selter) advised him it was the proper thing for them to marry; that Mr. Lehman came back and told him that Allie was willing to marry Lillian, but the mother did not have any faith in Allie; that he advised them to have the marriage; that Fritz Lehman, the father of Lillian, seemed at the time to

be overwhelmed with sorrow, and stated that he did not think the boy would amount to anything, but that he showed no viciousness towards Allie nor any tendency toward it. He also testifies as to the good standing of the family in the community, and that the appellant bore a good reputation in the community for moral character; that he never heard anything against her prior to her transaction with Main and never saw anything unladylike or suggestive, and that he saw her almost daily; that he saw Allie Main in his father's law office a good deal and about the street, during all this time; that he never had any reason to believe and heard no threats of violence; that, from his knowledge of the father of Albert Main, he believed he would have advised his son to marry the girl; that Albert Main stayed at Tracy for a year or more; that he saw them both in Tracy during the time, but could not say whether they cohabited as man and wife.

David H. Evans, witness for the defendant, resident of Tracy, Minn., 62 years of age, hardware and grain merchant, one-time mayor, member of the school board, member of the state reformatory board, director of Citizens' State Bank, president of the Tracy Cement Tile Company, president of the Implement Mutual Fire Insurance Company, vice president of Retail Hardware Dealers' Fire Insurance Company, testified that he has lived in Tracy for 37 years; has known Lillian Main since her birth; saw her at school, on the streets, and in her home; well acquainted with the family; without personal knowledge of the exact state of affairs, but knowing something of the relations between them in a general way, states that Albert T. Main married Lillian to fulfill a moral obligation to her; that the father of Lillian called on him and went over his troubles with him and expressed himself as not being desirous of the marriage between Albert and Lillian, but under the circumstances would offer no objections; does not know of any violence toward Main by Mr. Lehman; that the father expressed himself as being reluctant in his approval of their marriage; that he saw him almost daily, and never saw any inclination to violence or a tendency toward quarrelsomeness, on the contrary, knew him to be a peaceable and agreeable law-abiding citizen; saw Albert T. and Lillian Main together after their marriage; once met them conversing together in the office of Chas. W. Main & Son.

The chancellor on this evidence granted a decree annulling the marriage between the appellant and the appellee.

Brandon & Bowman, of Natchez, for appellant. B. W. Crawford and C. F. Engle, both of Natchez, for appellee.

ETHRIDGE, J. [1] Marriage is not only a contract between the parties affecting their



personal rights, but is a legal status affecting materially the public; and the public as well as the parties have an interest in the marriage status. And although the marriage contract, like all other contracts, in order to be valid, requires the assent of both parties, still, where the marriage ceremony has been performed with all the requisites and usual solemnity of those rites, the proof must be clear and convincing before the marriage will be annulled so as to make it void ab initio.

"Where it is sought to annul a marriage contract on the ground of duress, it must be shown by clear, satisfactory, and convincing evidence that the duress dominated throughout the transaction so as to disable the one influenced from acting as a free agent at the time of the marriage." *Beeks v. Beeks*, 66 Fla. 256, 63 South. 444.

[2] In the instant case it is sought to annul the marriage and make it void from the beginning, the effect of which will be, if permitted, to render the child born a bastard and to place upon the woman in the case the stigma of impurity; and it is a familiar rule of law that, where a situation arises under which one person will suffer wrong and injury because of the situation, the law will favor the one who is not responsible for the situation, if that be reasonably possible under the circumstances. In the present case the proof for the complainant, if taken alone, is far from being satisfactory and convincing. It appears that the marriage, or so-called marriage, was solemnized in 1903, and the bill was not filed until some 12 or 13 years thereafter. Under the appellee's testimony, he lived for some years in the town where the relatives lived, separate from the woman, without any effort being made to molest him. The courts were open during all this time to the annulment if the marriage was brought about by duress. We find from the letters in the record that he had solicited Mrs. Main to procure a divorce at his expense on any ground which she might choose as a ground for divorce and he would pay the expense of this procurement. It appears from the appellant's testimony (which is not disputed by the appellee, though he testified) that he had written her a letter soliciting her to come to Natchez and live with him as his wife, which she refused to do. It appears that the letters written, while not expressly recognizing the marriage, necessarily recognized it in urging the appellant to procure a divorce from the appellee. It appears that the appellee was reared in the town of Tracy, Minn., where the alleged marriage took place, and, if the facts relied on by appellant for annulment of the marriage were true, it would have been an easy matter to have established the facts by evidence of other parties living in that place. His family and friends and (presumably) relatives lived there, and some person must necessarily have been familiar with

the facts; yet the only witness produced is one who moved to Tracy shortly after the alleged marriage, and who did not know either the appellant or appellee until after the marriage, and who was not at the time of taking his deposition a resident of that place, and who testifies that he had no personal knowledge of the facts he undertook to testify to. As stated, this testimony of itself is not as strong as ordinarily it should be in a case of this kind to procure an annulment of the marriage, which requires a higher degree of proof than the ordinary civil contracts between parties. When this testimony is considered with the testimony for the appellant and the witnesses on her behalf, three of whom are old citizens and residents, and shown to be men of character and standing in that community, it so completely outweighs the testimony of the appellee and his witness as to make it impossible to uphold the judgment in this case annulling the marriage. Some authorities go to the extent of holding that where a marriage is entered into, so as to escape the consequences of a situation like the one before us now, either from fear of prosecution or violence of the relatives, the court ought to deny an annulment at all because of the responsibility for the condition that arises resting upon the party alleged to have been coerced. 19 Am. & Eng. Enc. Law, 1189. While we do not mean to hold that annulment will not be granted where the proof is clear that duress was used, we believe in this case that the great weight of proof is with the appellant, and that the appellee failed to meet the requirements, imposed by legal rules, to annul the marriage.

There being a cross-bill praying for alimony pendente lite and permanent alimony, and there being no evidence in the record as to a reasonable attorney's fee, we think that the decree of the chancellor should be reversed, the bill of complaint dismissed, and the cause remanded, with directions to the court below to make such allowance for alimony and attorney's fee as may be proper.

Reversed and remanded.

(113 Miss. 239)

SPANN v. ALABAMA & V. R. CO.

(No. 18798.)

(Supreme Court of Mississippi, Division A.  
Feb. 26, 1917.)

CARRIERS — 132—DAMAGE TO FREIGHT—BURDEN OF PROOF—CAUSE OF INJURY.

Where a piano shipped under a bill of lading which exempted the carrier from liability for damage only if it was caused by the act of God, the public enemy, quarantine, the authority of law, or act or default of the shipper, was shown to have been delivered to the carrier in good condition and to have been injured when delivered by the carrier, the carrier is liable unless it shows that the injury was not received while the piano was in its possession or that it resulted from one of the excepted causes, and instructions to find for defendant if the jury

could not say from the evidence what was the cause of the injury were erroneous.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 578-582, 605.]

Appeal from Circuit Court, Rankin County; J. D. Carr, Judge.

Action by Hal Spann against the Alabama & Vicksburg Railroad Company. From a judgment for defendant in the circuit court on appeal from a justice of the peace, the plaintiff appeals. Reversed and remanded.

Stingily & McIntyre, of Brandon, for appellant. R. H. & J. H. Thompson and Fulton Thompson, all of Jackson, for appellee.

SYKES, J. Suit was originally filed in a justice of the peace court in Rankin county by Hal Spann, the appellant here, against the Alabama & Vicksburg Railroad Company for damages to a piano shipped from Meridian, Miss., to Pelahatchie, Miss. Plaintiff obtained judgment in the justice of the peace court, and defendant appealed to the circuit court. The trial in the circuit court resulted in a verdict for the defendant upon which judgment was entered, and from which judgment this appeal is prosecuted.

The testimony of the plaintiff in the court below showed that the piano was wrapped in a clean, dry sheet, packed in a piano box, and delivered to the agent of the railroad company at Meridian in good condition; that, about four days thereafter, the piano was properly hauled from the depot at Pelahatchie to the residence of the plaintiff, and when the piano box was opened and the piano taken out it was found that the wood on the front of the piano had become very badly blistered. The attention of the agent of the defendant company at Pelahatchie was immediately called to the condition of the piano. In short, the testimony for the plaintiff shows that the piano was properly packed and delivered to the railroad company in good condition, and that it was in a damaged condition when received by plaintiff at Pelahatchie. The employees of the railroad company who testified in the case had no positive knowledge of the handling of the piano, but testified that from their records the piano was properly loaded at Meridian, placed in a suitable car which contained no freight that would cause injury to the piano, and was transported under seal from Meridian to Pelahatchie. It was neither hot nor cold and did not rain while the piano was in the hands of the railroad company. The railroad company also attempted to prove that the piano was improperly packed; that it should have been wrapped in paper instead of a sheet. Section 1 of the bill of lading under which the piano was shipped, among other things, provides that:

"No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy,

quarantine, the authority of law or the act or default of the shipper or owner," etc.

The lower court submitted the question of liability to the jury.

At the request of the defendant railroad company, the four instructions herein copied were given:

"If the jury cannot say from the evidence that the defendant caused the injury, it is the duty of the jury to find for defendant, and the court so instructs; and if the jury find for defendant their verdict may be in the following form: 'We, the jury, find for defendant.'

"The court instructs the jury for defendant that, unless they believe from the evidence that the plaintiff has shown the defendant injured the piano, the jury should find for the defendant.

"If the jury believes from the evidence that the cause of the injury is not known and has not been shown and that the piano was carefully and safely handled and transported by defendant, the jury should find for defendant.

"The court instructs the jury for defendant that, unless they can say on their oaths from the evidence that the injury occurred while the piano was in the hands of defendant, the jury should find for defendant."

The giving of all four of these instructions was error. When the plaintiff proved that the piano was in good condition when delivered to the defendant and was by the defendant delivered to it in bad condition, then it devolved upon the defendant to show that the damage to the piano did not occur while the piano was in its possession, or that, if it did so occur, then the damage was caused "by the act of God, the public enemy, quarantine, the authority of law, or an act or default of the shipper or owner." The carrier attempted to prove that the damage was caused by the act of the shipper in improperly packing the piano. The burden of proof in this case to prove one of the above excepted causes rested upon the defendant.

"Proof of the delivery of the goods to the carrier in good order and their loss or injury makes it a prima facie case for the owner of the goods within this rule." 6 Thompson on Negligence, § 7709.

"We think the better reason and policy and the greater number of cases adjudged favor the rule to require the carrier which delivers goods damaged, and which are shown to have started on their journey over connecting lines of transportation in good condition, to exculpate itself from liability by showing that the injury did not occur by its default." *M. & O. R. R. Co. v. Tupelo Furniture Mfg. Co.*, 67 Miss. 35, 7 South. 279, 19 Am. St. Rep. 262.

"The burden was upon the defendant to show that the loss occurred without fault on its part, and this burden defendant failed to meet." *Southern Express Co. v. Seide*, 67 Miss. 609, 7 South. 547.

The rules above cited are where the bills of lading or express receipts provided that the carriers were only liable when the goods were damaged on account of negligence. In the bill of lading in the instant case, however, the carrier is an insurer of the property and would for this reason have to show that the damage to the piano was due to one of the excepted causes contained in its bill of lading above set out.

Reversed and remanded.

(113 Miss. 189)

**SOUTHWESTERN SURETY INS. CO. v. TREADWAY. (No. 18789.)**(Supreme Court of Mississippi, Division A.  
Feb. 28, 1917.)**1. JUDGMENT  $\S$  143(10)—NEGLIGENCE OF ATTORNEY—FAILURE TO APPEAR.**

The client is bound by the negligence of his attorney in failing to appear when duly summoned by the court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig.  $\S$  281.]

**2. JUDGMENT  $\S$  160 — SETTING ASIDE DEFAULT — AFFIDAVIT OF DEFENSE — SUFFICIENCY.**

On motion to set aside a judgment by default in an action on an accident insurance policy, an affidavit of defense stating that insured was the aggressor in the affray in which he was killed, and therefore his death was not accidental, is sufficient for the purposes of the motion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig.  $\S$  314-316.]

**3. JUDGMENT  $\S$  138(1)—SETTING ASIDE DEFAULT—DISCRETION OF COURT.**

While no fixed rule can be adopted with reference to setting aside default judgments, as to which the trial court has a large discretion, the relief should be granted where justice and right demand a trial on the merits, and as a general rule should be granted where a meritorious defense is shown and the opportunity for trial at the same term has not been lost.

[Ed. Note.—For other cases, see Judgment, Cent. Dig.  $\S$  249-251.]

**4. JUDGMENT  $\S$  143(10)—SETTING ASIDE DEFAULT—INTENTION TO APPEAR—MISTAKE.**

Where a default judgment was obtained against a foreign insurance company which intended to appear and make a bona fide defense, but through the inadvertence or mistake of its counsel failed to do so, and which filed a proper motion and affidavit to set aside the judgment within a few hours after it was rendered, and while a trial could be had at the same term, the relief should be granted though, if defendant for any reason did not intend to appear in obedience to the summons, it is not entitled to the relief.

[Ed. Note.—For other cases, see Judgment, Cent. Dig.  $\S$  281.]

**5. JUDGMENT  $\S$  138(1)—SETTING ASIDE DEFAULT—REASONABLE DOUBT.**

Where there is reasonable doubt as to whether a default judgment should be vacated, the doubt should be resolved in favor of opening the judgment and hearing the case on its merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig.  $\S$  249-251.]

**6. JUDGMENT  $\S$  160 — SETTING ASIDE DEFAULT—AFFIDAVIT BY ATTORNEY.**

Under Code 1906,  $\S$  1011, providing that in all cases where the oath of a party is required it may be made by his attorney, and shall be as effectual for all purposes as if made by the party, an attorney can make the affidavit of defense in support of a motion to set aside a default judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig.  $\S$  314-316.]

Appeal from Circuit Court, Washington County; F. E. Everett, Judge.

Action by Mrs. Ola R. Treadway against the Southwestern Surety Insurance Company. From a judgment overruling defendant's motion to set aside a judgment by de-

fault, defendant appeals. Reversed and remanded.

Percy & Percy, of Greenville, for appellant. Brunini, Hirsch & Griffith, of Vicksburg, for appellee.

HOLDEN, J. This is an appeal from a judgment of the circuit court of Washington county, overruling a motion to set aside a judgment by default for \$6,168.75 entered in favor of the appellee, Ola R. Treadway, against the appellant, the Southwestern Surety Insurance Company, a foreign corporation. The appellee filed her declaration based on an accident insurance policy issued to her husband, Chas. S. Treadway, by the defendant company, seeking to recover \$6,000, the amount named in the policy, for the death of her husband. Summons was duly issued and served on the defendant on the 5th day of April, 1915, and on the 9th day of June, 1915, the cause having been set for trial on that date, the case was called, and no plea having been filed by the defendant and no appearance of the defendant being made by counsel or otherwise, the plaintiff took a judgment by default against the defendant, appellant here, for the sum of \$6,168.75.

A few hours after the rendition of the judgment the appellant heard of the rendition of the judgment, and immediately proceeded through counsel to bring the matter to the attention of the court by filing a motion and affidavit to set aside the judgment, open the case, and hear it on its merits. This motion to set aside the default judgment was made during the same day that the judgment was taken, and within a few hours after its rendition, and was made before the default judgment had been entered upon the minutes of the court. The term of court had not ended, but was to continue for at least another week. The motion to set aside the judgment was promptly brought to the attention of the counsel for appellee, and he appeared and contested the motion. The witnesses were still within the jurisdiction of the court and could have appeared and testified had a trial on the merits been granted to appellant.

The motion and affidavit filed by the appellant, seeking to have the judgment set aside, states, in substance, that the appellant was a nonresident insurance corporation, with its principal office in Dennison, Tex.; that it had only been apprised in the last few hours of the fact that a judgment by default had been rendered against it in this cause, and that the defendant had intended and directed its chief attorney, E. V. Mitchell, to arrange for a defense of said suit; that owing to the absence of said Mitchell from his office, on account of the press of business, the matter was overlooked by the appellant; and that the judgment was allowed without the knowledge of appellant. The appellant alleg-

ed that it had a meritorious defense to the suit, claiming that the suit was upon an accident policy, and that it was informed and believed that the proper proof could be made that the deceased assured was the aggressor in the difficulty which resulted in his death, and that, consequently, his death was not effected through accidental means.

The appellant also offered to be taxed with all costs incurred up to date or suffer any other reasonable punishment imposed by the court for its failure to appear in court as it wanted and intended to do, and that it was ready for trial at the same term of court; that the application to open the judgment was not made for the purpose of delay, but that a trial on the merits might be had, and could be had, at that term, and that it had a meritorious defense; that it had intended to employ Percy & Percy, local attorneys, to represent it in the suit, and was depending upon its attorney, the said Mitchell, to make the arrangements for the employment of said local counsel to defend the case.

The appellee here contends that the judgment of the lower court denying the motion to set aside the judgment by default was correct and proper. It appears from the record that the appellant insurance company was duly served with process through its local agent, and that its chief attorney, Mitchell, had corresponded with the attorneys of appellee regarding a settlement of the claim under the accident policy, and that he knew that the case was set for trial on the 9th of June, the day it was called. The correspondence, copies of which are in the record, shows that the attorney for the appellant had full knowledge of the pendency of the suit, and also had notice of the date set for the trial of it. It also appears that the local resident agent of the appellant, Mr. Wheatley, was subpoenaed as a witness on the 3d day of June, 1915, to appear as a witness in the case on the 9th of June, the day it was called, but that no one appeared or represented the defendant insurance company when the case was called.

It is shown that the affidavit and motion to vacate the judgment was made by the attorneys, Percy & Percy, on information and belief, and that the affidavit and motion alleging that the insurance company had a meritorious defense to the cause of action did not specifically set out the defense to be relied upon, but stated, in general terms, in effect, that the defense was that the insured did not meet his death by accidental means within the terms of the insurance policy. It is also to be observed that the excuse offered by the appellant insurance company for its failure to appear when the case was called was based on the fact that it was relying upon its general counsel to appear and look after the case or to secure local counsel to do so for it, and that the failure to appear was simply on account of the attorney Mitchell forgetting

or overlooking the date when the case would be called for trial, on account of a press of business in his office.

The question presented to us for decision is, whether or not, under the facts as disclosed by the record in this case, the lower court should have set aside the default judgment and permitted a trial on the merits.

[1] The question is rather difficult to decide under the facts here, in view of the different elastic rules governing in such cases in the United States. After an examination of the authorities in other states, we think the correct rule is that the client is bound by the negligence of the attorney in failing to appear when duly summoned by the court. The neglect of the attorney, generally, is the neglect of the client; but the question here is, whether or not the lower court properly and justly exercised its discretion in refusing to set aside the default judgment upon the showing made below by the appellant.

Now, let us see upon what ground the lower court was asked to set aside this default judgment. It appears that the insurance company was a corporation domiciled in another state, and that it had been duly served with process to appear and defend the suit of appellee; that appellant placed the matter in the hands of its general attorney who, by correspondence, undertook to adjust the claim before the trial day. But no settlement was reached, and it seems that the firm of Percy & Percy, attorneys at Greenville, were written to with a view of retaining them to represent the appellant in the case, but, for some reason which does not clearly appear, employment was not agreed upon before the trial day, but the insurance company thought that its general attorney was making the proper arrangement for local counsel to represent it in the case at Greenville.

It is shown that Attorney Mitchell, on account of the press of business in his office at Dennison, Tex., overlooked, or, to state it plainly, simply forgot to appear on the day set for trial, either in person or by securing local counsel to do so for him. When the judgment by default was taken on the morning of the day set for the trial, the agent at Greenville, Mr. Wheatley, accidentally heard of the judgment having been rendered, and he immediately communicated by wire with the insurance company, informing it that the judgment had been taken by default, and the insurance company immediately, by wire and telephone, secured local counsel, Percy & Percy, and informed them of the circumstances under which the failure to appear and defend the suit had occurred, and instructed Percy & Percy to proceed in a legal manner to make these facts known to the court by a proper proceeding and have the default judgment set aside, and obtain a trial on the merits of the case, claiming that they had a meritorious defense to the cause of action.

Whereupon, on the same day that the default judgment was obtained, and within a few hours thereafter, and even before the default judgment had been entered upon the minutes of the court, Percy & Percy, counsel for the appellant, filed the motion and affidavit setting up the facts as related above, and asking the court to set aside the default judgment and hear the case upon its merits at that term of court, which term would continue for at least one week longer. The appellant offered to pay the cost of court incurred up to date, or suffer any other reasonable penalty imposed by the court as is usual in such cases.

It appears that there would have been no difficulty in trying the case on its merits at that term of court, as the witnesses were near at hand; that counsel for the appellee, plaintiff below, was present at the hearing of the motion; and that no injury, prejudice, or delay could result to the appellee, but that a speedy trial would be had upon the merits if the default judgment were vacated. With the above state of facts before the circuit judge, the motion to open the default judgment was overruled, from which action of the court the insurance company prosecutes this appeal.

The appellee contends here that the lower court did not abuse its discretion in denying the motion to set aside the default judgment, but that under the facts in the record the lower court acted properly and was fully warranted in the exercise of its discretion in denying the motion. Appellee also contends that the motion of the appellant did not show a meritorious defense to the cause of action, and that what it set up as a defense, to wit, "that the insured was the aggressor in the difficulty which resulted in his death upon which the suit is predicated, such death under the circumstances not being within the purview of the policy," would not be a defense to this character of suit, and contending that the death, under such circumstances, is accidental or unexpected and would be covered by the accident insurance policy, and that the affidavit of merits should have been made by the appellant, and not by its attorneys on information and belief.

[2] In the case before us, in considering the question of the merits of the defense, we are not prepared to say now that the defense set up is not a good (*prima facie*) defense, or that it is a defense which, if proven, might not raise a question as to liability, to be determined by a jury.

[3] It seems that the rule in this state, as far back as *Porter v. Johnson*, 2 How. 736, and *Fore v. Folsom*, 4 How. 282, is that a motion to set aside a judgment, supported by an affidavit of meritorious defense, should be granted where the opportunity for a trial at the same term of court has not been lost. *Meridian v. Trussell*, 52 Miss. 711.

We realize the importance of the enforce-

ment of the rules of procedure and practice in the courts, and that the law favors the diligent and is against the careless; and we appreciate the fact that the large discretion resting with the circuit judge in dealing with such questions before him should not be encroached upon, restricted, nor considered abused, unless it manifestly appears that the discretion exercised in any particular case was wrongful and resulted in injustice to a litigant. We do not think any fixed, iron-clad rule can be safely adopted with reference to the setting aside of default judgments, but that the courts must look to the facts of the particular case, and if from the whole record the court can reasonably say that justice and right demand that the default judgment should be set aside and a trial had upon the merits, it should be done, and thereby bring about a result by trial on the merits of the controversy between the parties.

Courts are instituted primarily for the purpose of determining disputes and controversies between litigants upon the merits of the case, and much liberality should be allowed toward that end. Of course, rules governing the practice and procedure in the courts must be established and maintained in order to bring about efficient and prompt administration of justice, and when such rules are violated by litigants, in failing to appear and defend at the proper time when duly summoned, there should be proper and reasonable punishment for such negligence on the part of the litigant.

[4] But we think that where a judgment by default is obtained against a defendant, who by mere inadvertence or mistake failed to appear when the case was called, and he appears within a few hours thereafter on the same day, and before judgment has been entered upon the minutes of the court, and by proper motion and affidavit seeks to have the judgment set aside and granted a trial on the merits, at the same term of court, and the judgment could be set aside and a trial had at that term of court without material injury or prejudice to the plaintiff, it is error to refuse to set aside the judgment and award a trial upon the merits. A reasonable rule in such cases would be, that where the defendant is duly summoned and fails to appear on account of mere mistake or inadvertence, and it can be said that he intended in good faith to appear and make a *bona fide* defense, then the default judgment should be set aside, if a proper motion and affidavit is filed within a few hours, or other reasonable time, after the rendition of the judgment, at the same term of court, and trial on the merits can be had at that term without substantial injury or prejudice to the opposing party.

And so, on the other hand, if it appears that the defendant was duly summoned to appear on a certain day to defend a suit against him, and he treated the summons or process of the court with indifference, and he

intended, for any fancied reason known to himself, not to appear, and does not appear, thus intentionally ignoring the process of the court, or was guilty of gross neglect amounting to willfulness, in that case we think he would have no valid excuse to offer the court to justify it in vacating a default judgment and granting a trial on the merits. It seems to us that the line of distinction lies between the act of the defendant in failing to appear intentionally or by indifference or through gross neglect tantamount to willfulness, and his failing to appear by mere mistake or inadvertence, intending in good faith to observe the process of the court and appear and defend the suit.

Counsel for appellee cite a large number of authorities which more or less sustain their contention according to the rules of courts in other states, some of which are governed by statute; but, after all, these decisions depend upon the facts in each particular case, and must rest upon sound discretion and justice, as to whether or not the discretion of the trial judge was properly exercised in the particular case.

Counsel for appellee cite the case of *Jones-town v. Ganong*, 97 Miss. 67, 52 South. 579, 692, and contend that the decision in that case should settle the question here in favor of appellee. We cannot agree with counsel in this contention, for the reason that the decision in that case is founded upon a different state of facts from the case before us. In that case the defendant was duly summoned to appear and defend the suit against him, but he failed to appear, and made no effort to respond to the process of the court, but intentionally failed and refused to appear, because of his mistaken view of the case, fully knowing the day of the trial, and intentionally absented himself from the trial of the case. Besides this, the motion to set aside the judgment in that case was not promptly filed on the same day that the judgment was obtained. But regardless of that distinguishing feature, we think the conduct of the defendant in that case was entirely different from that of the appellant here, and the decision rests on a different ground. We here quote a part of that decision, showing how the court viewed the case:

"This record shows that the mayor was duly summoned, and it then became his duty to find out for what purpose he had been summoned into court; but as the city's representative he paid no attention to it, but allowed judgment to go by default. His excuse is that he thought the suit was only for the purpose of making final the judgment previously recovered by Ganong against the town, and on this account he asks that it be set aside. It was gross neglect on the part of the mayor not to have informed himself on this subject, and his failure can never furnish any legal reason why this judgment should be vacated. However meritorious may be the defense of the town, it has lost its right to make any defense by the neglect of its mayor, if there are no reasons for vacating this judgment outside of the excuse offered, and this disposes of the first error assigned."

From a careful perusal of the above decision it will be plainly seen that the defendant in that case was guilty of gross neglect tantamount to willfulness, and intentionally absented himself from the trial, acting under a misapprehension of the character of the case, and treated with indifference the process of the court commanding him to appear and defend the suit. In the case before us now there was no such indifference on the part of the appellant insurance company, nor did the appellant intentionally or willfully refuse to obey the process of the court and absent himself therefrom, but it appears that appellant had a bona fide intention to appear and defend the case, and by oversight and inadvertence failed to do so.

[5] Where there is a reasonable doubt as to whether or not a default judgment should be vacated, the doubt should be resolved in favor of opening the judgment and hearing the case on its merits.

"While the courts should adhere to the rule that a party who has suffered a default ought not to have relief except upon showing a substantial excuse for his apparent neglect because the adverse party is *prima facie* justly entitled to the advantage which he has secured by the default, yet they should not indulge in refined distinctions or assign importance to matters of form, which might result in a denial of justice. Each case must be determined upon its own facts; and, when the motion is made promptly and is supported by a showing which leaves the court in doubt or upon which reasonable minds might reach different conclusions, the doubt should be resolved in favor of the motion. *Benedict v. Spendiff*, 9 Mont. 85, 22 Pac. 500; *Morse v. Callantine*, 19 Mont. 87, 47 Pac. 635; *Eakins v. Kemper*, 21 Mont. 160, 53 Pac. 310." *Naah v. Treat et al.*, 45 Mont. 250, 122 Pac. 745, Ann. Cas. 1913E, 751.

The following restatement is from the note to *Peterson v. Koch*, 110 Iowa, 19, 81 N. W. 160, 80 Am. St. Rep. 261:

"Although a wide discretion is vested in courts to set aside or vacate judgments because of the neglect, misconduct, or inadvertence of counsel employed in the case, the general rule undoubtedly is that the neglect of the attorney is the neglect of the client, and that no mistake, inadvertence, or neglect attributable to an attorney can be successfully used as a ground for relief, unless it would have been excusable if attributable to the client. The acts and omissions of the attorney in such case are those of the client. \* \* \* Many cases are found, however, where the failure of the attorney employed to attend the trial caused by his inadvertence, mistake, or engagement elsewhere at the time, or his absence from some other cause, has been considered by the court sufficient ground for reopening the judgment rendered by default because of such absence. In such case, though the attorney may have been guilty of neglect, such neglect has been excused on various grounds."

[6] Any necessary affidavit made by the attorney of record is as effectual as the affidavit of the party. Section 1011, Code 1906.

In view of these conclusions we hold that the lower court erred in refusing to set aside the default judgment, and in not permitting the defendant below to defend the cause of action upon the merits. Therefore the judgment of the lower court is reversed, and the

case remanded, with direction that the judgment be set aside upon payment by appellant of all costs incurred in the court below.

Reversed and remanded.

(113 Miss. 246)

**BROOKS-SCANLON CO. v. CHILDS.**  
(No. 18735.)

(Supreme Court of Mississippi, Division A.  
Feb. 26, 1917.)

**ADVERSE POSSESSION ⇐100(1)—COLOR OF TITLE—PAROL GRANT.**

Color of title cannot be created by a parol grant so as to establish constructive adverse possession of lands adjoining those in actual possession against strangers; but the doctrine of parol color of title applies only in favor of the vendee as against his vendor or persons claiming under him.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 547.]

Appeal from Circuit Court, Marion County; A. E. Weathersby, Judge.

Trespass by E. H. Childs against the Brooks-Scanlon Company. Judgment for plaintiff, and defendant appeals. Reversed, and judgment entered for defendant.

Dale & Rawls, of Columbia, and Griffith & Wallace, of Gulfport, for appellant. Mounger & Ford, of Columbia, for appellee.

SYKES, J. The appellee, E. H. Childs, filed suit in the circuit court of Marion county against the appellant, Brooks-Scanlon Lumber Company, in an action of trespass. The declaration alleged that the plaintiff was in possession and was the owner of certain lands therein described, and that the defendant without the consent and over the protest of plaintiff burned 124 panels of plaintiff's fence of the value of 25 cents per panel, and boxed for turpentine purposes the trees on about 100 acres of plaintiff's land. The defendant pleaded the general issue, and gave notice thereunder that it would prove that the title to the land was not in the plaintiff, but was in the defendant. The testimony in the case failed to show that the fence of plaintiff was burned by any of the agents or employees of the defendant. The principal contention in the case is whether or not the appellee is the owner of the lands which were boxed for turpentine purposes by the appellant. The testimony showed that the lands involved in this controversy were swamp and overflowed lands, the title to which was granted the state by the United States under the act of Congress approved September 28, 1850. The state granted this land to Dave Stock in 1883, and by successive conveyances this record title is now vested in the appellant. The testimony of the appellee showed that under a void patent the state of Mississippi granted this land to the Pearl River Improvement & Navigation Company in 1871. Also appellee introduced a forfeited tax

patent from the state to Samuel Huggins, dated May 2, 1881, which patent was void because the state had not at that time parted with its title to this land as swamp and overflowed land. Huggins sold this land (section 35) to C. W. Tynes in 1889. Tynes sold the land by parol in about the year 1890 to one Corley. Corley built a cabin, a crib, and a smokehouse on the land, and cleared up about 14 acres of it, and inclosed the field with a fence. He lived there about two years, and then sold the same by parol to appellee. It seems that each party in making a parol sale of this land would turn over to his vendee the void deeds obtained from the state of Mississippi and the deed from Huggins to Tynes. The appellee went into possession of the land and cultivated the 14 acres that had been cleared. He has had actual possession of this cleared land since 1892, and is claiming a constructive possession of the lands involved in this controversy (which controversy does not involve the 14 acres of cultivated land) by virtue of his alleged parol color of title. The testimony of appellee does not positively show just how many acres he bought from Corley, but from an examination of his entire testimony it is evident that he means that he bought all of the land claimed by his vendor. From a reference to the void patents and deed turned over to appellee, it is clear that his vendor, if he claimed any other land except that actually cultivated, claimed the entire section 35. However, counsel for appellee limit this claim in their brief to the 120 acres of land described in the declaration. The cultivated land is not a part of the land involved in this suit. There is no claim whatever that plaintiff had actual possession of the lands in suit. His claim is based solely upon a constructive possession under parol color of title. Neither Huggins, Tynes, nor Corley ever had title to this land. If the parol color of title of appellee were valid as such, then he has a good title by virtue of this possession since 1892. The appellant asserts a hostile and different title to that of appellee. In a great many states it is held that there is no such thing as a parol color of title. In fact the great weight of authority sustains this view of the question.

"As heretofore shown the weight of authority is to the effect that a written instrument is necessary to give color of title, and where this view prevails a vendee or donee in possession under a parol gift or purchase holds without color of title, although his vendor may have what would be color of title in him if he were in possession of the premises. But in jurisdictions where a written instrument is unnecessary a person holding under a parol purchase or gift is considered as holding under color of title." 2 Corpus Juris, § 393, p. 196.

See, also, section 326, p. 170, Id.

"The authorities do not agree as to the necessity of having 'color' of title evidenced by a writing. In many states a writing is considered to be indispensable either as a matter of gen-



eral law, or because of statutory requirements. In some jurisdictions, however, it is recognized that color of title may exist in the absence of a writing. Thus it has been asserted that one may be in possession under color of title, although he entered by virtue of a parol contract of sale. So, color of title may be acquired by descent cast upon heirs by the death of the ancestor, even though the ancestor was originally a trespasser, and in possession under claim of right only. Where the ancestor was never in possession, however, a conveyance to the ancestor cannot avail his heirs as color of title upon their taking possession after his death, and an exhaustive examination of the cases discloses that, outside of the acquisition of color of title by 'descent cast' as above mentioned, the statements to the effect that a writing is unnecessary have resulted from the unwarranted intermingling of the terms 'color' and 'claim' of title which has been spoken of heretofore. That one may acquire a good title to land by the open and notorious possession thereof for the required time, as his own, is beyond question. Such occupancy, however, is clearly one under 'claim' of right, and not under 'color' of title, and, of course, will be effective where the original entry was under an oral contract of sale, or under a parol gift, or under any other parol agreement. But it will be observed that the efficacy of the acquired title does not depend on the fact that the entry was had under the oral gift or agreement, but, rather, that it was maintained under a claim of right. It would, in such case, have been just as effective even if its origin had been tortious." 1 R. C. L. § 21, p. 708.

See, also, section 23, p. 7f1, Id.; 88 Am. St. Rep. 701, note; 15 L. R. A. (N. S.) 1215, note.

In this state this court has recognized parol color of title of a vendee as against his vendor and those claiming under him. In the case at bar the appellant does not claim under the vendor of the appellee, but is a stranger to the title claimed by appellee. We decline to apply the doctrine of parol color of title to any other parties, except the vendor and those claiming under him. When a vendor puts his vendee in possession of land under a parol sale, he knows the limit and the claim of the vendee to this land. As to him it is unnecessary that there should be a visible, actual occupation of the entire tract, because of his actual knowledge of the claim of ownership. But to an entire stranger this reason does not apply. The stranger is bound by the actual adverse possession for the required number of years. This visible possession puts him upon inquiry as to its duration. If the vendee in possession has a deed to the land whether void or voidable, then this deed shows the limits of his claim, and a vendor would therefore be put on notice of that claim. However, where a vendee has no deed, if he be in possession of a small tract of land of only 15 or 20 acres and could be allowed to say, "I am claiming 160 or 640 acres because of a parol purchase from John Smith," the door would be thrown wide open to fraudulent and false claims under alleged parol color of title. In the previous decisions of this court between vendee and vendor or those claiming under the vendor, the court has realized that this doctrine should

be carefully limited, as is shown by the following quotation from *Niles v. Davis*, 60 Miss. 750:

"While there are many cases in which the doctrine that a parol sale or gift of lands is sufficient to give color of title to the vendee or donee, we have been unable to discover any case in which the question whether the parol sale or gift extends the boundaries of the tenant's possession to those of the whole tract, though only a part be actually occupied; but we think that as against the parol vendor or donor, the law will impute possession in the vendee or donee to all the lands comprised in the verbal contract or gift. A mere trespasser in possession of land is restricted to so much only as is actually occupied by him, because no one can tell what are the limits of his claim otherwise than by the evidence afforded by his occupancy, while one in possession, claiming under a written instrument, gives to the world notice of the extent of his claim. But one who claims under a parol sale, and to whom possession of the land has been yielded by the vendor, certainly as against the vendor gives notice by the mere occupancy of a part of the land purchased of his claim to the whole. Such occupancy is evidence of a claim under the contract, and the contract, though void by the statute of frauds, embraces the whole body of land. The delivery of possession by the vendor is an admission by him that the vendee enters claiming as owner to the extent of the right which would have been conferred if the sale had been evidenced by a formal deed. It is not a question of the validity of the title, but of the character and extent of the possession, and of this the vendor has notice, not by the character of the occupancy, as being visible and notorious, but by the very contract to which he is a party. Possession, to give title under the statute of limitations, is required to be visible, notorious, hostile, and continued, to the end that all others having a claim to the property may have notice of the claim of the occupant, and having notice they must contest his right within the time fixed by law, or the presumption will be conclusive that they have yielded to the title asserted by the occupant."

In referring to this case the same able jurist who wrote the opinion above quoted from says:

"In *Niles v. Davis*, 60 Miss. 750, it was held that a parol vendee entering under his purchase was, as against his vendor and those claiming under him, in possession of the whole land, though only a portion should be actually occupied. This rule, though announced in that case for the first time in this state, had been silently recognized in *Davis v. Bowmar*, 55 Miss. 671, and has been distinctly formulated and applied in other states." *Davis v. Davis*, 68 Miss. 478, 10 South. 70.

In all of the cases in this state in which the doctrine of parol color of title has been upheld the suits were between the vendor or those claiming under him and the vendee. It is also worthy of remark that in those cases the vendor had a good title to the lands in controversy. In this case neither the vendor of appellee nor those under whom he claimed ever had any title to this land. So far as the lands in controversy are concerned, there was no actual possession attempted to be exercised over them by appellee. He had no color of title to them, and therefore has had no constructive possession of them. The lower court submitted the case on instructions to the jury. This was error. The per-



emptory instruction asked by the defendant should have been given.

Reversed, and judgment here for appellant.

(113 Miss. 146)

SMITHSON v. SMITHSON. (No. 18805.)\*  
(Supreme Court of Mississippi, Division B.  
Feb. 19, 1917.)

1. DIVORCE  $\Leftrightarrow$  184(10)—REVIEW—FINDING.

A finding by the chancellor, in an action for divorce on conflicting evidence, will not be disturbed on appeal; it not appearing that he was manifestly wrong.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 572.]

2. DIVORCE  $\Leftrightarrow$  22—GROUNDS—HABITUAL USE OF DRUGS.

Where, at the time complainant separated from his wife, she was addicted to the habitual and excessive use of narcotics, such as opium, but by the time complainant filed his bill for divorce, a few months later, she had overcome such habit and had regained her normal condition of body and mind, complainant was not entitled to a divorce; the cause of action not existing at the time the bill was filed, and the decree would be rendered; and the ground not being one such as personal indignities or some offense against the marriage relation.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 41-45.]

Appeal from Chancery Court, Hinds County; O. B. Taylor, Chancellor.

Bill by W. W. Smithson against Meta M. Smithson. From a decree for complainant, but awarding defendant alimony, defendant appeals, and complainant cross-appeals. Reversed on direct appeal and bill dismissed, and reversed and remanded on cross-appeal.

L. Brame, of Jackson, for appellant. G. G. Lyell and Mayes, Wells, May & Sanders, all of Jackson, for appellee.

COOK, P. J. [1] Appellee exhibited his bill of complaint in the chancery court of Hinds county against the appellant, his wife, seeking a divorce from the bonds of matrimony upon the alleged cause of "habitual and excessive use of opium, morphine, or other like drug." Appellant answered the bill of complaint, denying the allegations of the bill. The evidence introduced on behalf of the complainant supported the allegations of the bill that respondent, for 8 years prior to the separation of complainant and respondent, which separation occurred August 3, 1914, was addicted to the habitual and excessive use of the drugs mentioned, and that in consequence it was impossible for the complainant and respondent to live together. On the other hand, the evidence produced by respondent in denial of the allegations of the bill went to show that she had never been an habitual and excessive user of the habit-forming drugs mentioned in complainant's bill. Viewing the case as one in which there is a conflict of evidence, the finding of facts by the chancellor will control this court in the application of the law. Upon final decree

the court below granted the divorce, and also granted respondent alimony. Respondent appeals to this court from the decree dissolving the bonds of matrimony, and complainant from the decree granting alimony.

The chancellor, in his final decree—

"finds as a fact that the cause of divorce alleged in the original bill existed in favor of complainant at the time of the separation of the parties August 3, 1914, but did not exist at the time suit was instituted, December 22, 1914. But the court finds that complainant had reasonable time after the separation within which to file the bill, and it was filed within reasonable time."

It will be observed that the chancellor, in the decree, decided two facts, to wit: (1) The defendant was an habitual user of drugs on the date of the separation of the parties, (2) that she was not guilty on the date of the institution of the suit. After finding the facts the chancellor proceeded to announce the law controlling the facts. We are not required to review or comment upon the chancellor's finding of facts; for, as we have stated, the evidence was in direct conflict, and we are unable to say that he was manifestly wrong in his conclusions. So we have a record before us presenting, purely and simply, a question of law; the facts being ascertained.

[2] Concretely stated, was the trial court empowered to grant the relief it did grant, when it determined that the cause of complaint did not exist when the suit was filed for relief? Broadly speaking, it is quite sure that a cause of action may exist to-day and not exist to-morrow; the cause of action might exist when the suit was begun and lost before the day of judgment. To illustrate, a suit may be brought on a promissory note, due and unpaid, but before the trial the note has been paid, and therefore a judgment cannot be entered. A trustee in a deed of trust may have a right to institute replevin for personal property after condition of the deed is broken, but if he postpones his suit until the debt secured is paid, he loses his cause of action. Illustrations might be multiplied. The general rule is, and must be, that a cause of action must exist when the suit to enforce same is begun. If one of the parties to a marriage contract commits adultery, and the act is not condoned by the injured party, it is doubtless true that proof of repentance and promised reformation before suit for divorce is filed will not destroy the cause of action. It may be also true that habitual cruel and inhuman treatment, as a cause for divorce, is not satisfied by repentance. The first is a completed act—a fact established. The latter is a personal indignity that regrets and a promise of reform may not cure. In cases where desertion for stated statutory periods gives a cause of action, many courts have held that an offer to return will not take away the matured cause of action. In the present case, no moral

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*For opinion on motion for allowance of temporary alimony and on suggestion of error, see 76 South. 809.

crime is charged or proven, and no personal indignity has been inflicted upon the complainant. The story told by this record is a pathetic one. The defendant was a great sufferer for a long period, from no fault of her own, and, according to the evidence believed by the chancellor, she took drugs to palliate her physical pains to such an extent and period of time that she became an habitual and excessive user of these insidious drugs. Finally, the husband and wife separated, and then it was that defendant waged a brave fight, and before the bill was filed, she had succeeded in overcoming the enemy and was restored to normal health of body and mind.

Did the chancellor fall into an error when he construed the law to be that complainant was, under those circumstances, entitled to a decree severing the ties that bound him to his wife? The appellant's counsel answer this question in the affirmative and cite in support of their contention the following authorities, viz.: *McMahon v. McMahon*, 170 Ala. 338, 54 South. 165. We think the Alabama court states the appellant's side of this case more definitely and clearly, perhaps, than any other case called to our attention:

"Paragraph 6 of section 3793, which said section enumerates certain grounds for divorce, says: 'For becoming addicted after marriage to habitual drunkenness.' This section does not, of course, mean that if a party becomes addicted to the habit after marriage, but overcomes same for a reasonable period before any steps were taken for a divorce, and no steps were taken to get a divorce until after the habit had been overcome, the once existence of the habit, which did not continue to exist at or near the time of filing of the bill, would be a ground for divorce. Here the parties were married 23 years before the bill was filed, and the respondent may have become addicted to the habit shortly after the marriage, yet may have overcome it for years before the bill was filed, and the statute was not intended to apply to such a case. The habit must be fixed, and must continue until the suit is brought. *Gourlay v. Gourlay*, 18 R. I. 705, 19 Atl. 142; 9 Am. & Eng. Encyc. of Law, 814, and cases cited in notes 8 and 9."

The Supreme Court of Massachusetts, in the case of *Burt v. Burt*, 168 Mass. 204, 46 N. E. 622, speaking of a case similar to the present case, under a statute making "gross and confirmed drunkenness" a cause for divorce, said, that "gross and confirmed drunkenness" is a condition, and before a divorce could be granted under this statute, the condition "must exist when the libel is filed." It may be said that the facts of that case showed that the defendant still used drugs to a certain extent, but the court held that it was error to grant the relief because it was not shown that the use of the drug was excessive at the time the bill was filed.

The Supreme Court of Connecticut, in *Allen v. Allen*, 73 Conn. 54, 46 Atl. 242, 49 L. R. A. 142, 84 Am. St. Rep. 135, discussed the point here discussed in this fashion, viz.:

"This status can only be dissolved between living parties by the assent of the state, which is ordinarily indicated by the judgment of a com-

petent court. When an attempt is made through the courts to undo a marriage the state becomes in a sense a party to the proceedings, not necessarily to oppose, but to make sure that the attempt will not prevail without sufficient and lawful cause shown by the real facts of the case, nor unless those conditions are found to exist at the time the decree is made upon which the state permits a divorce to be granted. The state has an interest in the maintenance of the marriage ties which neither the collusion nor the negligence of the parties can impair. \* \* \* The state does not favor divorces and only permits a divorce to be granted when those conditions are found to exist in respect to one or the other of the married parties which seem to the Legislature to make it probable that the interests of society will be better served, and that parties will be happier, and so the better citizens, separate than if compelled to remain together. The state allows divorces, not as a punishment to the offending party, \* \* \* but because the state believes its own prosperity will thereby be promoted.' Obviously this condition must be found to exist at the very time when the divorce is granted, otherwise the divorce should be refused."

The last-mentioned case goes further than any other authority consulted by us, but it gives cogent reasons for its view of the law. The rule announced by this case, that the court should never grant a decree dissolving a marriage contract for the reason that the state has an interest in the maintenance of the marriage ties, unless the cause exists when the decree is rendered, is logical, to say the least, for it is certainly true that the strength and prosperity of all states rests upon the family, and it is also true, that a divorce frequently divides the family concerned into hostile groups. The text-books and cyclopedias seem to concur in the correctness of the decision referred to, and no decision to the contrary has been brought to our notice. If the authorities cited by appellant are approved the chancellor was in error.

Let us see what appellee has offered to weaken or overthrow appellant's contention. Appellee stresses the note of Judge Freeman to *Allen v. Allen*, a case decided by the Supreme Court of Connecticut, supra. The views of Judge Freeman always command the respect of the bench and bar, but it may be noted that Judge Freeman cites no authority to support appellee's view of the law. The cases cited by Judge Freeman are cases of adultery or desertion. For obvious reasons, we think that the complaining party would not, in such cases, be denied a divorce. The cause for divorce for desertion is complete when the desertion has embraced the period of time fixed by the statute, and, generally speaking, the complaining party may bring his action at any time within the statutes of limitation. In adultery cases repentance will not wipe out the offense condemned by the moral as well as the civil law, unless the injured party condones the crime. A careful reading of Judge Freeman's note shows that his main quarrel with the court in the case criticized was the apparent announcement by the court that trial courts have a discretion to deny a divorce. We see

no reason to criticize Judge Freeman's reasoning along that line. The real reason, we think, for the denial of a divorce in such cases is based on public policy—the admitted interest of the state in matters of this nature.

Appellee cites *Acker v. Acker*, 22 App. D. C. 353, as an authority for his contention that complainant had a reasonable time within which to file his bill. We have considered the opinion in that case with due care, and we are unable to find anything in the opinion to sustain the view of appellee. The opinion, on the contrary, is more of an authority for appellant than it is for appellee.

Appellee also relies on *Benkert v. Benkert*, 32 Cal. 467. This case merely holds that desertion for the statutory period is a cause for divorce, and that repentance did not obliterate the offense, and that there was no condonation proven.

Appellee insists that *Carlin v. Carlin*, 65 Ill. App. 160, justifies the decree granting the divorce. The demurrer to the bill of complaint in that case was that the cause was barred by the statute of limitation of 2 years. The court merely held that the statute did not apply to divorce cases filed in the equity; that the complainant showed a reasonable excuse for not filing the bill earlier, and that no laches was shown. A mere reading of the bill of complaint in that case clearly demonstrates the correctness of the court's reasoning, and we approve it unreservedly.

We have examined *Moore v. Moore*, 41 Mo. App. 176, cited by appellee, and find nothing in that case to justify the decision in the present case.

We have carefully considered all of the authorities cited by appellee, and have reached the conclusion that no case has been found upholding the decree of the chancellor. We have made an independent investigation of the interesting and important question, and our investigation, like that of counsel for appellee, has been barren of results. All of the cases upon the subject, wherein the precise question was involved, hold that a divorce should not be granted in cases where the conditions authorizing a divorce did not exist when the complaint was filed. There are cases, in abundance, holding that repentance will not excuse adultery, personal indignities and conditions matured and fixed by statutory enactment. Our statute does not authorize divorcement for the habitual and excessive use of narcotics for a fixed time. The statute merely gives to the injured party the right to a divorce when it can be shown that the conditions existed when the relief was sought.

When we come to consider this question, upon authority, we find all the law is against the decree of the chancellor. When we view

this contest from a common-sense standpoint, and in the light of public policy, it seems to us that we must inevitably travel to the conclusion that the complainant was without a grievance when he filed his bill; that the respondent was, at that time, fully restored to her normal self, both mentally and physically; and, this being true, and the chancellor declared it to be a fact, why should the court sever the ties that bind this man and wife? The law says it must not be done, and we are unable to say that the law is wrong.

The judgment of the chancellor will be reversed on direct appeal and the bill dismissed and reversed and remanded on cross-appeal for further consideration in the light of this opinion.

(113 Miss. 226)

**ALKAHEST LYCEUM SYSTEM v.  
FEATHERSTONE et al.**  
(No. 18883.)

(Supreme Court of Mississippi, Division B.  
Feb. 19, 1917.)

**ASSOCIATIONS —18—LIABILITY OF OFFICERS  
—CONTRACT.**

The officers of an unincorporated civic league, who signed a contract between the league and a lyceum system for certain entertainments at a stipulated consideration, are individually liable for the consideration, though they did not intend to assume such liability by signing the contract.

[Ed. Note.—For other cases, see *Associations*, Cent. Dig. §§ 31-35.]

Appeal from Circuit Court, Tate County;  
E. D. Dinkins, Judge.

Action by the Alkahest Lyceum System against Mrs. H. C. Featherstone and another. Judgment for the defendants, and plaintiff appeals. Reversed and remanded.

Appellant is a corporation organized for the purpose of providing the public musical, literary, and other forms of entertainment. It has a list of attractions which it offers during each season. Appellees are officers of an unincorporated society in Senatobia, Miss., called the Civic League. Appellant was plaintiff in the court below, and brought this action to recover \$325 as a total consideration which the Civic League of Senatobia agreed to pay for certain entertainments to be furnished during the season of 1913 and 1914. The agreement is in writing, and extracts from this document read as follows:

"This agreement made this day and year written, between the Alkahest Lyceum System, of Atlanta, Ga., party of the first part and Civic League, party of the second part, witnesseth: That the party of the first part hereby agrees to furnish party of the second part with the following lyceum attractions, to appear in Senatobia, Miss., during the season of 1913, for and in consideration of the sum of three hundred and twenty-five (\$325.00) dollars:

Attraction.	Price.	Approximate Time.
Apollo Con. Co.....	\$100.	
Mrs. Chilton .....	50.	
Ross Crane .....	50.	
Orphean Male Quartette .....	75.	No date to be given on Thanksgiving or in two weeks of each other.
Elias Day .....	50.	
1 sub. L. & T.....	1.	
"Subject to president's acceptance."		

It appears from the testimony that the Civic League is simply an unincorporated local organization "for the improvement and betterment of the town of Senatobia, for beautifying and for civic pride." Appellee, Mrs. Featherstone, was president of this organization, while Mrs. Rush, the other appellee, was chairman of the finance committee at the time the contract was executed. The circumstances under which this agreement was signed appear to be about as follows: Mr. Bell, the agent of appellant, requested a conference with the officers and members of the Civic League with the view of entering into a contract to furnish them a series of entertainments. It so happened that on the day Mr. Bell was in Senatobia for this purpose there was to be a funeral which all the leading members of the League desired to attend, the mother of one of the members having died. The funeral had been arranged for 4 o'clock p. m. and, at the solicitation of Mr. Bell, Mrs. Featherstone agreed to a conference with him at her home at 3 o'clock preceding this funeral. Mrs. Featherstone invited to this hurried conference a number of the members, and there was only a short discussion of the contract and a rather hurried execution thereof. When the question of signing the contract came up for discussion, some of the women inquired, "Who shall sign it?" and Mr. Bell thereupon stated that it did not make any difference, "just so some of you sign it." Thereupon the contract was duly signed by Mr. Bell, acting for his company, and by Mrs. Featherstone and Mrs. Rush, as officers of and on behalf of the Civic League. It appears that nothing was said about the personal liability of either one of the officers or members, and it further appears that these good ladies did not read over the contract before they signed it. There is, however, no controversy as to the material terms or provisions of the contract. After the contract had been executed, Mrs. Featherstone attempted to make sale of tickets for the first attraction, and, failing to arouse the necessary interest, she first requested a reduction of the total consideration from \$325 to \$200. The company declined to reduce the price, and thereupon the officers of the Civic League attempted to wire a cancellation of the entire contract. These communications were had by wire and by letter. Appellant company declined to accept the cancellation, but in due course provided each of the attractions called for by the contract, except one listed at \$50. The various persons whose talent was engaged by appellant appeared at Senatobia at the time duly scheduled for

each, and offered their professional services, but the Civic League declined to make any arrangements for the reception of this talent, declined to furnish an auditorium, or to do anything in the way of giving any of the performances.

The cause was submitted to the jury under instructions for both parties. The verdict was returned in favor of the defendants, and from the judgment entered in pursuance of this verdict, appellant appeals. The court refused the following instructions asked for by the plaintiff:

"The court instructs the jury that if they believe from the evidence that plaintiff furnished the several attractions as provided in the contract, and the defendants have not paid any part of the price agreed upon, then the jury will find for the plaintiff the amount stipulated in the contract, except \$50 for Elias Day, and in addition thereto such an attorney's fee as the evidence shows plaintiff was required to pay, provided the evidence further shows such fee was reasonable."

"The court instructs the jury to find for the plaintiff as to all the attractions at the price named in the contract sued on, except as to Elias Day, with interest at 6 per cent. per annum from March 8, 1913, and in addition thereto the sum of \$50 as attorney's fee."

The court also modified the following instructions which, on account of the modification, plaintiff declined to use:

"The court further instructs the jury that the addition of the abbreviations Pres. and Sec. & Treas. does not necessarily relieve the signers of the contract from individual liability." The word "necessarily" having been added by the court.

"The court further instructs the jury that under the contract in evidence (if the minds of the parties thereto were agreed as to its contents) the defendants were not authorized to cancel the contract without the consent of plaintiff and the jury will not consider the defendants' action in attempting to cancel the same." The words added by the court are shown in parentheses.

The court granted to appellees instruction No. 1 in the following language:

"The court instructs the jury that there can be no contract between two parties on any matter unless their minds meet or come together on the matters to be included in the same; and if the jury believes from the evidence in this case that the defendants never understood that they were to be individually bound, and that plaintiff so understood, but that the Civic League alone, as an organization, was to be bound, and that they so understood the nature of their understanding by reason of the declaration and conduct of the agent of the plaintiff, then the jury should find for the defendant."

The same thought is expressed in other instructions given appellees.

L. F. Rainwater, of Sardis, for appellant.  
J. F. Dean, of Senatobia, for appellees.

STEVENS, J. (after stating the facts as above). The Civic League of Senatobia is not a corporation, and therefore could not be sued as an organic entity. The League is simply a majority of the individuals composing the organization. It follows that the officers who executed the agreement forming the basis of this suit are individ-

ually liable for the consideration agreed to be paid. There was a stagger at a showing of fraud in the procurement of the contract, but the testimony falls short of the necessary proof of fraud. While the cultured women here sued affixed their signatures to the instrument without reading over the contract in its entirety, they yet admit that the contract in its material parts speaks the agreement of the Civic League. The particular attractions called for by the contract were admittedly engaged—and engaged, too, at the prices listed. There is no controversy about the exact performances to be given or as to the price of either. The defense of appellees is bottomed upon the theory and assumption that they are not individually liable for the debts of the Civic League. This question of law has been ruled against them in *Evans v. Lilly & Co.*, 95 Miss. 58, 48 South. 612, 21 Ann. Cas. 1087, and authorities there referred to by Judge Fletcher. Appellees could have read over the instrument if they had so demanded. It is quite probable that they entered into this agreement hurriedly, without previous thought or reflection. The contract, however, must speak for itself, and, hard as it may seem to the good women involved, it speaks liability. It is immaterial that appellees did not think or believe they would be personally liable. If the individuals composing this unincorporated society are not liable, then no one could be sued for the obligation, and plaintiff would be without any remedy whatever. The jury was not instructed in accordance with the views herein expressed, and the cause must therefore be reversed and remanded.

Reversed and remanded.

**YAZOO & M. V. R. CO. v. McGEE.**  
(No. 13782.)

(Supreme Court of Mississippi. Feb. 26, 1917.)

Appeal from Circuit Court, Warren County; E. L. Brien, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and Pat L. McGee. Judgment for the latter, and the former appeals. Affirmed.

Hirsh, Dent & Landau, of Vicksburg, for appellant. Anderson, Voller & Kelly, of Vicksburg, for appellee.

PER CURIAM. Affirmed.

**McLAIN v. DYSON.** (No. 19657.)

(Supreme Court of Mississippi, Division A: Feb. 26, 1917. On Suggestion of Error, March 26, 1917.)

Appeal from Circuit Court, Bolivar County; W. A. Alcorn, Judge.

Action between James L. McLain and Jack Dyson. Judgment for the latter, and the former appeals. Motion to dismiss sustained.

Owen & Roberts, of Cleveland, for appellant. J. T. Smith, of Cleveland, for appellee.

PER CURIAM. Motion to dismiss sustained.

On Suggestion of Error.

SMITH, C. J. This appeal was dismissed on motion of appellee at the last term, and appellant

now suggests that we erred in so doing. The motion to dismiss was not answered by appellant in any way, but was suffered to go by default, so that we were not called on to pass on the merits thereof, but treated it as confessed, sustained it as a matter of course, and committed no error in so doing. 4 C. J. 603.

Overruled.

**RAY v. STATE.** (No. 19668.)

(Supreme Court of Mississippi. Feb. 26, 1917.)

Appeal from Circuit Court, Sunflower County;

Frank E. Everett, Judge.

Tom Ray was convicted of forgery, and he appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.

**YAZOO & M. V. R. CO. v. ROBINSON.**  
(No. 13832.)

(Supreme Court of Mississippi. Feb. 19, 1917.)

Appeal from Circuit Court, Tallahatchie County; E. D. Dinkins, Judge.

Action between Yazoo & Mississippi Valley Railroad Company and Jerry Robinson. Judgment for the latter, and the former appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. Woods & Kuykendall, of Charleston, and Rowe Hays, of Sumner, for appellee.

PER CURIAM. Affirmed.

**LEE v. STATE.** (No. 19623.)

(Supreme Court of Mississippi. Feb. 26, 1917.)

Appeal from Circuit Court, Warren County; E. L. Brien, Judge.

Dan Lee was convicted of grand larceny, and he appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.

**BURRELL v. STATE.** (No. 19621.)

(Supreme Court of Mississippi. Feb. 26, 1917.)

Appeal from Circuit Court, Attala County; H. H. Rodgers, Judge.

Ode Burrell was convicted of assault and battery with intent to kill, and he appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.

**BLANCAND v. I. G. COX & CO.** (No. 13867.)

(Supreme Court of Mississippi. Feb. 26, 1917.)

Appeal from Circuit Court, Simpson County; W. H. Hughes, Judge.

Action between Gus P. Blancand and I. G. Cox & Co. Judgment for the latter, and the former appeals. Affirmed.

C. M. Whitworth, of Mendenhall, for appellant. J. C. Jones, of Braxton, for appellee.

PER CURIAM. Affirmed.

**HALEY v. McNEILL.** (No. 13843.)

(Supreme Court of Mississippi. Feb. 26, 1917.)

Appeal from Chancery Court, Leflore County; Joe May, Chancellor.

Suit between Mrs. M. E. Haley and Mrs. M. D. McNeill. Decree for the latter, and the former appeals. Affirmed.

Lomax & Tyson, of Greenwood, for appellant. S. R. Coleman, of Greenwood, for appellee.

PER CURIAM. Affirmed.

**BANKS GROCERY CO. v. BELL et al.**  
(No. 18844.)

(Supreme Court of Mississippi. Feb. 26, 1917.)

Appeal from Circuit Court, Attala County;  
H. H. Rodgers, Judge.

Action by the Banks Grocery Company  
against T. E. Bell; Mrs. J. E. Watson, claim-  
ant. From the judgment, plaintiff appeals. Af-  
firmed.

Flowers, Brown, Chambers & Cooper, of Jack-  
son, and Dodd & Allen, of Kosciusko, for ap-  
pellant. M. L. Dew, of Kosciusko, for appellees.

PER CURIAM. Affirmed.

**TURNER v. CRUDUP.** (No. 18812.)

(Supreme Court of Mississippi. Feb. 19, 1917.)

Appeal from Circuit Court, Scott County;  
J. D. Carr, Judge.

Action between E. L. Turner and W. L.  
Crudup. Judgment for the latter, and the for-  
mer appeals. Affirmed.

Street & Street, of Laurel, for appellant. A.  
W. Cooper, of Forest, and Quinn & Cooper, of  
Indianola, for appellee.

PER CURIAM. Affirmed.

**GILMER v. HARDIN et al.** (No. 18806.)

(Supreme Court of Mississippi. Feb. 19, 1917.)

Appeal from Chancery Court, Prentiss Coun-  
ty; A. J. McIntyre, Chancellor.

Suit between Edna Gilmer, by next friend,  
and Sidney Hardin and others. Decree for the  
latter, and the former appeals. Affirmed.

E. O. Sharp, of Booneville, S. N. Ayers, Jr.,  
of Ripley, and Thos. H. Johnston, of Corinth,  
for appellant. Julius E. Berry and J. A. Cun-  
ningham, both of Booneville, for appellees.

PER CURIAM. Affirmed.

**HATTIESBURG TRUST & BANKING CO.**  
**v. HEMPHILL et al.** (No. 18730.)

(Supreme Court of Mississippi, Division A.  
Feb. 26, 1917.)

Appeal from Chancery Court, Forrest Coun-  
ty; W. M. Denny, Jr., Chancellor.

Action by the Hattiesburg Trust & Banking  
Company against Mrs. Maria E. Hemphill and  
others. After judgment for plaintiff, C. E. Lin-  
neman was garnished, and a decree issued  
against him, from which decree defendant nam-  
ed appeals. Affirmed and remanded.

Flowers, Brown, Chambers & Cooper, of Jack-  
son, for appellant. Tally & Mayson, of Hatties-  
burg, for appellee.

**HOLDEN, J.** This is an appeal from the chan-  
cery court of Forrest county in which ap-  
pellant seeks to reverse the decree of the chan-  
cellor in a garnishment proceeding growing out  
of the case of Mrs. Maria Hemphill et al. v.  
Hattiesburg Trust & Banking Co., in which the  
banking company obtained a decree against  
Mrs. Hemphill for the sum of \$12,271.90 in the  
same court, at a prior term thereof. Upon this  
decree for money, the garnishment proceedings  
here involved were instituted, and one C. D.  
Linneman was garnished; whereupon he filed  
his answer, showing an indebtedness of \$300 due  
to Mrs. Hemphill. Mrs. Hemphill came in and  
claimed this \$300 as exempt from garnishment,  
and also contended that the decree upon which

the writ of garnishment was issued was super-  
seded by an appeal to the Supreme Court; and  
that the decree was against certain lands which  
had been ordered by the court to be sold and the  
proceeds applied to the payment of the decree;  
and that the garnishment under the decree could  
not issue until the sale of this property was made  
and the proceeds credited on the decree. She  
also claims that the decree against her for the  
\$12,271.90 is an interlocutory decree, and that  
execution and garnishment cannot issue upon  
it. The appellant here contends that the decree  
of the lower court in the former case is a final  
decree; that the appeal to the Supreme Court  
was dismissed by this court because it was an  
interlocutory decree and no appeal was obtain-  
ed under section 35, Code of 1906; and, also,  
that the bond given for supersedeas in that ap-  
peal was not a supersedeas bond; and that for  
these reasons the writ of garnishment was prop-  
erly issued, and the money admitted to be due  
by the garnishee to Mrs. Hemphill should have  
been awarded to the appellant here.

The chancellor, on the hearing of the gar-  
nishment issue, entered a decree which appears  
in this record, and we here copy a part of the  
decree, as follows:

"This cause coming on to be heard on the an-  
swer of C. E. Linneman, garnishee in this cause,  
and it appearing from the record that the said  
Hattiesburg Trust & Banking Company pro-  
cured a decree of this court at the September  
term, 1914, against complainants for the sum of  
\$12,271.90 and costs of court, and it appearing  
further that the said C. E. Linneman was sum-  
moned as a garnishee, returnable to this term  
of the court, and said garnishee having admit-  
ted in his answer an indebtedness of \$300, but  
having suggested in his answer that the said  
money would be claimed, as he was advised, by  
cross-defendants as exempt from execution, and  
the said cross-defendants having appeared at  
this term of the court and propounded a claim  
to the said money upon the ground that said  
money was exempt from execution and gar-  
nishment, because that cross-defendants had ap-  
pealed from the decree rendered in favor of  
cross-complainant against them for the said  
sum of \$12,271.90 and had executed a superse-  
deas bond for the said appeal and praying that  
the said money be awarded to them for this  
reason, and an issue having been made up be-  
tween the parties, and the court having heard  
the matter, being of the opinion that the ques-  
tion as to whether or not the appeal bond exe-  
cuted by cross-defendants operated as a super-  
sedeas is a question for the Supreme Court to  
determine, and not a question for this court to  
decide, it is ordered, adjudged, and decreed that  
cross-defendants, Mrs. Maria E. Hemphill et  
al., are entitled to the money now in the hands  
of the garnishee, admitted to be due by him for  
rent, to wit, the sum of \$300, and the said gar-  
nishee is required to pay the said money, less  
\$3 garnishee fee, forthwith into the hands of  
the clerk of this court for the use and benefit of  
the person that may be held to be entitled there-  
to, and that in default of such payment, within  
the said time, by the said garnishee, that execu-  
tion issue against him therefor. \* \* \* Said  
money when placed in the hands of the said  
clerk of this court shall remain there until it  
shall have been determined by the Supreme  
Court as to who is entitled to it, but by consent  
of the solicitors of both parties in writing filed  
in this cause said money may be withdrawn  
from the hands of the clerk."

It will be observed that the decree of the chan-  
cellor does not finally dispose of the money an-  
swered to be owing by the garnishee, but orders  
it to be paid into court by the garnishee, and  
leaves its disposition for some future order of  
the court. The record in the former appeal is  
not filed here, and therefore is not before us  
now, and we are unable to say whether the ap-  
peal bond in that case was a supersedeas bond;  
in fact, the record in the case now before us is

so incomplete and confusing that we are unable to intelligently pass upon the correctness of the decree of the chancellor.

Furthermore, it is not clear to us that the decree rendered by the chancellor in the case here really disposes of any property or money involved, but retains the money for future disposition by order of the court.

Affirmed and remanded.

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**DELTA & PINE LAND CO. v. ROWE.**  
(No. 18834.)

(Supreme Court of Mississippi. Feb. 19, 1917.)

Appeal from Chancery Court, Tallahatchie County; J. G. McGowen, Chancellor.

Suit between the Delta & Pine Land Company and W. J. Rowe. Decree for the latter, and the former appeals. Affirmed.

Ward & Ward, of Sumner, for appellant. Mayes, Wells, May & Sanders, of Jackson, for appellee.

PER CURIAM. Affirmed.

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**SUPPLY STORE CO. et al. v. LYLES.**  
(No. 18808.)

(Supreme Court of Mississippi. Feb. 19, 1917.)

Appeal from Circuit Court, Panola County; E. D. Dinkins, Judge.

Action between the Supply Store Company and others and James Lyles. Judgment for the latter, and the former appeal. Affirmed.

Shands & Montgomery, of Sardis, for appellants. Geo. M. Johnson, of Sardis, and J. F. Dean, of Senatobia, for appellee.

PER CURIAM. Affirmed.

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**EDDINGTON et al. v. McDANIELS et al.**  
(No. 18706.)

(Supreme Court of Mississippi. Feb. 19, 1917.)

Appeal from Chancery Court, Leflore County; Joe May, Chancellor.

Suit between Lizzie Eddington and others and W. McDaniels and others. Decree for the latter, and the former appeals. Affirmed.

John J. Adams, of Clarksdale, and Mayes & Mayes, of Jackson, for appellants. J. W. Bradford, of Itta Bena, and Gwin & Mounger, of Greenwood, for appellees.

PER CURIAM. Affirmed.

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**AMERICAN EXPRESS CO. v. ROBINSON  
MERCANTILE CO.** (No. 19012.)

(Supreme Court of Mississippi. Feb. 26, 1917.)

Appeal from Circuit Court, Wilkinson County; R. E. Jackson, Judge.

Action between the American Express Company and the Robinson Mercantile Company. Judgment for the latter, and the former appeals. Appeal dismissed.

Burch & Minor, of Memphis, Tenn., and W. F. Tucker, of Woodville, for appellant. Ackland H. Jones, of Woodville, for appellee.

PER CURIAM. Appeal dismissed.

**SMITH v. BRADFORD.** (No. 18860.)

(Supreme Court of Mississippi. Feb. 26, 1917.)

Appeal from Circuit Court, Jones County; Paul B. Johnson, Judge.

Action between W. T. Smith and J. J. Bradford. Judgment for the latter, and the former appeals. Affirmed.

Stover Dunagan, of Overt, for appellant. Pack & Collins, of Laurel, for appellee.

PER CURIAM. Affirmed.

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**SMITH v. MERIDIAN & M. R. CO.**  
(No. 18864.)

(Supreme Court of Mississippi. Feb. 26, 1917.)

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action between C. W. Smith and the Meridian & Memphis Railroad Company. Judgment for the latter, and the former appeals. Affirmed.

Relly & McCall, of Meridian, for appellant. Neville, Stone & Currie, of Meridian, for appellee.

PER CURIAM. Affirmed.

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**MOORE v. STATE.** (No. 19578.)

(Supreme Court of Mississippi. Feb. 26, 1917.)

Appeal from Circuit Court, Sunflower County; J. C. Ward, Special Judge.

Jesse Moore was convicted of carrying concealed weapons, and he appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.

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**RUTLEDGE v. SOUTHERN RY. CO.**  
(No. 18824.)

(Supreme Court of Mississippi, Division B.  
Feb. 19, 1917.)

Appeal from Circuit Court, Tishomingo County; Claude Clayton, Judge.

Action by W. L. Rutledge against the Southern Railway Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

W. B. Ellis, of Inka, for appellant. Earl King, of Memphis, Tenn., and W. H. Kier, of Corinth, for appellee.

STEVENS, J. Appellant sued for the value of a mare and a mule alleged to have been wrongfully killed by appellee railway company. After all the testimony for both parties had been introduced, a peremptory instruction was granted the defendant. From the judgment entered in pursuance of this instruction, appellant, as plaintiff in the court below, prosecutes this appeal.

Without summing up the entire evidence, we think the case should have gone to the jury. It is the usual case of tracks against train crew, with the odds, perhaps, in favor of the tracks. There are sufficient conflicts to warrant the jury in bringing in a verdict for the plaintiff.

Reversed and remanded.

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**BROWN, Land Com'r, v. SESSIONS.**  
(No. 18679.)

(Supreme Court of Mississippi, Division B.  
Feb. 19, 1917.)

Appeal from Chancery Court, Wilkinson County; R. W. Cutrer, Chancellor.

Bill by James M. Sessions against M. A.

Brown, Land Commissioner. Decree for plaintiff, and defendant appeals. Reversed, and decree rendered.

E. N. Floyd, Asst. Atty. Gen., for appellant. Ackland H. Jones, of Woodville, for appellee.

STEVENS, J. The decision of this case must necessarily follow and be controlled by the opinion rendered very recently in the case of M. A. Brown, Land Commissioner, v. H. B. Ford et al., 73 South. 722, decided January 22, 1917, by Division B of this court, being case No. 18718.

The decree of the chancery court will be reversed, and the bill dismissed. Appellee is privileged at any time to present his claim to the auditor for audit and allowance.

Reversed, and decree here for appellant.

(15 Ala. App. 507)

**J. T. CAMP TRANSFER CO. v. DAVENPORT.** (6 Div. 948.)

(Court of Appeals of Alabama. Aug. 1, 1916. On Rehearing, Sept. 7, 1916.)

**1. PLEADING**  $\S$  34(7) — CONSTRUCTION OF COMPLAINT — OBJECTION ON APPEAL.

In view of Code 1907,  $\S$  4143, providing that no judgment shall be set aside for objection not previously raised, if complaint states a substantial cause of action, such complaint will on appeal receive a liberal construction.

[Ed. Note.—For other cases, see Pleading, Cent. Dig.  $\S$  74.]

**2. NEGLIGENCE**  $\S$  114 — SUFFICIENCY OF COMPLAINT.

Where complaint merely states circumstances of injury, without imputing defendant's negligence to them, a general averment that plaintiff was injured as proximate result of defendant's negligence in respect to duty owed plaintiff is sufficient.

[Ed. Note.—For other cases, see Negligence, Cent. Dig.  $\S$  181.]

**3. PLEADING**  $\S$  34(4) — CONSTRUCTION — OBJECTION BY REQUESTED INSTRUCTION.

Where, complaint not being demurrable, defendant objected by request to charge, it cannot be said that he suffered judgment to be rendered without objection, within meaning of Code 1907,  $\S$  4143, providing that in such case judgment shall not be set aside when complaint states substantial cause of action, and the complaint will be construed, according to the general rule, most strongly against the pleader, in considering such requests.

[Ed. Note.—For other cases, see Pleading, Cent. Dig.  $\S$  66.]

**4. PLEADING**  $\S$  26 — CONSTRUCTION OF LANGUAGE.

The context with which a word is used in pleading largely governs its meaning.

[Ed. Note.—For other cases, see Pleading, Cent. Dig.  $\S$  48.]

**5. PLEADING**  $\S$  34(5) — CONSTRUCTION — "EQUIPMENT OF TEAM AND VEHICLE."

The phrase "equipment of said team and vehicle," construed in connection with preceding parts of complaint, held to mean equipment of horses and vehicle; horses not being a part of the equipment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig.  $\S$  54½, 70.]

**6. NEGLIGENCE**  $\S$  108(1) — COMPLAINT — RULE.

Although a very liberal rule exists in construing general averments of negligence, the general rule that facts showing defendant's duty

to plaintiff and a breach thereof proximately causing injury still exists.

[Ed. Note.—For other cases, see Negligence, Cent. Dig.  $\S$  174, 180.]

**7. MUNICIPAL CORPORATIONS**  $\S$  706(1) — ACTION FOR COLLISION ON STREET — SUFFICIENCY OF COMPLAINT.

A complaint which failed to charge that horses alleged to have caused collision belonged to defendant, or that they were wild or dangerous, construed most strongly against the pleader, merely describing horses which were not in any way peculiar and placing no burden on defendant to keep them off from public highway, did not state a cause of action growing out of ownership or custody thereof, but merely one growing out of the management of team.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig.  $\S$  1518; Pleading, Cent. Dig.  $\S$  128.]

**8. PLEADING**  $\S$  49 — FORM OF ALLEGATION.

A count may be so generally framed as to permit proof of distinct acts which are breaches of the same duty, but it must be framed on some definite theory, and cannot be elastic to conform to various theories or developments of the case.

[Ed. Note.—For other cases, see Pleading, Cent. Dig.  $\S$  107-111.]

**9. TRIAL**  $\S$  251(8) — ACTION FOR COLLISION ON STREET — INSTRUCTION — PLEADINGS.

Where complaint failed to allege that team owned by defendant alleged to have caused collision was vicious, requested instructions limiting question of negligence to conduct and management of team were proper, and should have been given.

[Ed. Note.—For other cases, see Trial, Cent. Dig.  $\S$  593.]

**10. TRIAL**  $\S$  253(4) — ACTION FOR COLLISION ON STREET — INSTRUCTIONS IGNORING ISSUES.

Requested instruction that plaintiff could not recover for damages received in collision if defendant's team became unmanageable, but not touching question of whether it became unmanageable through driver's negligence, held improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig.  $\S$  613.]

**11. TRIAL**  $\S$  253(1) — INSTRUCTIONS — OMITTING MATERIAL ISSUE.

An instruction which attempts to cover the whole case is erroneous if it omits any material issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig.  $\S$  613, 614.]

**12. MUNICIPAL CORPORATIONS**  $\S$  706(8) — ACTION FOR COLLISION ON STREET — INSTRUCTIONS.

Requested instructions held misleading which might be construed as directing jury not to consider for any purpose evidence showing disposition of horses causing collision, where such evidence was relevant on the issue of driver's negligence in controlling them.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig.  $\S$  1518.]

**13. TRIAL**  $\S$  76 — EFFECT OF FAILURE TO OBJECT TO EVIDENCE.

A party cannot delay in objecting to evidence for purpose of speculating on what answer will be given to the question, and then charge error in court's refusal to instruct against considering such evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig.  $\S$  172, 183-190, 237.]

**14. EXCEPTIONS, BILL OF**  $\S$  36(3) — TIME OF SIGNING.

Where bill of exceptions was not signed within time required for review of main trial, but in time to be used in reviewing the over-



ruling of motion for new trial, it will be considered so far as it relates to the latter.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 51.]

#### On Rehearing.

#### 15. MUNICIPAL CORPORATIONS — 706(1) — PLEADING — CONSTRUCTION — "CONTROL" — "MANAGEMENT" — "OPERATION."

The words "control," "management," and "operation" of team and vehicle, in complaint charging collision caused by driver's negligence, held to have same or similar meaning, as evidence admissible with reference to either would be admissible as to others.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.

For other definitions, see Words and Phrases, First and Second Series, Control; Management; Operation.]

Appeal from City Court of Birmingham; John C. Pugh, Judge.

Action by Hattie Davenport against the J. T. Camp Transfer Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded. Application for rehearing overruled.

The complaint charges that upon a certain day defendant was in charge or control of a team of horses attached to a vehicle being driven along the streets of the city of Birmingham. The plaintiff was driving on said street in a vehicle drawn by a horse. When defendant's team ran away or became unmanageable, and ran upon or against, or caused the vehicle to which they were hitched to be run upon or against, the vehicle in which plaintiff was driving, inflicting personal injuries upon plaintiff, which are set out in extenso, and inflicting injuries upon her buggy. It is then averred that defendant was guilty of negligence in or about the management, control, operation, or equipment of said team and vehicle, and as a proximate consequence of said negligence plaintiff suffered said injury and damage. The following charges were refused to defendant:

(5) Defendant is not liable in this action, unless you find from the evidence that its driver is guilty of some negligence in the management of the team, and that this negligence was the proximate cause of plaintiff's injury.

(6) Defendant is not liable to plaintiff in this action, unless you find from the evidence that its driver did something which a reasonably prudent person would not have done, or failed to do something which a reasonably prudent person would do, under the circumstances, in the management of the team, and that this act or omission proximately caused plaintiff's injury.

(8) The mere fact that the wagon and team which ran into plaintiff's buggy belonged to defendant does not authorize the jury to return a verdict in favor of plaintiff, but before you can return a verdict in favor of plaintiff, you must be reasonably satisfied from the evidence that defendant's driver was guilty of some negligence in the management of the team which proximately caused plaintiff to be injured.

(9) You are not authorized to award plaintiff any damages on account of the injury to her buggy, unless you find from the evidence that defendant's driver in charge of the team was guilty of some negligence in the management.

(11) The driver in charge of the team is only required to exercise due care in the management of the same, such care as a reasonably prudent person would exercise under the circumstances, and if they find from the evidence that defendant's driver exercised such care in the management of the team, then they are not authorized to find that he was guilty of any negligence, and in that event the jury should return a verdict in favor of defendant.

(7) If you find from the evidence that defendant's wagon and team, while uncontrolled, ran into plaintiff's buggy and injured her, and that defendant's driver could not control said team or prevent it from running into plaintiff's buggy, and injuring her, by the exercise of ordinary care, then you will find for defendant.

(12) You are not authorized to find a verdict in favor of plaintiff on account of the character or disposition of the team which ran into plaintiff's buggy and caused her injury.

(A) Unless you find from the evidence that the team was of a dangerous disposition or vicious character, and this was known to plaintiff, you cannot consider the character of the team for any purpose whatever.

(B) The jury cannot consider the fact, if it be a fact, that a man was killed on Morris avenue by a team belonging to J. T. Camp, for the purpose of showing liability on defendant.

Stokely, Scrivner & Dominick, of Birmingham, for appellant. Harsh, Harsh & Harsh, of Birmingham, for appellee.

PELHAM, P. J. The appellee sued the appellant to recover damages for personal injuries, as well as for damage to her buggy, alleged to have been done when a team belonging to the defendant was alleged, by reason of the defendant's negligence, to have run into her buggy, in which she was riding. The only plea was the general issue.

It is urged by the appellant that the only issue of negligence in the case is whether the driver was negligent in the management or control of the team, and attempted to so limit the issues to be submitted to the jury by several written charges, which were refused, and separately assigned as error on the motion for a new trial.

The appellee contends that under the pleadings and proof, the driver's negligence in the management or control of the team was not the only issue, and that the defendant's negligence in the matter of "the equipment" of the team and vehicle and in using these horses for dray purposes in the streets of Birmingham were also questions for the jury. It is urged by the appellee that the word "equipment," as used in the complaint, includes the horses as a part of the equipment of the team, and that evidence tending to show the disposition of these horses would support the insistence that the defendant was negligent in the "equipment of said team and vehicle."

[1] We have, therefore, for consideration the rule for the construction of a complaint, after verdict for the plaintiff, where the pleadings consist of the complaint and a general denial, and where the meaning of the complaint was contested in the primary

court by written charges, and not by demurrer. Code, § 4143, provides that:

"No judgment can be arrested, annulled, or set aside, for any matter not previously objected to, if the complaint contain a substantial cause of action."

Where a judgment has been rendered without previous objection on a complaint which contains a substantial cause of action, the complaint, on appeal, will be given a liberal construction. *American Bonding Co. of Baltimore v. New York & M. W. Co.*, 11 Ala. App. 578, 66 South. 847. The usual manner of objecting to a complaint for insufficient allegations or indefiniteness is by demurrer; but the complaint in the present case was not demurrable.

[2] It is well settled that where the complaint merely states the facts and *res gestæ* of the injury, not imputing the defendant's negligence to them, and without specifying the negligent acts or omissions relied on, a general averment that the plaintiff was injured as a proximate result of the negligence of the defendant in respect of the duty owed to the plaintiff is sufficient. *Birmingham Ry., L. & P. Co. v. Barrett*, 179 Ala. 274, 60 South. 263; *Birmingham Ry., L. & P. Co. v. Gonzalez*, 183 Ala. 273, 61 South. 80, Ann. Cas. 1916A, 543; *Ensley Ry. Co. v. Chewning*, 93 Ala. 24, 9 South. 458.

[3, 4] The only manner, therefore, in which the meaning of the complaint in the present case could be contested by the defendant company was by written charges, which were requested by it. Having done so, it cannot be said that the defendant suffered judgment to be rendered against it without objection. *Walker v. Marine Dock & Mutual Ins. Co.*, 31 Ala. 529. The statute not being applicable and the complaint not demurrable, we must, in determining whether the trial court erred in refusing the requested charges, construe the complaint according to the general rule, most strongly against the pleader; and if the complaint admits of two constructions, that least favorable to the pleader will be adopted. *Lacy v. Holbrooks*, 4 Ala. 88; *Lovell v. De Bardelaben*, 90 Ala. 13, 7 South. 756; *Baker v. B. & A. Ry. Co.*, 163 Ala. 101, 49 South. 751. The context with which a word is used largely governs its meaning.

[5] When the last sentence of the complaint is read in conjunction with the preceding allegations contained therein, it will be seen that the word "team" as last used may mean "horses." We must, therefore, hold that the words "equipment of the said team and vehicle," as here used, mean the equipment of the horses and vehicle. There is no evidence that the harness or trappings or other equipment of the horses or vehicle were defective or unsuitable for use.

[6, 7] The complaint does not allege a cause of action growing out of the ownership or custody of domestic animals which are vicious and prone or accustomed to do violence,

because it fails to allege previous knowledge of the animals' vicious habits (*Strouse v. Leipf*, 101 Ala. 433, 14 South. 667, 23 L. R. A. 622, 46 Am. St. Rep. 122); and while our system of pleading is very liberal in the matter of general averments of negligence, our cases do not depart from the elementary rule that the pleader must allege facts showing a duty owing by the defendant to the plaintiff and a breach of that duty which proximately caused the plaintiff's injury (*Ensley Railway Co. v. Chewning*, 93 Ala. 24, 9 South. 458; *Leach, Harrison & Forwood v. Bush*, 57 Ala. 145; *Birmingham Railway, L. & P. Co. v. Barrett*, 179 Ala. 274, 60 South. 262). The allegations of the present complaint not only fail to charge the defendant with the ownership of the horses, but also fails to describe them as dangerous, wild, vicious, or likely to run away, or as such horses that a reasonably prudent man, in the exercise of due care, would not have used in the public streets of the city of Birmingham. Wanting in such facts, we must construe the complaint, most strongly against the pleader, as describing horses about which there was nothing unusual or peculiar, and we find that it fails to show any duty owing by the defendant not to use or permit these horses to be used in the public streets, or to warn the driver as to their past history, temperament, or disposition. If the complaint had shown that the horses were unusual or likely to run away, the plaintiff's rights and the defendant's duty would have been made to appear in a more favorable light to the plaintiff. The only duty that the facts alleged show is a duty on the part of the defendant "in charge or control" of them in the public streets, on or about a certain day, to so control or manage them at that time as not to negligently permit them to injure the plaintiff or her property.

[8] While a single count under our system of pleading may be framed in so general a way as to permit proof of several distinct acts of commission or omission which are in violation of the duty alleged, the acts so shown in evidence must be breaches of that duty. A count must be framed on some definite theory, the breach of some particular duty or the violation of some specific right, and on that theory must succeed or fail. *McGhee et al. v. Reynolds*, 129 Ala. 540, 29 South. 961. A complaint cannot be made elastic so as to take form with the varying views of counsel or the developments of the evidence.

[9] Written charges 5, 6, 8, 9, and 11, which limited the question of negligence to the conduct of, or management of the team by, the driver were proper and should have been given.

[10, 11] Written charge No. 7 is faulty, and was properly refused, in that it pretermits the question as to whether or not the team became unmanageable or got beyond the control of the driver by reason of his negli-

gence. "An instruction which attempts to cover the whole case, and authorizes a finding for one party or the other, according as the jury may determine certain facts, is erroneous, if it omits any material issue." *L. & N. R. Co. v. Christian-Moerlein Brewing Co.*, 150 Ala. 390, 43 South. 723.

[12] Written charge No. 12 is misleading, and was properly refused, in that it may be construed as directing the jury not to consider for any purpose the evidence tending to show the character or disposition of the horses. That evidence was relevant on the issue of the driver's negligence in the control or management of the team. *Park v. O'Brien*, 23 Conn. 339. And for the same reasons charge A was properly refused.

[13] The evidence which was sought to be eliminated by charge B was not objected to. A party cannot be permitted, by delaying to object to a question before it is answered, to speculate as to what the answer will be or as to the effect of such answer on the issues of the case, and then, dissatisfied after the case has been argued, put the trial judge in error for refusing to charge out such testimony. *Western Union Telegraph Co. v. Bowman*, 141 Ala. 175, 87 South. 493; *Dowling v. State*, 151 Ala. 131, 44 South. 403; *B. R. L. & P. Co. v. Taylor*, 152 Ala. 105, 44 South. 580.

[14] The bill of exceptions in this case was not signed within the time required for a review of the main trial, but was signed in time to be used in reviewing the ruling of the court on the motion for a new trial, which was overruled. *Shipp v. Shelton*, 193 Ala. 658, 69 South. 102; *Montgomery Traction Co. v. Knabe*, 158 Ala. 458, 48 South. 501; *Cobb v. Owen*, 150 Ala. 410, 43 South. 828. The charges above referred to were incorporated in the motion for a new trial as grounds therefor. The judgment must be reversed, and the cause remanded.

Reversed and remanded.

EVANS, J., not sitting.

On Rehearing.

PELHAM, P. J. On this application counsel rely on *Slight v. Frix*, 165 Ala. 230, 51 South. 601, in support of the contention that the complaint in this case should be liberally construed; but an examination of the opinion in the *Slight* Case shows that it is not in conflict with the principle declared in the present case, in that in the *Slight* Case "no point was made, by demurrer or otherwise, to point out any defect in the complaint or variance between it and the affidavit." Counsel further insist that written charges 5, 6, 8, 9, and 11, which limited the question of negligence to be submitted to the jury to the conduct of, or management of the team

by, the driver, were properly refused, in that they pretermitted the negligence of some other servant or employé of the defendant company in the matter of failing to warn the driver of the disposition of the horses. "When the gravamen of the action is the alleged nonfeasance or misfeasance of another, as a general rule it is sufficient if the complaint aver facts out of which the duty to act springs, and that the defendant negligently failed to do and perform. \* \* \*" *Ensley v. Chewning*, 93 Ala. 24, 9 South. 458. But notwithstanding the fact that under our system of pleading the negligent act or acts to be proved may be alleged in general terms, such act or acts must show or tend to show a breach of the duty alleged. In the present case when the complaint showed that the defendant was in charge or control of the horses on a public street along which the plaintiff was driving or being driven, it sufficiently alleged a duty on the part of the defendant not to negligently injure the plaintiff or the plaintiff's buggy. However, it will be noticed that the complaint with reference to the defendant's duty merely charges the defendant with "the charge or control of a team of horses attached to a vehicle" in a public street along which the plaintiff was driving or being driven. Construing the complaint most strongly against the pleader, we must hold that the only duty that the facts alleged show is a duty on the part of the defendant "in charge or control" of the horses in the public streets on or about a certain day, to so control or manage them at that time as not to negligently permit them to injure the plaintiff or her property.

[15] Counsel also insist that the charges referred to were properly refused, in that in the complaint the general averment of negligence contains the words "control" and "operation," in addition to the word "management," and that they do not have the same or a similar meaning. The word "management," as well as the word "operation," when used in a general administrative sense, as in the conduct or operation of a business, might in some instances be said to have a broader meaning than the word "control"; but, as used in this complaint, evidence which would be admissible with reference to either would be admissible with reference to the other. In other words, if this complaint had consisted of several counts, and the negligence in the separate counts had been alleged by the use of one of said words in each of the counts, the same proof that would be admissible under one count to show the breach of the duty alleged in that count would be admissible under each of the counts.

Application overruled.

EVANS, J., not sitting.

(140 La. 318)

No. 20895.

**PERRIN v. NEW ORLEANS TERMINAL CO.**(Supreme Court of Louisiana. Jan. 15, 1917.  
Rehearing Denied Feb. 12, 1917.)*(Syllabus by the Court.)***1. RAILROADS — 301 — CROSSINGS — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE.**

Both railroad and traveler on intersecting highways are charged with the usual duties of keeping a careful lookout for danger, and both must use the degree of diligence a prudent man would exercise under the circumstances.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 956.]

**2. RAILROADS — 327(1) — CROSSING TRACK — LOOKING AND LISTENING.**

A traveler about to cross a railroad track in the country must stop, look, and listen.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043, 1045.]

**3. RAILROADS — 338 — INJURY AT CROSSING — CONTRIBUTORY NEGLIGENCE.**

If the traveler fails to exercise ordinary care, and is injured by a passing train, he cannot recover, although the train crew may have been negligent also.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1096-1099.]

**4. RAILROADS — 324(1) — CROSSINGS — CARE REQUIRED.**

The greater the difficulty of seeing and hearing an approaching train as it nears a crossing, the greater caution the law imposes upon the traveler.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1020, 1022, 1023.]

Appeal from Twenty-Ninth Judicial District Court, Parish of St. Bernard; R. Emmett Hingle, Judge.

Suit by Alexander P. Perrin against the New Orleans Terminal Company. Judgment for plaintiff, and he asks for an amendment of the judgment by increasing it to a certain sum, and defendant appeals. Judgment reversed, with judgment in favor of defendant rejecting plaintiff's demand.

Dufour & Dufour, R. Bland Logan, and Hall, Monroe & Lemann, all of New Orleans (George Janvier, of New Orleans, of counsel), for appellant. Oliver S. Livaudais, of New Orleans, for appellee.

**SOMMERVILLE, J.** Plaintiff sues the defendant company in damages for personal injuries in the sum of \$1,000, and for the destruction of his automobile in the sum of \$1,100, all of which he alleges occurred through the fault and negligence of the defendant. Defendant answers that the automobile of plaintiff was not entirely demolished, and that he did not suffer any personal injuries whatever. Defendant further denies any fault or negligence on its part, and charges gross negligence on the part of plaintiff in attempting to drive his automobile over the tracks of defendant, where the lane on which he was running crossed the tracks

at right angles just ahead of the defendant's train. There was judgment in favor of plaintiff for the automobile in the sum of \$1,100, and the claim for personal injuries was rejected. Defendant has appealed, and plaintiff asks for the amendment of the judgment by increasing it to \$2,100.

It appears from the evidence that plaintiff, together with three friends, was driving his automobile down the main public road of the parish of St. Bernard, which is a continuation of St. Claude street of New Orleans, and which parallels the tracks of the defendant company, and which tracks are located about 75 to 80 feet on the river side of the public road. It also appears that a train of freight cars left the Frisco crossing at about the same time that plaintiff left it, which is about a mile and a half above the Fazendeville crossing, where the accident occurred. The train consisted of an engine and 12 box cars which were being backed down the track at a somewhat rapid rate. This train was properly manned, with lookouts on the forward end. It is shown that the engineer blew his whistle at the half mile post before reaching the crossing, and that the bell was an automatic bell which was being rung continuously from the time that the train left the Friscoville crossing. It is further shown by defendant's witnesses that they were within view of the automobile belonging to plaintiff all the way down the road, and that they expected it to continue going down the public road; instead, the automobile was turned at Fazendeville crossing, and ran in front of the train before the train could be stopped; that plaintiff did not stop, or look, or listen before going upon the track; and that the lookouts on defendant's train gave all the necessary warnings, and did what they could to avoid the accident.

It is testified by plaintiff and one of his witnesses that, although they and the train left Friscoville at about the same time, they did not see the train, because of weeds intervening between the public road and the track. These same witnesses testified that they heard no bell, or whistle, or noise of the moving train, although after having turned into the Fazendeville crossing they stopped the automobile and looked and listened.

[1] Both railroad and travelers on intersecting highways "are charged with the mutual duty of keeping a careful lookout for danger," and both must use "the degree of diligence, \* \* \* a prudent man would exercise under the circumstances." *Continental Improvement Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403.

The evidence is clear that the defendant company was keeping a careful lookout for danger, and that its employes were diligent; that the bell of the engine was operated by air, and that it was ringing from the time the train left Friscoville until the time it

was stopped after the accident; that the danger signal was blown at the usual place; and that the bell and signal might have been heard by plaintiff if he had been listening therefor all the time he was on the public road. It is further shown that plaintiff unexpectedly turned from the public road into a crossing, running at right angles with defendant's track, without stopping or looking or listening for danger on the railroad track which he knew he was about to cross.

Plaintiff and one of his witnesses testify that he, while on the Fazendeville crossing, stopped his automobile before he reached the railroad track because of a man and his wheelbarrow occupying a part of the roadway on the river side of the track. If plaintiff stopped his automobile on this crossing, he was not seen to stop by the employés of the defendant company, who were on the lookout. And, if he did stop, he should have stopped sufficiently close to the railroad track to have been able to look up and down that track, and, if he stopped his automobile, he should have seen and heard the moving train on the track. It is equivalent to not looking or listening if one fails to see and hear a noisy train as it runs over the track, with bell ringing in very close proximity to him.

[2, 3] If a traveler fails to stop, look, and listen before crossing a railroad track in the country, he is at fault; and he cannot recover damages because of injuries inflicted because of a collision with a train on said track. The testimony of plaintiff to the effect that weeds and willows intercepted his vision, and that he could not see the moving train is contradicted by the testimony of the crew on the train to the effect that the automobile was within their view all of the time that it was going on the public road. And the photographs of Fazendeville crossing show that the train and the auto were within view of one another at that crossing.

There is some evidence on the part of plaintiff that some of the weeds along the track had been cut after the date of the accident; but the only weeds shown to have been cut were a few willows, which the witness said were doubtless cut by some Italians or colored men to be used for bean poles for butter beans; that they were not cut down by the railroad company; and that those which had been cut were on the lower side of Fazendeville crossing, which could not have affected the view from the upper side of the crossing.

Witnesses for the defendant testify that they were present on the day of the accident, and that the weeds and willows did not obstruct the view sufficiently to obscure a train on the track; and they stood on the crossing some distance from the track.

It was the duty of plaintiff, before crossing the track, to have stopped, looked, and listened; and, where it is shown that the view was unobstructed and the accident occurred in the daytime, it is clear that the train was

in plain view of plaintiff for a sufficient length of time before the accident to have allowed him to realize its presence, and to have avoided the danger.

In the case of *Tatum v. Rock Island, A. & L. R. Co.*, 124 La. 927, 50 South. 798, we say:

"As the deceased could have avoided the accident by the exercise of the least degree of ordinary care, it is useless to inquire into the particular acts of negligence charged against the defendant, as none of them, if established, would affect the result."

And in *Eyma Brown v. Railroad Co.*, 42 La. Ann. 355, 7 South. 684, 21 Am. St. Rep. 374, it is said:

"No failure on the part of the railroad company to do its duty will excuse any one from using the senses of sight and hearing, upon approaching a railway crossing, and whenever the due use of either sense would have enabled the injured person to escape the danger, the injury is conclusive evidence of negligence, without any reference to the railroad's failure to perform its duty."

[4] Even if the weeds had obstructed plaintiff's view, as he claims, his duty to stop, look, and listen was the more incumbent upon him. We say in *Blackwell v. Railroad Co.*, 47 La. Ann. 270, 16 South. 819, 49 Am. St. Rep. 371:

"These obstructions, while they are not to be lost sight of in considering the question of responsibility, certainly should have suggested caution to travelers about crossing the tracks."

And in *Barnhill v. Railway Co.*, 109 La. 43, 33 South. 63, we say:

"The greater the difficulty of seeing and hearing the train as he approaches the crossing, the greater caution the law imposes upon the traveler."

"The traveler, however, is rigidly required to do all that care and prudence would dictate to avoid injury, and the greater the danger the greater the care that must be exercised to avoid it, as where, because of physical infirmities, darkness, snow, fog, the inclemency of the weather, buildings, or other obstructions and hindrances it is more than usually difficult to see or hear, greater precaution must be taken to avoid injury than would otherwise be necessary."

And Mr. Wilkinson, in his work on *Personal Injuries*, in commenting on the case of *N. Y. C. & H. R. R. Co. v. Maidment*, 168 Fed. 21, 93 C. C. A. 413, 21 L. R. A. (N. S.) 794, says:

"The looking and listening for an approaching train should be made at a time and in a place to make them most effective. It would be useless to look where the sight is obscured, or to listen where other greater noises drown the roar of the coming train. In other words, the precaution of the traveler should be reasonable, and by that is meant such precautions as a reasonable man would exercise in the ordinary affairs of life. Because of the fact that a collision between a train and automobile endangers not only those in the automobile, but also those on board the train, and also because the car is more readily controlled than a horse vehicle, and can be left by the driver, if necessary, the law exacts from him a strict performance of the duty to stop, look, and listen before driving upon a railroad crossing where the view is obstructed, and to do so at a time and place where the stopping and looking and listening will be effective. We cite this decision, which is a little

out of the ordinary, although it is not rendered by the courts of this state, for the reason that the greater number of automobiles now in use will soon bring about their quota of damage suits, and the law stated is correct and in accordance with reason and principle, and, we believe, will be applied when the question is presented to the courts of Louisiana. It is the first decision we have noted from the federal courts involving the rights of an automobile, and for that reason we thought that it would not be amiss to include it in this work."

In the Maidment Case just referred to it was said:

"From where he stopped it was impossible to see up the track, in the direction the west-bound trains would come from, further than 180 feet. Trees and bushes on the property adjoining defendants' right of way cut off all sight of the track beyond that short distance. \* \* \*

"But the plaintiff was not without means of crossing in safety. A second man was in the automobile. He could have gone ahead to the east-bound track, or Maidment could have safely halted the machine there. Instead of doing this, and without sight of the west-bound track, save for the very short distance a swift train would quickly cover, he took the chance of dashing across."

It is not possible for plaintiff to have taken the care which he says he took on the day of the accident, and yet to have been struck by the train of the defendant. It was broad daylight, with the automobile and train proceeding in the same direction on parallel roads. The automobile suddenly left the public road and went onto the Fazendeville crossing; and plaintiff and his friends, the occupants of the automobile, had their attention on other things, and were not paying attention to the train, or what was going on about them. He was at fault, and cannot recover damages.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be reversed, and that there be judgment in favor of defendant rejecting plaintiff's demand at his cost.

MONROE, C. J., takes no part.

(140 La. 325)

No. 20857.

ABRAMSON et al. v. LARABEE.

(Supreme Court of Louisiana. Jan. 15, 1917.  
Rehearing Denied Feb. 12, 1917.)

(Syllabus by the Court.)

1. HOMESTEAD §78 — HEAD OF FAMILY — CONSTITUTIONAL PROVISIONS.

The right of the husband, as head of a family, to claim a homestead exemption to the amount of \$2,000, out of the proceeds of the sale of the tract of 160 acres or less, on which the family resided, is conferred in express terms by article 244 of the Constitution, and was intended for the benefit of the husband's wife and children.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 110.]

2. HOMESTEAD §14 — EXEMPTION — OTHER PROPERTY.

In such a case, the alleged fact that the debtor owned other property than his home-

stead, or had fraudulently disposed of other property, is immaterial and irrelevant to the question of homestead exemption.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 15.]

Provosty, J., dissenting.

Appeal from Eighteenth Judicial District Court, Parish of Lafayette; William Campbell, Judge.

Action by Nathan Abramson and others against Chas. G. Larabee, Chas. G. Larabee and his wife, Fannie W. Smith, interveners and opponents. Judgment for plaintiffs, allowing defendants' homestead exemption, and plaintiffs appeal. Affirmed.

Jerome Mouton and Chas. D. Caffery, both of La Fayette, for appellants. Jerome E. Poche and George P. Lessley, both of La Fayette, and Cas Moss, of Winnfield, for appellees.

LAND, J. We make the following extracts from the brief filed in behalf of the plaintiffs and appellants:

"The issue in this case is briefly stated. Plaintiffs being the holders of a note against the defendant Charles G. Larabee, secured by mortgage, obtained judgment against him, and in due course caused the property mortgaged to be seized and advertised for sale.

"Defendant thereupon set up a homestead claim to the property, or in the event of its selling for more than \$2,000, prayed to be awarded the amount to the exclusion of the seizing creditors."

"The property having brought more than \$2,000, and his right to the homestead having been recognized by the lower court, this amount has been ordered paid to him by preference out of the proceeds of the sale, and plaintiffs have appealed."

"Plaintiffs do not deny that defendant was a man of family, living on the property in question, but they contend that the homestead right provided by law for an honest debtor in destitute circumstances, and not for one who illegally and fraudulently disposes of property covered by the mortgage sought to be enforced."

The only special reason urged in plaintiff's answer to the petition of intervention why the homestead claim of the interveners should not be recognized was:

"That the said exemption is one provided for the destitute, and that said interveners are in possession of means in excess of said exemption."

It is not claimed that the evidence shows that the wife of the defendant owned and was in the actual enjoyment of property or means to the amount of \$2,000. Const. art. 244.

In *White v. Givens*, 29 La. 571, it was held that the fact that the debtor had other property than his homestead or has fraudulently disposed of other property does not affect the exemption of the homestead, if his condition brings him within the operation of the homestead law.

The court in that case said, *inter alia*:

"The law exempts the homestead; and whether the defendant in exemption has other proper-

ty or \* \* \* has made fraudulent or fictitious sales of other property, it is not material for us to inquire, because the exemption is specifically of the homestead, and that cannot be sold under execution whether the defendant has other property or not."

"If White has disposed of his property fraudulently or by simulated titles that property may be pursued by his judgment creditors; but no act of White, however fraudulent, touching other property can deprive him and his family of the exemption of the homestead."

The case of *White v. Givens* was followed in *Tolbert v. Freeman*, 130 La. 47, 57 South. 590.

[1, 2] In this case the defendant's homestead was restricted to the amount of \$2,000, out of the proceeds of the sale of the 160 acres or less on which defendant and his family resided. Const. art. 244.

Hence the disposition of other property not subject to this homestead claim cannot affect the situation.

Under said article, the benefit of the exemption is extended to the debtor, as "a head of a family" or a person having some other person or persons dependent on him or her for support; and the benefit of the exemption may be claimed by the surviving spouse, or minor child or children of a deceased beneficiary.

Const. art. 246 makes the written consent of the wife necessary to any waiver of the homestead by the husband.

Judgment affirmed.

PROVOSTY, J., distinguishes this case from those where the home itself is being claimed, and not money, and dissents.

(140 La. 828)

No. 21202.

IRBY v. HARRELL.

(Supreme Court of Louisiana. Jan. 15, 1917.  
Rehearing Denied Feb. 12, 1917.)

(Syllabus by Editorial Staff.)

1. MALICIOUS PROSECUTION ¶55—GROUNDS OF ACTION.

To maintain suit for malicious prosecution, a prima facie case that the prosecution was without probable cause must be alleged and proven by showing that the prosecution terminated in plaintiff's favor, either by acquittal or abandonment.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 106-110.]

2. MALICIOUS PROSECUTION ¶35(2)—SUFFICIENCY OF EVIDENCE — TERMINATION OF PROSECUTION.

Where a prosecution for embezzlement was abandoned as the result of compromise, solicited by the accused, this was not such an equivalent of an acquittal as to justify a suit for malicious prosecution.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 77.]

3. MALICIOUS PROSECUTION ¶56—PROBABLE CAUSE.

Where plaintiff in malicious prosecution suit did not show the equivalent of an acquittal in

the prosecution complained of, the trial court cannot go into question of probable cause.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 112-116.]

Appeal from First Judicial District Court, Parish of Caddo; John R. Land, Judge.

Suit by N. F. Irby against S. P. Harrell. Judgment for defendant, and plaintiff appeals. Affirmed.

Murff & Roberts, of Shreveport, and Stephens & Raphael, of Coushatta, for appellant. Wise, Randolph, Rendall & Freyer, L. C. Butler, and John B. Files, all of Shreveport, for appellee.

PROVOSTY, J. This is a suit for malicious prosecution, based on the fact that the defendant caused the plaintiff to be arrested on a charge of embezzlement.

[1, 2] For the maintenance of a suit of this kind a prima facie case of the prosecution having been without probable cause must be made out, by allegation and proof of the prosecution having terminated favorably to the plaintiff. In other words, the question of probable cause vel non must first have been fought out in the court of the prosecution; and there must have been an acquittal, or else an abandonment of the prosecution equivalent thereto. *Greenleaf*, vol. 2, p. 449; *Starkie*, *Malicious Prosecution*; 25 Cyc. 55; 2 L. R. A. (N. S.) 927 note. In this case the prosecution was abandoned, but only as the result of a compromise—of a compromise entered into at defendant's instance. An abandonment, thus solicited by plaintiff, and brought about by a compromise, is not the equivalent of an acquittal.

[3] Perhaps plaintiff would have been acquitted if tried; and perhaps this court would find upon investigation of the facts that there was no probable cause for the prosecution although the learned trial judge found otherwise, and, indeed, would seem to have come to the conclusion that plaintiff was guilty; but the court in which a suit of this kind is brought cannot go into the inquiry of probable cause vel non unless a previous acquittal, or its equivalent, shall first have opened the door for such inquiry. Authorities, *supra*. This in the present case has not been done.

Judgment affirmed.

No. 22210.

(140 La. 828)

STATE v. EMILE.

(Supreme Court of Louisiana. Oct. 16, 1916.  
Rehearing Denied Feb. 12, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW ¶680—TRIAL—READING OF INFORMATION.

In a criminal prosecution wherein the defendant may waive the reading of the bill of indictment or information, he cannot successfully complain, after conviction and in a mo-

tion in arrest of judgment, that the officer who read to him the indictment or information on arraignment was not qualified to act as clerk of court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1536, 1537.]

2. CRIMINAL LAW §692, 968(7)—SWEARING WITNESSES — OBJECTION — PRESUMPTION—MOTION IN ARREST OF JUDGMENT.

The fact that the oath was administered to the witnesses in a criminal prosecution by an officer who was not qualified to administer the oath or to serve in the capacity of clerk of court is an irregularity or informality to which the defendant must object when the testimony is offered, or it will be presumed that he had no objection to it. Having had the opportunity of being acquitted, the defendant cannot, after conviction, by motion in arrest of judgment, complain of the manner in which the witnesses who testified against him on the trial were sworn.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1629, 2430, 2435, 2436.]

3. CONSTITUTIONAL LAW §42 — CONSTITUTIONALITY OF STATUTE — RIGHT TO QUESTION.

One who has been convicted of violating a criminal statute has no interest in demanding, by motion in arrest of judgment, that the court pass upon the constitutionality of sections of the statute that are not relevant to the provisions which he was convicted of violating.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40.]

Appeal from City Court of Shreveport; David B. Samuel, Judge.

A. Emile was convicted of operating a blind tiger in violation of law, and from the conviction and sentence, he appeals. Conviction and sentence affirmed.

Charles F. Crane, of Shreveport, for appellant. A. V. Coco, Atty. Gen., and W. A. Mabry, Dist. Atty., and S. I. Foster, Asst. Dist. Atty., both of Shreveport (Vernon A. Coco, of Marksville, of counsel), for the State.

O'NIELL, J. The defendant was found guilty of operating a blind tiger, made unlawful by Act No. 8 of 1915; he was sentenced to pay a fine and be imprisoned, and has appealed from the conviction and sentence. He relies on a bill of exceptions taken to the overruling of his motion in arrest of judgment. The motion, filed after the conviction, but before the sentence was passed, is founded upon the statements: (1) That the oath taken by the witnesses who testified against him on the trial was not valid; and (2) that the arraignment was not valid; and it was based upon the further contention that Act No. 8 of 1915 is unconstitutional and invalid, in that it violates article 7 of the Constitution of this state, in so far as it provides for an unreasonable search and seizure and does not fix a minimum nor a maximum amount of liquor in the provision that a place suspected of being a blind tiger may be searched, and that any spirituous or intoxicating liquor on such premises may be seized.

The defendant's contention that he was

not legally arraigned refers to the fact that the statute creating the city court of the city of Shreveport provides that the judge shall be ex officio clerk of that court; whereas, in this case it appears that a police officer acted as clerk of the court and read the charge to the defendant when he was called for arraignment. The statement per curiam in the bill of exception, however, recites that the judge asked the accused whether he was guilty or not guilty, and that the plea of not guilty was addressed to the judge. Inasmuch as the defendant might have waived the reading of the charge in this case, there is no merit in his complaint that the charge was read by one who was perhaps only the de facto clerk of court.

The contention that the oath taken by the witnesses in the case was not administered in the manner required by law is based upon the fact that the police sergeant acting as clerk of court, administered the oath. In the statement per curiam, the judge gives his reasons for overruling the motion in arrest of judgment, with regard to this complaint: (1) That no objection was made by the defendant or his attorney when the oath was administered to the witnesses, or until after the conviction; and (2) that the police sergeant was a notary public, qualified to administer the oath.

[1, 2] Our opinion is that the judge of the city court of Shreveport, who is, by virtue of his office, clerk of that court, should administer the oath to the witnesses. A police officer, though he be also a notary public, is not the proper officer to swear the witnesses in the trial of a lawsuit. But we are also of the opinion that the defendant's objection to the manner in which the oath was administered in this case came too late. The fact that the error is apparent on the face of the record, or, as in this case, is admitted by the trial judge, is not in itself a cause for setting aside the conviction on a motion in arrest of judgment. The error in this case was an informality or irregularity to which the defendant should have objected when it was committed if he intended to object at all. The situation is very much the same as if the statements of witnesses who were not sworn at all had been introduced in evidence against the defendant, without any objection on his part. In the case of *State v. Jackson*, 25 La. Ann. 537, it was held that, having had the benefit of the trial and an opportunity to be acquitted, the defendant could not, after conviction, successfully complain of an informality or irregularity in the drawing of the jury. In *State v. Nunez*, 26 La. Ann. 605, it was held that the objection that the party who filed the information as district attorney pro tempore was not appointed to that office, and that his official act was null, could not be successfully urged in a motion in arrest of judgment, but should have been urged before the defendant went



to trial. In *State v. Swift*, 14 La. Ann. 827, it was held that an objection to the method of drawing and impaneling the grand jury came too late in a motion in arrest of judgment. That decision was cited with approval in *State v. Millican*, 15 La. Ann. 557, where it was said that a defect merely of form, in the indictment or in the proceedings in a criminal prosecution, however apparent on the face of the record, could not be the basis for a motion in arrest of judgment.

[3] The validity of the verdict and sentence appealed from does not depend upon the constitutionality or validity of that section (section 3) of Act No. 8 of 1915, authorizing an officer to search any place suspected of being a blind tiger and to seize any intoxicating liquor found in such place, and to bring into court all persons found in such place, along with the liquors. The record in this case does not disclose that the place in which the defendant was accused of operating a blind tiger was subjected to an unreasonable search, or that any liquor was seized, or that he was brought into court without a warrant for his arrest. He cannot require the court to pass upon the constitutionality or validity of provisions of the statute that are entirely irrelevant to the issues presented and do not concern him in this case. See *State v. Doremus*, 137 La. 269, 270, 68 South. 608. If the section of the law with regard to the search of a place suspected of being a blind tiger and the seizure of intoxicating liquors found there should be held unconstitutional and invalid, the invalidity of those provisions of the law would not affect the sections of the statute defining a blind tiger and declaring it a misdemeanor to operate one.

The conviction and sentence appealed from are affirmed.

(140 La. 338)

No. 22313.

### STATE v. BATES.

(Supreme Court of Louisiana. Jan. 15, 1917.  
Rehearing Denied Feb. 12, 1917.)

#### (Syllabus by the Court.)

#### 1. CRIMINAL LAW § 942(2)—NEWLY DISCOVERED EVIDENCE—IMPEACHING TESTIMONY.

The oral statements of a state witness made after verdict, and impeaching his own testimony as given at the trial, furnish no legal basis for granting of a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2316, 2332.]

#### 2. CRIMINAL LAW § 398(1)—DEMONSTRATIVE EVIDENCE AS BEST EVIDENCE.

Where the deceased died from a fracture of his skull, the skull itself is best evidence of the location and extent of the wound.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-881.]

#### 3. CRIMINAL LAW § 665(2)—TRIAL—SEPARATION OF WITNESSES—DISCRETION OF COURT.

The exception of a deputy sheriff from an

order directing a separation of the witnesses is within the sound discretion of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1550-1554, 1565.]

#### 4. WITNESSES § 287(4) — RE-EXAMINATION—SCOPE.

Where a witness has been cross-examined as to certain statements made during a certain conversation, he may be re-examined on the whole conversation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1002.]

#### 5. CRIMINAL LAW § 1141(2) — RULING ON EVIDENCE—EXCEPTION—AFFIRMANCE.

Where the judge overruled an objection to certain testimony as immaterial and irrelevant, his ruling will be affirmed, when the bill of exception fails to show that the testimony had no bearing on any material or relevant issue of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3015, 3022.]

#### 6. CRIMINAL LAW § 958(1) — APPEAL — MOTION FOR NEW TRIAL—AFFIDAVIT.

The trial judge may disregard an affidavit annexed to a motion for a new trial, where it contradicts undisputed facts proven on the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2396.]

O'Niell, J., dissenting.

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Robert S. Ellis, Judge.

Milton Bates was convicted of manslaughter, his motion for a new trial was overruled, and he appeals. Affirmed.

Ponder & Ponder, of Amite, and H. K. Strickland, of Baton Rouge, for appellant. A. V. Coco, Atty. Gen., and W. H. McClen-don, Dist. Atty., of Amite (R. R. Reid and B. B. Purser, both of Amite, and Vernon A. Coco, of Marksville, of counsel), for the State.

LAND, J. The defendant was indicted for the murder of John Drohan.

The first trial resulted in a mistrial. On the second trial, the jury found the defendant guilty of manslaughter, and recommended him to the mercy of the court.

The defendant filed a motion for a new trial, which, after a hearing, was overruled, and thereupon the defendant was sentenced to imprisonment at hard labor in the state penitentiary for not less than 7 years and for not more than 16 years.

The defendant has appealed, and relies for reversal on several bills of exception.

The bill relating to the competency of a certain juror has been abandoned.

[2] The bill relating to the offer by the state of a part of the fractured skull of the deceased is without merit.

The skull was the best evidence of the location and extent of the fracture, and was offered to correct any variance in the descriptions of the fracture by the physicians who testified on the trial of the case. The same skull had been produced in court on the first trial.

[3] The bill relating to the exception of a

certain deputy sheriff from an order for the severance of the witnesses was not well taken. The judge states that "It is a rule of court that all court officers are exempt from an order of severance."

We know that this is the usual practice in district courts. The matter of separation of witnesses is one in the sound discretion of the trial judge.

[4] Another bill recites that Fendlason, a deputy sheriff, a state witness, was asked on cross-examination by defendant's counsel if on a certain occasion he had a private conversation with one Harrell; that the witness replied, "No," that he had no recollection of it; did not think he had; that counsel for defendant then asked the witness if he did not on that occasion take Harrell off to themselves and offer him \$10 and his expenses if he would swear that he heard the defendant say that he had killed John Drohan, and that the witness replied, "No," he did not; there was no such conversation.

On his re-examination the witness stated that on the occasion referred to he talked with Harrell in the presence of others, and if they got slightly apart from the crowd, he did not recollect it.

Defendant's counsel objected to the witness stating any conversation he had with Harrell other than the private conversation referred to in the cross-examination. This objection was properly overruled. There was but one conversation, and evidence as to all that was said at the time was relevant and pertinent to the subject-matter of the cross-examination. *Marr's Crim. Juris. of La. p. 743.*

[5] Another bill relates to a question propounded by the prosecution to Mrs. Drohan, the mother of the deceased, as to the difference in the condition of the deceased when brought home at the time of the homicide, and when previously brought home in an intoxicated condition. Defendant's counsel objected on the ground that the matter was immaterial and irrelevant, and called for the opinion of the witness. The court overruled the objection, at the same time instructing the witness not to give any opinion, but to describe the physical difference, if any, there was.

The witness answered that on the former occasion the deceased was limber and on the last occasion, was stiff.

It is impossible for us on the meager showing made by the bill of exception to say that the testimony was immaterial and irrelevant. It may have been pertinent to some issue in the case. The judge ruled that the evidence was relevant and material, and the bill merely alleges the contrary. The presumption is that the ruling was correct.

[6] The defendant filed a motion for a new trial on several grounds which was overruled by the judge in a per curiam setting forth

the facts of the case and the reasons for his action.

No evidence was offered on the trial of the motion for a new trial, but several affidavits were filed therewith to support the grounds of newly discovered evidence.

The first ground is that Fred Crawford, the only eyewitness for the state, the day after the conviction of the defendant, stated to several persons:

"Well Red Bates was convicted, but ought not to have been."

"Because he did not kill John Drohan, but I know who did kill him."

This ground is supported by the affidavits of four men giving time and place of the statement. The motion for a new trial represents that Crawford on the next day disappeared for parts unknown.

The second ground is supported by the affidavit of one Murry Brumfield to the effect that Easley and Drohan were cursing each other, and Easley hit Drohan on the head with a quart bottle and knocked him down; that Drohan jumped up and they clinched, and both fell together; that Varnado and the defendant went over to separate them; that both Easley and Drohan were drunk; and that Fendlason, the city marshal, picked them both up and put them in a car.

The last affidavit may be disregarded on the ground that the motion discloses no diligence whatever to discover the witness, and to secure his attendance on the second trial of the case. Moreover, the statements in the affidavit are contradicted by the undisputed testimony in the case as shown by the following extract from the reasons assigned by the trial judge:

"All the testimony showed that John Drohan, the deceased, had been with a number of young men, including defendant, at or near a negro dance hall in the upper part of the town of Kentwood, nearly all afternoon; that deceased and Tom Easley, another youth, were in a fist-cuff fight, with deceased on top beating Easley, when, this being reported to defendant, Bob Varnado, a deputy sheriff at that time, and several others, who were about 75 yards away, they went down there and separated them, or rather pulled Drohan off Easley."

As to Fred Crawford, witness for the prosecution, the judge states that he testified that Drohan stood up and Easley remained on the ground; that Drohan said, "You Southern sons of bitches can't run it over me;" whereupon Bates struck him a swinging blow on the head and he fell, and that Varnado and the defendant, close personal friends, who had been jointly charged before with felony, denied Crawford's statement.

The judge further stated that the evidence recited by him showed that the fracture could not have been caused with the naked fist, and that the testimony convinced him, and convinced the jury, that the defendant struck deceased with some blunt instrument, which was unseen by any of the witnesses

who could tell what it was, and thereby caused his death.

The judge stated that Crawford as a witness was hostile to the state; and his examination disclosed that on the trial of the case he went back of his statement before the coroner's jury, that the defendant had something in his hand when he struck Drohan.

[1] The question before us is whether the judge below erred in holding that Crawford's verbal statements after the conviction of the defendant did not warrant the granting of a new trial.

The only legal effect of such statements is to impeach the credibility of the witness, and it is settled beyond controversy that a new trial will not be granted for any such purpose. *Marr's Crim. Juris. of La. p. 830, note (c).*

In a stronger case where a state witness testified that his statements on the trial were false, and were coerced by threats, we held that the overruling of the motion for a new trial based on such testimony was within the sound discretion of the trial judge. *State v. Doyle, 138 La. 850, 70 South. 322.*

In this case we have the mere say-so of the state witness, who the next day "disappeared for parts unknown," as alleged in the motion for a new trial.

Judgment affirmed.

O'NIELL, J., dissents.

(140 La. 339)

No. 21207.

# REYNAUD v. FABACHER.

(Supreme Court of Louisiana. Jan. 15, 1917.  
Rehearing Denied Feb. 12, 1917.)

## (Syllabus by the Court.)

### 1. APPEAL AND ERROR §1005(1)—QUESTIONS OF FACT—CONCLUSIVENESS.

The findings of the jury and trial judge on questions of fact will not be disturbed, unless clearly erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8860-3876, 8948.]

## (Additional Syllabus by Editorial Staff.)

### 2. DAMAGES §132(15) — INADEQUATE DAMAGES—PERSONAL INJURY.

A verdict of \$2,000 for plaintiff, a laborer, 47 years of age, earning \$16 per week, for fractures of the tibia and fibia, which after a year and a half left a deformity and a permanent lameness and incapacity for continued work and caused physical and mental pain, was inadequate and would be increased to \$3,500.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 396.]

O'Niell, J., dissenting in part.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Louis Reynaud against Peter Fabacher, in which, after his death pending appeal, his widow, Mrs. Sophie Wendling Fabacher, executrix, made herself a party

defendant. Judgment for plaintiff, and defendant appeals. Judgment amended by increasing it from \$2,000 to \$3,500, and as amended affirmed.

Wm. C. Dufour, H. Generes Dufour, and George Janvier, all of New Orleans, for appellant. Lewis R. Graham, of New Orleans, for appellee.

SOMMERVILLE, J. Plaintiff, age 47, was injured while working on the river front, near Jackson avenue, in New Orleans, May 16, 1913. He and another laborer were engaged in "heading" or arranging cotton on the docks, when a dray of defendant was driven by one of his employes into the dock with a load of cotton. While the dray was being unloaded by said employe, one of the bales struck plaintiff, and the two bones in one of his legs were broken.

He alleged that the injury was due to the fault and negligence of defendant's employe, and he asked for judgment in the sum of \$4,704.30, which included a claim of \$1,000 for exemplary damages. The balance was for actual damages. This is not a case in which exemplary damages will be allowed.

Defendant answered that plaintiff's injuries were due to his own fault and negligence, and asked that the suit be dismissed.

There was a trial before a jury, and a verdict and judgment in favor of plaintiff and against defendant in the sum of \$2,000. Defendant has appealed.

Plaintiff has answered the appeal, and has asked for an increase in the judgment to the amount claimed in his petition.

[1] Plaintiff was injured, as has been stated, while heading cotton in close proximity to a float belonging to defendant which was being unloaded. He contends, and introduces evidence to show, that he was in a safe place on the side of, and at a safe distance from, the float; but that the driver, contrary to the method usually followed in unloading cotton from a float, threw a bale off the side of the float, instead of rolling it to the tail, and the bale struck plaintiff and broke his leg. On the other hand, defendant contends that the bale of cotton which struck plaintiff was not unloaded from the side of the float, but from the rear or tail, and that plaintiff should have remained a safe distance away from the float while it was being unloaded, or should have paid attention to what was going on around him.

The evidence on this point, as to whether the bale of cotton was unloaded from the side or not, is conflicting. Four witnesses testified on behalf of the plaintiff that the bale was rolled over the side of the float near plaintiff, who was working to the side of the float; while three witnesses for the defendant testified that it was rolled off the rear or tail, and that defendant was standing near the rear of the float. The jury and

the judge who heard and saw the witnesses accepted the testimony of those who appeared for the plaintiff, and found a judgment for plaintiff. We have examined the testimony, and think that the jury came to a correct conclusion. The judgment, in this respect, will not be disturbed.

[2] The evidence shows that plaintiff sustained a fracture of the lower third of the bone, which is known as the tibia, and a fracture of the upper or middle third of the bone, known as the fibula; the two separating bones in the lower portion of the leg. A radiograph, taken at the time of the trial, a year and a half after the accident, shows the union of the two bones with a deformity; especially of the tibia, and very little of the fibula.

Plaintiff was taken to the Charity Hospital in the city of New Orleans, where he was treated, and a plaster cast was put on his limb. He was sent home the next day, and his attending physician testified, on the trial, that the jointure of the foot and ankle was not perfect; that:

"There is a shortening of the limb. I haven't measured it, but I can tell from his walking there is a shortening; and another thing the ankle joint is impaired. In other words, the functions are not perfect."

He testified that he could not tell how long the disability might continue; but he regarded the injury as permanent, because the ankle could not be restored to its usefulness without being fractured again, and that that was too hazardous to do because it was so near the ankle joint.

We conclude from the evidence that the injury to the leg is greater than that which results from a simple fracture. Plaintiff has been lamed by the accident; and this lameness cannot be cured, according to the testimony of the attending physician. Plaintiff testified that when he attempts to work he is compelled to cease after a short time, because of the great swelling and pain in his limb. Whether this swelling and pain will continue to interfere with his working at his vocation is impossible to say. He was earning on an average \$16 per week before the accident and since that time his average earnings have been \$8.66 per week. He reserved the right, in his petition, to claim further damages for loss of wages, but he has not done so in this suit.

The testimony shows further that plaintiff suffered great pain in body and mind, and he is entitled to recover damages therefor. He is a cripple, one leg being shorter than the other; and this will doubtless interfere with his earning capacity in the future.

Under the circumstances, we think that the verdict is too small, and should be increased.

In the case of *Francois v. Maison Blanche Realty Co. et al.*, 134 La. 215, 63 South. 880, Ann. Cas. 1916B, 451, where the plaintiff suffered a fracture of the foot, which was

mashed or broken down, a rupture and laceration of the ligaments, and permanent injuries to the ankle, and plaintiff could not hold any job where he had to walk or get around, the court increased the verdict from \$2,000 to \$5,052.47. The judgment in this case will be increased from \$2,000 to \$3,500.

During the pendency of this case on appeal, the defendant died; and his widow, Mrs. Sophie Wendling Fabacher, has been appointed executrix of his succession, and she has made herself a party defendant.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by increasing the judgment from \$2,000 to \$3,500 in favor of plaintiff and against Mrs. Sophie Wendling Fabacher, executrix of the succession of Peter Fabacher; and as thus amended it is affirmed. All cost to be paid by defendant.

O'NIEMI, J., is of opinion the judgment should be affirmed.

No. 21469. (140 La. 343)

KING v. NEW ORLEANS RY. & LIGHT CO.

(Supreme Court of Louisiana. Nov. 13, 1916.  
Rehearing Denied Feb. 12, 1917.)

(Syllabus by the Court.)

1. TRIAL  $\S$  13(1)—DOCKET—"EX DELICTO"—STATUTE.

The term "ex delicto," found in Act No. 17 of 1916, p. 47, is used in its ordinary sense, and it does not give rise to any confusion whatever.

[Ed. Note.—For other cases, see Trial, Cent. Dig.  $\S$  32.

For other definitions, see Words and Phrases, First and Second Series, Ex Delicto.]

2. TRIAL  $\S$  18(3) — "PREFERENCE DOCKET"—STATUTE.

The "preference dockets" mentioned in the act are the lists of preference cases prepared by the clerks when the cases are set for trial. The law and the rules of court designate the cases to be tried by preference.

[Ed. Note.—For other cases, see Trial, Cent. Dig.  $\S$  32.

For other definitions, see Words and Phrases, First and Second Series, Docket.]

3. TRIAL  $\S$  13(1)—PREFERENCE DOCKET—ACTION "EX DELICTO" OR "EX CONTRACTU"—PERSONAL INJURIES.

A suit for damages for personal injuries is a suit "ex delicto," and not one "ex contractu."

[Ed. Note.—For other cases, see Trial, Cent. Dig.  $\S$  32.

For other definitions, see Words and Phrases, First and Second Series, Ex Delicto; Ex Contractu.]

4. CARRIERS  $\S$  316(1)—PASSENGERS—PERSONAL INJURY—BURDEN OF PROOF.

Where plaintiff fails to sustain the burden of proof, the suit will be dismissed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig.  $\S$  1261, 1262, 1283, 1285, 1294.]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by Mrs. Janie King against the New Orleans Railway & Light Company.

Judgment for defendant, and plaintiff appeals. Affirmed.

Waguespack & Waguespack, of New Orleans, for appellant. Dart, Kernan & Dart, of New Orleans, for appellee.

SOMMERVILLE, J. [1] This is a personal injury suit, which, on motion by plaintiff, was fixed to be tried by preference under Act No. 17, 1916, p. 47.

Defendant moved the court to recall and reverse the order permitting the case to be tried by preference, on the ground that the act of the Legislature, No. 17, 1916, p. 47, was unconstitutional; being in contravention of articles 31 and 48 of the Constitution. It made a second motion to recall the order fixing the case by preference on the ground that the act of the Legislature of 1916 is inoperative, null, and void for the reason:

"That it fails to define what are actions 'ex delicto.'

"That it requires in all suits on actions for damages arising ex delicto the same shall be placed on the preference docket of all the courts of this state and shall be tried along with such other preference cases as is now provided by law, and said act fails to provide that the courts of the state shall keep a preference docket.

"That this cause is one arising ex contractu as well as from a tort."

On the brief filed in behalf of the defendant it is stated:

"The original application to vacate the order advancing this cause on the docket urged that Act No. 17, of 1916, under which it was advanced, is unconstitutional, being violative of articles 31 and 48. Nothing, however, can be urged against the constitutionality of the act, and the attack upon it on that ground must fail."

The question of the constitutionality of the act of 1916 has thus passed out of the case.

The other ground alleged, that the act of 1916 is inoperative because it fails to define what are actions "ex delicto," is without merit.

The Legislature, in declaring "that in all actions or suits arising ex delicto the same shall be placed on the preference docket of all the courts of this state," used the words "ex delicto" in their ordinary sense and acceptance. The term has a well-defined meaning, and it required no definition on the part of the Legislature. It is in general use. It may be found in the English dictionaries, and might be classed as an English expression. This court in *McGinn v. New Orleans Railway & Light Co.*, 118 La. 811, 819, 43 South. 452, 13 L. R. A. (N. S.) 601, speaking of a similar suit, say:

"Plaintiff's suit is not ex contractu, for damages arising from the violation of a contract, but one ex delicto, for damages for personal injuries based upon an allegation of negligence, and where the act complained of is such as characterizes it as a tort or quasi offense."

[2] The next objection to the act is that it fails to provide that the courts of the state shall keep preference dockets, after ordering that all suits based on actions arising ex

delicto shall be placed upon preference dockets. The rule of this court, No. 10, § 2 (67 South. 1x), provides that:

"Cases entitled to preference shall be fixed for argument by motion," etc.

And section 3 provides:

"The following classes of cases are entitled to preference, and may be fixed for argument by motion, in accordance with section 2 of this rule, to wit: Those to which the state, or any political subdivision, agency, or officer of the state, shall be a party; interdiction appeals; and those involving, affecting or concerning the following matters or any of them, viz.: Contest for public office; the public interest or fisc; the constitutionality or legality of any tax, where the collection of the tax is delayed; the distribution of money in the hands of representatives of successions, sheriffs, and other public officers, receivers, garnishees, and depositaries; the validity of wills; the putting of heirs in possession; demands for separation from bed and board or divorce; claims for alimony; awards of arbitrators, amicable compounders or referees; claims against sureties on judicial bond; injunctions in restraint of writs of execution or seizure and sale; claims for salary, wages or compensation for professional service; suits upon promissory notes, where the answer is a general denial"; and cases on rehearing.

So there is a preference docket in this court, and it was unnecessary for the Legislature to direct that such docket should be kept.

The word "docket" used in the legislative act merely refers to a list or calendar of causes prepared for the use of courts by the clerks. And a preference docket is one prepared by a clerk which contains those cases which are to be tried by preference.

The case at bar is founded on a tort, or wrong; and it arises ex delicto. It was entitled to be fixed by preference, and placed on the preference docket.

[3] The last objection, that the suit is one ex contractu as well as ex delicto and could not therefore be tried by preference under the law, is also without merit. The case arises from an alleged tort on the part of the defendant, while executing a contract of carriage with the plaintiff. The quotation from the *McGinn Case*, supra, holds it to be ex delicto. The contract created and implied by law relative to the duties and liabilities of a carrier is so complete within itself there is no necessity for any additional contract, unless the carrier desires to limit its liability. It has been held that:

"Tort is the natural and habitual foundation of an action for the breach of an ordinary contract of carriage."

Act No. 17, 1916, p. 47, is operative; and it is not null and void for the reason set forth by defendant to recall or rescind the order placing this cause on the preference docket. The motion is denied.

[4] As has been mentioned, this is a personal injury suit for damages sustained by plaintiff as alleged by her through the fault and negligence of the defendant company. The only question is whether the defendant, through its agents and employes, caused the car on which plaintiff had taken passage,

and from which she was about to alight, to stop, upon the signal given by the plaintiff, and then to start before she had an opportunity to alight.

The preponderance of the evidence is to the effect that the car stopped, and that plaintiff alighted therefrom while the car was stopped, and that she fell after she had reached the pavement in safety; and that she then sustained the injuries and bruises of which she complains. As she failed to prove fault and negligence on the part of the defendant, she cannot recover damages. The burden of proof was on her, and she has failed to sustain it. The district court saw and heard all of the witnesses, and was of the opinion that plaintiff failed to make out a case of negligence on the part of the defendant; and plaintiff has failed in this court to point to any error in the findings of the district judge. The judgment of the trial court on questions of fact which is not clearly erroneous will not be reversed by the appellate court.

Judgment affirmed.

(140 La. 848)

No. 21836.

**POLICE JURY OF PARISH OF LAFAYETTE v. MARTIN et al.**

(Supreme Court of Louisiana. June 30, 1916.  
On Rehearing, Feb. 12, 1917.)

(Syllabus by Editorial Staff.)

**1. EMINENT DOMAIN §=166—EXPROPRIATION—HIGHWAY—PROCEEDINGS—STATUTE.**

A parish, having converted one of its public roads into a state highway under State Highways Law (Act 49 of 1910) in a proceeding to shorten the road by expropriating right of way over defendants' land, properly proceeded under the highway law, instead of under Rev. St. §§ 3369, 3370, prescribing special mode of proceeding for expropriating rights of way for parish roads.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 448-450, 456.]

**2. EMINENT DOMAIN §=71—EXPROPRIATION—COMPENSATION—CONSTITUTIONALITY OF STATUTE.**

State Highways Law, § 14, providing that measure of damages to owner of land expropriated for right of way shall be double the assessed value of the property per acre appearing on the last assessment roll, violates Const. art. 187, declaring that private property shall not be taken for public purpose without adequate compensation first paid, as such compensation is to be fixed by the courts according to the facts.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 180-187.]

**3. STATUTES §=64(5)—PARTIAL INVALIDITY—EFFECT.**

The unconstitutionality of State Highways Law, § 14, purporting to fix the measure of damages for land expropriated for right of way, does not invalidate the entire statute of which it is a mere detail.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 62, 195.]

On Rehearing.

(Syllabus by the Court.)

**4. PLEADING §=245(1)—AMENDMENT—NEW CAUSE OF ACTION.**

An amendment changing the allegations or the prayer of a petition, so as to make it disclose a cause of action, where none was originally disclosed, should not be allowed after issue joined, and, still less, after a judgment sustaining an exception of no cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 655, 669.]

Appeal from Eighteenth Judicial District Court, Parish of Lafayette; William Campbell, Judge.

Condemnation proceeding by the Police Jury of the Parish of Lafayette against Adelma Martin and others. Judgment for defendants dismissing the suit, and plaintiff appeals. Affirmed in part, and in part reversed.

C. B. De Bellevue, Dist. Atty., of Crowley (Mouton & De Baillon, of Lafayette, of counsel), for appellant. Crow Girard and John L. Kennedy, both of Lafayette, for appellees.

PROVOSTY, J. [1] Sections 3369 and 3370 of the Revised Statutes prescribe a special mode of proceeding for expropriating rights of way for parish roads.

Article 2630 et seq. of the Civil Code and section 1479 et seq. of the Revised Statutes, as amended by Acts 117 of 1886, and 96 of 1896, provide the mode of proceeding in other cases of expropriation of private property for public purposes.

Interpreting these statutory provisions, this court, in *Fuseller v. Police Jury*, 109 La. 551, 33 South. 597, held that the said sections 3369 and 3370 authorized the taking of only a servitude of passage, whereas these other provisions authorized the taking of the fee itself, or perfect ownership.

Act 49, p. 74, of 1910 (the State Highways Law), provides how parish public roads may become state highways, and may be constructed, improved, and thereafter maintained as state highways, at the joint expense of the state and the parish. Its section 14 provides that:

"In all cases where it is necessary to acquire a right of way in constructing a new highway or changing the location of an old, the right of way thereof shall be acquired by the parish, city, town or village, either by purchase, donation or by expropriation under the general laws of the state relative to expropriation of private property for public purposes, in the event the owner of said property and the governing authorities of such cities, towns or villages, or the state highway engineer should not agree upon the price thereof."

The parish of Lafayette, having converted one of its public roads into a state highway under the provisions of this Act 49, wishes to shorten this road by expropriating a right of way across the 80-acre tract of land of the defendant, along the three sides of which the road runs at present, and has filed the pres-

ent suit for that purpose; and is proceeding under the said article 2630 et seq. of the Code, and section 1479 et seq. of the Revised Statutes, instead of under said sections 3369 and 3370 of the Revised Statutes.

In other words, it is proceeding "under the general laws of the state relative to expropriation of private property for public purposes," as it is directed to do by the said Act 49.

Defendant contends it should have proceeded under the said sections 3369 and 3370, which prescribe a special mode in expropriations for parish roads. The said Act 49 says differently, and we can see no good reason why it should not be held to mean what it expressly and plainly says.

[2] The same said section 14 of said Act 49 of 1910 provides that:

"In expropriating lands for the right of way the measure of damages to such landowner shall be double the assessed value of the property per acre, appearing on the last assessment rolls. This measure of damages shall include the price of the land and all damages that may result to the owner: Provided, however, that if any improvements of the landowner, or any crops upon the land are damaged or destroyed by the location of such highway, then he may recover additional compensation for the actual injury or destruction of such improvements or crops."

Defendant contends that this provision by which the quantum of damages is fixed by the Legislature, or by which a standard is fixed for measuring same, instead of the matter being left to be determined by the courts according to the facts and circumstances of the case, is unconstitutional, as violative of article 167 of the Constitution, reading:

"Art. 167. Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid."

The authorities are agreed that the Legislature cannot fix the amount to be paid in the forced expropriation of property or adopt an arbitrary standard for the measure of it; but that such amount must be left to be determined by the courts from the particular facts of the case. Thus:

Elliott's work on Roads and Streets (2d Ed.) § 257:

"The value of the land is not to be measured by the appraisement put upon it for purposes of taxation."

Lewis on Eminent Domain (2d Ed.) vol. 2, § 448:

"The assessed valuation of the land made for the purpose of taxation is not the market value, and generally it is not to be considered in determining the market value of the property."

See Am. & Eng. Enc. of Law, vol. 10, p. 1154, Title Eminent Domain.

Vol. 15, p. 644:

"While the Legislature is judge of the expediency of the exercise of the right of eminent domain, it is not the judge of the amount to be paid for the property taken." *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463; *Shoemaker v. United States*, 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170.

*St. Louis County Court v. Griswold*, 58 Mo. 175:

"The act of 1874 to establish Forest Park in St. Louis county, providing that in all cases the assessment of the county assessor for the year 1873 shall be taken as a guide in the value of the property to be condemned or appraised, is unconstitutional in so far as it designs that the assessment of 1873 is to be taken as a standard in fixing the compensation, as arbitrarily fixing a value on the property which the owner shall be required to take."

Cooley, *Constitutional Limitations* (4th Ed.) pp. 703, 704:

"The proceeding is judicial in its character, and the party in interest is entitled to have an impartial tribunal, and the usual rights and privileges which attend judicial investigations. It is not competent for the state itself to fix the compensation, though the Legislature, for this would make it the judge in its own cause."

Cyc. vol. 15, p. 872:

"A condemnation proceeding is judicial in its character."

[3] The unconstitutionality of this provision need not, however, entail that of the entire statute, which is an elaborate piece of legislation of which this provision is a mere detail. Evidently, this provision was adopted as appearing to be an easy and practical mode of arriving at the amount to be paid to the expropriated owner. It being omitted from the statute, the ordinary and constitutional mode will be followed. *Wheelwright v. City of Boston*, 188 Mass. 521, 74 N. E. 937, and *Edwards v. Bruerton*, 184 Mass. 529, 69 N. E. 328, are cases directly in point.

The judgment appealed from is affirmed in so far as it holds the provision of said section 14 adopting a standard for ascertaining the amount to be paid defendant to be unconstitutional, but it is otherwise set aside, and the case is remanded to be proceeded with in accordance with the views herein expressed; defendant to pay the costs of this appeal.

#### On Rehearing.

MONROE, C. J. The rehearing having been granted solely upon the question whether the case should have been remanded or dismissed, we confine ourselves to that question.

The prayer of the petition is that the property sought to be expropriated be adjudged to the parish of Lafayette, upon payment into court of such damages as the owners may sustain, in consequence of the expropriation, "not to exceed \$67.60, double the assessed value thereof." The suit was met by exceptions, to the jurisdiction of the court *ratione materię*, of no cause of action, and to the constitutionality of the act under which plaintiff was proceeding, all of which were sustained by the trial court, and plaintiff's demand was rejected, at its cost. In the opinion handed down, we hold that Act 49 of 1910 is unconstitutional in so far as it purports to fix a standard for determining the amount that shall be paid for the property to be expropriated, though not unconstitu-

tional with respect to the provision which vests jurisdiction in the district court; but we also hold that plaintiff's petition discloses no cause of action. From which it follows that, in sustaining that exception, the trial court properly dismissed the suit, since the Code of Practice declares that peremptory exceptions tend to that result. C. P. 343; Hen. Dig. vol. 2, p. 1169, No. 2.

[4] Plaintiff made no attempt to amend either the allegations or the prayer of its petition, but appealed directly to this court, and its learned counsel now think that the case should be remanded in order to give it an opportunity to amend, but we think not. The purpose of the amendment would, necessarily, be to "alter the substance of the demand" and make it "different from the one originally brought," and amendments of that kind are not permitted after issue joined, and, still less, after judgment. C. P. 419; Hart & Co. v. Bowie, 34 La. Ann. 323; National Bank v. Moss & Co., 41 La. Ann. 232, 6 South. 25; Abadie v. Berges, 41 La. Ann. 281, 6 South. 529; Godchaux v. Hyde, 126 La. 187, 52 South. 269. It is hardly necessary to say that a judgment maintaining an exception of no cause of action constitutes no bar to the institution of a suit in which a cause of action is disclosed.

For the reasons thus assigned, it is ordered that the decree heretofore handed down be amended and recast so as to read as follows, and, so reading, that it constitute the final decree of the court, to wit:

The judgment appealed from is affirmed in so far as it holds the provisions of said section 14, adopting a standard for ascertaining the amount to be paid to a defendant in the proceeding authorized by the statute, to be unconstitutional, and is so far as it sustains defendants' exception of no cause of action and dismisses its suit, and it is reversed in so far as it sustains the exception to the jurisdiction of the court, defendants to pay the costs of the appeal, and plaintiff those of the trial court.

(140 La. 854)

No. 21849.

GIBBON et al. v. POLICE JURY OF PARISH OF ST. MARY.

(Supreme Court of Louisiana. June 30, 1916.)

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Thomas M. Milling, Judge.

Action by Miss Kate Gibbon and others against the Police Jury of the Parish of St. Mary. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. C. Baker, Dist. Atty., and Caffery, Quintero & Brumby, all of Franklin, for appellant. Emmet Alpha and Borah, Himel, Bloch & Borah, all of Franklin, for appellees.

PROVOSTY, J. Section 3368, Revised Statutes, providing the manner in which police juries may expropriate rights of way for public

roads, is amended by Act 220, p. 417, of 1914, by the addition of the following provision:

"It shall be lawful for any individual through whose land the police jury shall cause a public road to be laid out, to claim a compensation of double the assessed value of the said land."

The defendant claimed a greater value than this, and contended that this law, in so far as it undertakes to fix the value of the land to be taken, or to fix the standard by which such value is to be determined, is unconstitutional as being violative of article 167 of the Constitution, which reads:

"Private property shall not be taken nor damaged for public purposes without just and adequate compensation being first paid."

This court had occasion to consider this same question precisely in connection with section 14 of Act 49, p. 74, of 1910, in the case of Police Jury of Lafayette v. Adelma Martin et al., 74 South. 170, No. 21836 of the docket of this court, not yet officially reported, and held such a provision to be unconstitutional. That the value of the property taken must be left to be determined from the facts of each particular case. The same conclusion must be adopted here. See the authorities there cited.

Counsel in this case argue that where the Constitution has not prescribed the mode in which the value of the property taken is to be ascertained, the tribunal for ascertaining and declaring this value need not necessarily be the ordinary courts of justice, but may be such other as the Legislature may establish, provided the tribunal thus established proceed judicially after a hearing. We can see no good reason why it should not be so; but that question has not been raised in this case, and hence is not now passed on. No other tribunal than the courts has been provided for in this case, and the defendant is willing that the value of the property should be fixed by the ordinary courts, provided they are left free to adopt such figure as the facts of the case may justify—are not required to abide by the arbitrary rule prescribed by said act of 1910.

Judgment affirmed.

(No. 21305.)

(140 La. 855)

MATHIS v. KANSAS CITY SOUTHERN RY. CO. et al.

(Supreme Court of Louisiana. Oct. 18, 1915.)

On the Merits, Jan. 15, 1917. Rehearing Denied Feb. 12, 1917.)

(Syllabus by the Court.)

On Motion to Dismiss Appeal.

1. APPEAL AND ERROR  $\Leftrightarrow$  389(1)—LITIGATION IN FORMA PAUPERIS.

A person litigating in forma pauperis, under Act No. 159 of 1912, does not cease to be a plaintiff, defendant, or intervener by becoming an appellant or appellee, and is entitled to the benefit of the act on and after, as well as before, the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2072, 2073.]

On the Merits.

2. MASTER AND SERVANT  $\Leftrightarrow$  228(2)—SAFETY APPLIANCE ACT—DEFENSE—CONTRIBUTORY NEGLIGENCE.

Under the federal safety appliance legislation, standard logging cars of a certain description are excepted from the requirement of air brakes, and hence, though a railroad company operate cars of that description without air brakes, it is not thereby precluded from setting up contributory negligence as a defense to an



action in damages for injury sustained by an employé by reason of its alleged negligence in the equipment and operation of a train of such cars.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 871.]

### 3. MASTER AND SERVANT — 246(3) — INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE.

In an action in damages for personal injuries, received in an effort to save property from a danger to which it was subjected by the alleged negligence of another, there can be no recovery where it appears that the injured person exposed himself recklessly, or failed to exercise such care and caution as a reasonably prudent man would have exercised under the same circumstances; the rule in such cases being different from that which obtains where injuries are received in the effort to save human life.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 792, 793.]

Appeal from Twelfth Judicial District Court, Parish of Sabine; J. H. Boone, Judge.

Suit by Mrs. Dottie Mathis against the Kansas City Southern Railway Company and others. Suit dismissed, and plaintiff allowed a devolutive appeal without giving bond for costs. Motion to dismiss appeal overruled, and judgment affirmed.

Hundley & Hawthorn, of Alexandria, for appellant. Alexander & Wilkinson, of Shreveport, and S. D. Ponder, of Many, for appellees.

#### On Motion to Dismiss Appeal.

MONROE, C. J. [1] Plaintiff's suit having been dismissed, she was allowed a devolutive appeal without giving bond for costs, under Act 156 of 1912, which reads in part:

"That any person, who is a citizen of this state, or who if an alien, has been domiciled in this state for three years, shall have the right to prosecute and defend in all the courts of this state all actions to which he may be a party whether as plaintiff, intervener, or defendant, without the previous or current payment of costs or the giving of bonds for costs, if he is unable because of his poverty to pay such costs or to give bond for the payment of such costs. This right to litigate without the previous or current payment of costs or without the giving of bonds for the payment of costs shall extend to all the services required by law in legal proceedings of clerks of court, sheriffs and official stenographers, and to obtaining copies of notarial acts from public officers and notaries and certificates from public officers in respect to records of their officers. \* \* \*

"The judges of the various courts may make such rules for the support and enforcement of this act as are proper and consistent with its provisions: Provided that none of the provisions of this act shall apply to suits for \* \* \* separation from bed and board."

Defendants (appellees) move to dismiss the appeal on the ground that the act is confined in its application to "plaintiff, intervener, or defendant," and does not include an appellant. We reached a different conclusion in the matter of *Adrien Serpas v. St. Bernard Cypress Co.* (not reported), No. 21336 of the docket, in which a motion similar to that under consideration was overruled,

and we adhere to the view, expressed at greater length in that case, that, for the purposes of the act, a litigant does not cease to be a plaintiff, a defendant, or an intervener by becoming an appellant or appellee, and hence that he is entitled to the benefit of the act on and after the appeal as well as before.

The motion to dismiss is therefore overruled.

#### On the Merits—Statement of the Case.

Plaintiff prosecutes this appeal from a judgment rejecting a claim for damages sustained by her in consequence of the alleged negligent killing of her husband by a logging train of the Zwolle & Eastern Railway Company, operated on the main track of the Kansas City Southern Company, it being alleged that the Zwolle Company and the Sabine Lumber Company were interested together, and the three companies having been made defendants. The material facts disclosed by the evidence are as follows:

Decedent was foreman of a section gang in the employ of the titular defendant, and on the day of the accident (September 8, 1914), at about 6 o'clock p. m., was returning, with his men on a hand car after a day's work, to the village of Zwolle. They were aware of the fact that the log train, consisting of a locomotive and 18 loaded cars, was due to return to Zwolle on the same track, and were on the lookout for it, and, when they reached a curve in the road, which began at a point, say 2 miles from Zwolle and ran through a cut, they stopped and looked and listened, but, seeing and hearing nothing of the train, went on until they reached a point, say, 150 or 200 yards beyond the cut, and were running on a straight track, down a rather heavy grade, and upon a "fill" or embankment some 12 feet high, when their attention was attracted by the whistle of the locomotive, which was blown first for a crossing, not far ahead, and then almost continuously as a signal to the hand car to clear the track. The section gang immediately devoted their attention to the stopping of the hand car, which they succeeded in doing, after it had traveled, say, 500 feet, and they then attempted to remove it from the track, and got off three of the wheels, when, finding that the fourth had caught on one of the rails, and that the train was quite near them, they, with the exception of Henry Moore and the foreman, abandoned the work and fled to safety. Moore stayed on the job until the locomotive was within, say, 45 feet, or less, when he, too, quit, and thereupon, when the locomotive was within 20 feet of the car the foreman, who had up to that time been standing by directing the work, sprang forward and took hold of the car, in an apparent attempt to complete its removal, and he, or the car, was instantly struck by the locomotive, and he

was so injured that he soon died. The engineer and others of the train crew testify that they first saw the hand car as the engine came out of the curve at a distance of 150 or 155 yards, and that a crossing whistle was at once blown to warn the section gang; and the engineer testifies that, when he then observed that the section gang were trying to stop the hand car, he blew the danger signals and did all that he could to stop the train, that is to say, he reversed the engine, applied the air brake with which it was equipped and sanded the track, but, there having been no brakes on the log cars, and the train being a heavy one, running on a down grade, he had succeeded only in slowing, and not in stopping, it when it reached the point at which the hand car had been stopped—something less than 1,000 feet from the point from which he had first seen it. Plaintiff's witnesses testify variously that the train came out of the curve at a speed of from 20 to 30 miles an hour, and were unable to say how much, if at all, it had slowed at the moment of the collision. Defendants' witnesses, the engineer, fireman, brakeman, and superintendent, who were on the train, testify that it was moving when coming out of the curve at the rate of 15 or 18 miles an hour, and had slowed down to from 8 to 12 miles when it struck the hand car. Plaintiff placed on the stand two locomotive engineers as experts to show within what distance such a train might have been stopped, if all the cars, as well as the locomotive, had been equipped with air brakes.

One of them (Mr. Barbro) gives the following testimony in his examination in chief, to wit:

"Q. Mr. Barbro, suppose a log train consisting of a locomotive and 18 loaded log cars, going at the rate of 20 to 30 miles an hour, came in sight of a hand car about 800 feet away, going in the same direction; \* \* \* please state whether or not, in your opinion, the log train could have been stopped by the time it reached the hand car, or, if not stopped, about what rate it would have been going. (Objected to on the ground that it is a hypothetical question, based upon a state of facts that has not been proven.) A. Now I will tell you; that depends upon the condition of the grade, the condition of the rails, and the condition of the brakes. Well, I think a man ought to slow down to about 8 miles an hour in 800 feet, but not stop. \* \* \* Q. Now, in about what distance, in your opinion, would the engineer be able to stop the train, if properly equipped with air brakes, and going slightly down grade. A. Between 1,200 and 1,500 feet; them cars are hard to hold."

The witness testified that he had been more than 30 years a locomotive engineer, and had heard of but one lumber company the log cars of which were equipped with air brakes.

The other witness, Mr. Russell, had been a locomotive engineer for eight years, and had heard of no other lumber company whose cars were equipped with air brakes, save the one referred to by Mr. Barbro. He testified that he thought that a train such as described, properly equipped with air brakes, and

moving at 20 or 25 miles an hour, could be stopped within 800 or 1,000 feet, and that, going down a slight grade, it could be slowed within 800 feet to 5 or 6 miles an hour.

It was shown by defendants' witnesses that the grade of the track where the accident occurred was 1 per cent., and that 1 per cent. was a heavy grade. It was shown that it was the duty of the section foreman to keep a lookout for trains and keep the track clear for their use; and we infer that it was well known to him that the cars of the log trains were not equipped with air brakes.

#### Opinion.

Plaintiff's counsel seem to rely upon the propositions: (1) That defendants were operating the train which inflicted the injury complained of over a railroad engaged in interstate commerce in violation of the provisions of the acts of Congress requiring the cars constituting such trains to be equipped with air brakes and declaring that a railroad company which has failed to comply with that requirement shall not be heard to interpose the plea of contributory negligence; (2) that, apart from the requirement mentioned, it was gross negligence to operate a heavy train without making adequate provision for stopping it in case of emergency; (3) that, where one is placed, through the negligence of another, in a position of sudden peril, and thereby sustains injury, he cannot be charged with contributory negligence by reason of his failure to exercise the better judgment which he might have commanded under other conditions.

[2] The safety appliance legislation to which counsel refer contains an exception (embodied as a proviso in Act March 2, 1893, c. 196, § 6, 27 Stat. 532 [U. S. Comp. St. 1913, § 8610]) which reads as follows:

"Provided, that nothing in this act \* \* \* shall apply to trains composed of four wheel cars or to trains composed of eight wheel standard logging cars where the height of each car, from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs."

[3] We understand from the evidence and from the argument of plaintiff's counsel that the engine and cars here in question were within the above description and exception, from which it follows that defendants were not in the position of having failed to comply with the requirement of the statutes, and hence are not precluded from setting up the plea of contributory negligence, which, as we think, is determinative of the case; for, while it is not made clear that the speed of the train was unusual or excessive, it is shown beyond controversy that the section foreman was aware of its approach in ample time to have enabled him to get out of the way, and that he did, in fact, get out of the way, and stood in a place of safety until the

last man of his gang had abandoned the attempt to get the hand car off the track, and, then, when the locomotive was within 20 feet of the car, sprang forward and took hold of the car, and in that same instant was struck by the locomotive, from which it also follows that the argument, predicated upon the theory that he acted under the impulse of a sudden danger to which he was subjected by reason of the negligence of the defendants, is inapplicable to the situation. It is said, however, that he must be presumed to have acted from a humane desire to protect the members of the train crew, and we find the following in counsel's brief, to wit:

"Who can tell but that he might have suddenly realized that this locomotive was weighted down by a precious charge of human freight; that among those who might in an instant be dashed into eternity was his friend Gill Smith."

According to the evidence in the record, about all that was said by the unfortunate man after the accident was in the way of a request for water, complaints of suffering, and the statement to one of plaintiff's witnesses, "I tried to save my car," and, as several railroad men of long experience testified that they had never heard of a train being wrecked by a collision with a hand car, and that the presence of such a car upon the track was not regarded as a serious danger to a train, for the reason that the pilot of the locomotive will ordinarily go underneath it and throw it off, we conclude that the decedent was actuated by no other purpose than that stated by him, and which, though laudable in itself, did not call for any imminent risk of either life or limb, and still less for the apparently desperate and hopeless venture described by the witnesses, which, and not the negligence attributed to defendants, cost him his life. If it were made certain that the train crew were in immediate danger by reason of the position of the hand car, that decedent's attempt was inspired by the desire or impulse to save them, and that the danger had not been caused or contributed to by his negligence, the case might still be within the rulings which have been made in a number of cases where recovery has been allowed. But, according to our understanding of the evidence, the decedent was at fault in bringing about or contributing to bring about the situation which culminated in the accident. He knew that the train was expected, and that it had the right of way, and, moreover, that it was his duty, as section foreman, to clear the right of way for the train, and he was at fault in placing himself, his gang, and his car in a position where he could not properly discharge that duty, so that, even if he had been injured in an effort, under these circumstances, to save the lives of the train crew, the necessity therefor would have arisen from his own negligence, in whole or in part. But the danger to the train crew was

not imminent, and, as it appears to us, the decedent risked and lost his life in an effort to save the hand car, and, as it was he who had put the hand car in danger, there can be no recovery on account of the injury sustained by him in that effort. On the other hand, though it be conceded that the danger to the hand car was not caused by his negligence, the rule (so far as it may be considered established) in regard to the risk that one may take for the saving of property is different from that which is applied where the saving of life is involved. When the question is one of saving property:

"It is necessary," say the authorities, "that the person injured should have acted with such care and caution as a reasonably prudent man would have exercised under the same circumstances; it being insufficient to show merely that he did not act recklessly. A few cases take the contrary view and hold that a person who voluntarily places himself in a position of danger simply for the protection of property is negligent so as to preclude recovery for injury received." 29 Cyc. 524.

We find no error in the judgment appealed from, and it is accordingly affirmed.

No. 22092.

(140 La. 368)

LANAN v. JOHNSON, Sheriff, et al.

(Supreme Court of Louisiana. Jan. 15, 1917.  
Rehearing Denied Feb. 12, 1917.)

(Syllabus by the Court.)

ABSENTEES **§** 7 — PROCESS — SUBSTITUTED SERVICE.

In a case of substituted service on an absentee the record must show that citation and copy of petition were served on the regularly appointed curator ad hoc.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. **§** 14-19.]

Appeal from Sixth Judicial District Court, Parish of Ouachita; Ben C. Dawkins, Judge.

Action by John Lanan against D. A. Johnson, Sheriff, and others. Judgment for plaintiff in part, and he appeals. Affirmed in part, and in other respects reversed, and plaintiff's case dismissed as in case of nonsuit.

A. A. Gunby, of Monroe, for appellant. Hudson, Potts, Bernstein & Sholars, of Monroe, and Dale, Young & Dale, of St. Joseph, for appellees.

SOMMERVILLE, J. Plaintiff, a resident of Illinois, alleging himself to be the owner of lots 2 and 3 of Swenson's subdivision of Bosco plantation in Ouachita parish, La., and that the sheriff of said parish has seized and will sell his property to satisfy a judgment rendered in the case of Burroughs Land Company (of Iowa) v. Frederick Deiser (of Chicago, Ill.), asks that the Burroughs Land Company and Deiser be cited, through curators ad hoc, that the judgment in favor of the company against Deiser be declared null and void for the reasons stated in his petition,

and that an injunction issue enjoining the sheriff from selling his property. A preliminary injunction was issued.

The district judge appointed a firm of lawyers, Hudson, Potts, Bernstein & Sholars, to represent both of the absentees, Burroughs Land Company and Deiser, plaintiff and defendant, in the suit wherein the judgment is attacked in this cause.

Messrs. Hudson, Potts, Bernstein & Sholars do not appear to have accepted the appointment of curator ad hoc to the plaintiff or defendant in the case of the Burroughs Land Company or Deiser. On the contrary, they, the attorneys, filed an exception in their own names to the citation directed to said firm as curator ad hoc and the order appointing it as curator ad hoc to represent the Burroughs Land Company, and asked that the citation directed to it as curator ad hoc for the Burroughs Land Company might be annulled and quashed.

The record fails to disclose whether or not a citation issued to the law firm as curator ad hoc of Deiser. And it does not appear what disposition was made of the exception filed by Messrs. Hudson, Potts, Bernstein & Sholars. Default was entered as to all defendants.

Subsequently the Burroughs Land Company filed an answer through its counsel, Hudson, Potts, Bernstein & Sholars.

The trial was proceeded with against the Burroughs Land Company and the sheriff; but Deiser does not appear to have been cited; he made no appearance, and the default taken against him was not confirmed.

There was judgment rejecting and dismissing the demands of plaintiff—

"save and except the prayer for injunction in so far as the demand for the same is based upon the illegality of the writ of fieri facias, because of the failure of the clerk of the court to impress and affix the seal of the court upon said instrument.

"It is further ordered, adjudged, and decreed that the said writ of fieri facias be quashed and annulled because and on account of the said omission and failure to impress and affix the seal of the court thereto, and that the injunction herein sued out be sustained only in so far as the same is prayed for on account of the said omission and failure to impress and affix the said seal, and that the said injunction in all other phases and in its other parts be and the same is hereby dissolved.

"It is further ordered that D. A. Johnson, sheriff, proceed to advertise and sell the property, the sale of which was enjoined herein, under the alias writ heretofore issued subsequent to the issue of the writ of fieri facias, which is herein quashed and annulled.

"It is further ordered that the plaintiff, John Lanan, do have and recover judgment of and against the Burroughs Land Company in the full sum of \$25 as damages for attorney's fees incident to the injunction herein sued out.

"It is further ordered that the defendant Burroughs Land Company, do pay all costs of this suit."

Plaintiff only has appealed.

The land in question was at one time the property of the Killoden Planting Company,

a corporation domiciled in Louisiana, which sold it, May 1, 1913, to Frederick Deiser, in an act of sale containing the pact de non alienando. The credit portion of the selling price was evidenced by three notes of \$1,000 each, which were secured by mortgage and vendor's lien. The act was recorded on May 17, 1913.

May 20, 1913, Deiser sold to plaintiff, John Lanan; and, as part of the purchase price, Lanan assumed the three notes issued by Deiser in favor of the Killoden Company.

The Burroughs Land Company alleged that it acquired two of the notes referred to, and sued via ordinaria upon them in suit against Deiser, No. 8781, in the Sixth judicial district court of Ouachita parish, July 2, 1915. R. V. Randle was therein appointed curator ad hoc to represent the absent defendant Deiser. Randle does not appear to have accepted the appointment in that case.

The record is silent as to who was served with the citation and copy of petition in the cause.

A writ of fieri facias was therein issued, and it and the notice of seizure were addressed to Deiser, the defendant, and they were served upon him in person in the city of Monroe, December 13, 1915. Subsequently, February 21, 1916, a notice of seizure under an alias writ of fieri facias was issued and served upon Robert V. Randle, as curator ad hoc of Frederick Deiser.

But the substituted service upon an absentee is not the service of a notice of seizure under a writ of fieri facias. It is required that the citation and copy of petition be served upon the person substituted in an ordinary proceeding. In this case the Burroughs Land Company was proceeding via ordinaria to collect the notes held by it and secured by a mortgage bearing upon the property which Deiser, an absentee, had transferred to Lanan. In such case the record should show that the copy of the petition and citation were served upon the duly appointed curator ad hoc.

There are other nullities charged by Lanan in the proceedings and judgment in the case of the Burroughs Land Company v. Deiser, but they will not be passed upon, as the validity of those proceedings and the judgment cannot be disposed of in a suit when all the parties to that suit are not before the court. Deiser, the defendant in that case, has not been cited and served as one of the defendants in this case, either personally or through a curator ad hoc.

A judgment of nonsuit should have been entered.

As the Burroughs Land Company has not appealed, that portion of the judgment against it for \$25 will not be disturbed.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed as to the award of \$25 and costs in

both courts, and that in other respects it be reversed, and plaintiff's case be dismissed as in case of nonsuit, at his cost in both courts.

(140 La. 867)

No. 20792.

BRYCELAND LUMBER CO., Limited, v.  
KERLIN et al.

(Supreme Court of Louisiana. Feb. 12, 1917.)

(*Syllabus by the Court.*)

APPEAL AND ERROR  $\Leftrightarrow$  434—TRANSCRIPT—REVERSAL.

Where the appellant filed the transcript of appeal in the Supreme Court, but made no other appearance therein, the judgment will be affirmed, where the record discloses no manifest error of fact or of law sufficient to warrant the reversal of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2183.]

Appeal from Third Judicial District Court, Parish of Bienville; J. E. Reynolds, Special Judge.

Action by Bryceland Lumber Company, Limited, against T. J. Kerlin Lumber Company, Limited, in solido. Judgment in solido for plaintiff against the answering defendant T. J. Kerlin, and against the defendant company by default, and defendant Kerlin prosecutes a devolutive appeal. Affirmed.

Wimberly, Reeves & Dormon, of Shreveport, for appellant. Goff & Barnette, of Arcadia, for appellee.

LAND, J. Plaintiff sued T. J. Kerlin and the T. J. Kerlin Lumber Company, Limited, in solido to recover the sum of \$3,595.77, with legal interest thereon from March 17, 1911, until paid, on a cause of action which, as alleged, may be briefly stated as follows:

That T. J. Kerlin, acting as manager of the plaintiff company, on March 17, 1911, without authority so to do, issued its voucher payable to F. A. Goodrich for \$12,000, of which \$3,402.23 was justly due, but the balance of \$3,595.74 was not in any way owing by said company to the said Goodrich, and that said balance was misused and misapplied to the payment of a debt due by the defendants to said Goodrich, and for which the plaintiff was in no wise liable and responsible.

That on February 2, 1911, an agreement was made between the said defendants and F. A. Goodrich for the organization of the Bryceland Lumber Company, and the purchase by it of all the property of the T. J. Kerlin Lumber Company, and there was attached to said agreement a list of the liabilities of said company, which the Bryceland Lumber Company was to assume, not including, however, a liability of \$3,595.77 due by the said T. J. Kerlin Lumber Company for state and parish taxes for the year 1910.

That between February 2, 1911, and March 9, 1911, when the new company commenced

to do business, the said Kerlin and Kerlin Lumber Company obtained advances from the said Goodrich to the amount of \$12,000, to be used in the payment of debts which the Bryceland Lumber Company was to assume, and the said Kerlin and Kerlin Lumber Company wrongfully used \$3,595.77 of said advances in paying the taxes aforesaid, and the said Kerlin, acting as general manager of the plaintiff company, wrongfully issued its voucher for \$12,000 to the said Goodrich as aforesaid.

That T. J. Kerlin was, at the time of the sale of the T. J. Kerlin Lumber Company to the plaintiff company, the owner of all the stock of the T. J. Kerlin Lumber Company, and took the entire proceeds of the sale of its property, and is therefore liable for all of its debts.

T. J. Kerlin answered, denying in detail all the material allegations of the petition.

The same defendant also filed a plea of estoppel, based on the pleadings of a former suit brought by the plaintiff against the same defendant. The T. J. Kerlin Lumber Company was cited, but made no appearance.

The cause was tried on default as against the said company, and judgment was rendered in solido against both defendants as prayed for in the plaintiff's petition.

T. J. Kerlin prosecuted a devolutive appeal from said judgment, and filed the transcript of appeal, but has filed no brief, or made any other appearance in this court.

It is the duty of the appellant to point out any error of law or of fact on which he may rely, in printed briefs seasonably filed as required by the rules of this court. If the appellant files no briefs, the presumption is that he is unable to assign any error of fact, or of law, which he deems sufficient to warrant the reversal of the judgment.

We have, however, gone over the record, and find no manifest error of law or of fact made by the judge below.

Judgment affirmed.

(140 La. 870)

No. 21528.

MERTZ v. DI GIORGIO.

(Supreme Court of Louisiana. Feb. 12, 1917.)

(*Syllabus by Editorial Staff.*)

ASSAULT AND BATTERY  $\Leftrightarrow$  35—CIVIL ACTION—EVIDENCE—SUFFICIENCY.

In an action for assault and battery and abusive language, evidence held to sustain a judgment for plaintiff on whose premises the difficulty occurred, notwithstanding defendant's claim that plaintiff was the guilty party.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 51.]

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by Elizabeth Mertz against Vito Di Giorgio, for assault and battery and abu-

sive language. Judgment for the plaintiff, and defendant appeals. Affirmed.

A. J. Rossi, of New Orleans, for appellant. James Barley Rosser, Jr., of New Orleans, for appellee.

PROVOSTY, J. Mrs. Mertz sues Mr. Di Giorgio for assault and battery and abusive language. He retorts that the thing is just the other way. Her house and his corner grocery and saloon are about ten feet apart, with a board partition midway between, extending, like the houses, to the sidewalk. On each side of this partition is an alleyway closed at the sidewalk by a door. The encounter was in her alleyway, at the door of her kitchen. She says he held his fist under her nose and called her bitch and whore, and would not leave her premises, and she sought to make him leave by using the stick end of her broom upon him, when he wrenched the broom out of her hands and beat her with it, following her in doing so into her kitchen. His side of the story it is needless to give, since the trial judge did not believe it, and we find no reason for disagreeing with him. Out of the din of the conflicting witnesses one fact stands prominent: The two homes had not been on good terms, and it was her premises which were invaded.

The judgment for \$250 is affirmed, with costs in both courts.

(140 La. 871)

No. 20817.

ROYAL v. NEW ORLEANS RY. & LIGHT CO.

(Supreme Court of Louisiana. Feb. 12, 1917.)

(Syllabus by Editorial Staff.)

STREET RAILROADS  $\S$  114(1) — INJURIES TO WAGON DRIVER—EVIDENCE—CAUSE OF INJURY.

In an action for injuries resulting in death to the driver of a wagon when the end of a street car which was turning a curve swung out from the tracks and struck his wagon a glancing blow, evidence held not to show that deceased received any injuries from the collision.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig.  $\S$  239.]

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by Celestine Royal, widow of Anthony Lawson, against the New Orleans Railway & Light Company. Judgment for the defendant, and plaintiff appeals. Affirmed.

A. A. Calongne and A. J. Peters, both of New Orleans, for appellant. Dart, Kernan & Dart, of New Orleans, for appellee.

PROVOSTY, J. The outer and inner bound street railway tracks of the defendant company on the neutral ground along the middle of Canal street are connected at the end of the street, near the Louisville & Nashville Railroad depot, by a curve around the monument in the middle of the street. This curve is necessarily sharp, so that when the long cars are on it their ends swing out a considerable distance. The rear end of one of the cars, in swinging out in this way, struck the hind wheel of a one-horse, no-top, spring wagon, which the 72 year old husband of plaintiff was driving on his way to the depot with a trunk, a child on the driver's seat with him, and a little grandson, 13 years old, on the trunk back of him. The latter says, of the collision: "It busted the seat, and he (the old man) went back and hit the trunk." This concussion, according to plaintiff, caused the old man to take to his bed on reaching home, and brought on the paralysis of which he died seven months later. We cannot accept that explanation of the old man's illness and death, for the very good reason that two of the prominent business men of this city, one of whom was on the step of the car and had to spring back in order not to find himself between the car and the wagon, and the other of whom was in the rear door of the car, who were produced by plaintiff as witnesses, testified that the collision was but slight, did not cause the old man to let go of the reins or leave his seat, but at most may have shaken him up a little. The undisputed fact is that he never stopped, but kept on his way as if nothing had happened. There is conflict in the evidence as to the old man's taking to his bed having coincided with the accident, and also as to whether it was the car that caught up with the wagon, or the wagon with the car, which latter is not improbable from the fact that, in engaging the curve, the car had to slow up in order not to jerk the trolley from the wire. If it was the wagon that caught up with the car, the accident would, of course, have been brought on by the old man himself; but, in the contrary event, we are not so clear that the failure of the motorman to foresee that the rear end of his car in swinging out might thus graze the wagon (for the contact was little more than a grazing) would constitute negligence; nor that, if it did constitute negligence, the old man, whose life occupation was the driving of this wagon on the streets, should not have known of the danger of coming too close to the car track at this curve, and not exposed himself to it.

The suit is for injury to the old man, and we find that there was none.

Judgment affirmed.

$\S$  For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(140 La. 873)

No. 20878.

**WALLACE v. TREMONT & G. RY. CO.**(Supreme Court of Louisiana. Jan. 15, 1917.  
Rehearing Denied Feb. 12, 1917.)*(Syllabus by the Court.)***1. MASTER AND SERVANT §163(1)—MASTER'S DUTY—NUMBER OF SERVANTS.**

It is the duty of a master to see that the number of servants engaged on any particular work is sufficient to secure the reasonable safety of each one of them.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 828, 329.]

**2. MASTER AND SERVANT §101, 102(1) — MASTER'S DUTY — TOOLS, APPLIANCES AND PLACE FOR WORK.**

The duty of a master to furnish proper tools, appliances, and a safe place, embraces human instrumentalities and mechanical devices.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171, 178, 179.]

*(Additional Syllabus by Editorial Staff.)***3. MASTER AND SERVANT §112(2) — INJURY TO SERVANT—NEGLIGENCE.**

Where it appeared that the cross-ties at the place of the accident were decayed, and that the passing of the train over the joint in the track in that place caused a "low joint" and the cars to rock in going over it, the master was liable for injury to a brakeman falling or jolted from a car he was climbing.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 212, 219.]

**4. DEATH §99(4)—DAMAGES.**

In an action by the widow of a brakeman for damages for his death, where it appeared that deceased was a young man, earning from \$60 to \$75 a month, married, and with one child, a verdict of \$9,000 would not be reduced.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 125, 126, 129.]

Appeal from Fifth Judicial District Court, Parish of Winn; W. L. Bagwell, Special Judge.

Action by Mrs. Ada Machen Wallace against the Tremont & Gulf Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Stubbs, Theus & Grisham, of Monroe, for appellant. Hundley & Hawthorn, of Alexandria, for appellee.

SOMMERVILLE, J. O. K. Wallace, husband of the plaintiff, while employed as brakeman of the defendant, received fatal injuries from which he died within 12 hours; and this suit is for damages, under allegations of negligence on the part of the employer on the ground that the train crew was insufficient in number, and that the track over which the train was being operated was defective. The answer admits the injury and death, but denies that the accident was occasioned by any fault or negligence on the part of the defendant, and avers that same was occasioned by negligence on the part of plaintiff, with the additional allegation of assumed risk.

There was judgment in favor of plaintiff and against defendant in the sum of \$9,000; and the defendant has appealed.

The train upon which the deceased was serving as a brakeman was a mixed train, running from Tremont, La., to Winnfield, thence to Rochelle, then going back over a portion of the same line running between Tremont and Winnfield to a junction point known as Minnifee, then to Tremont, on the same day.

While at Minnifee, it appears that some switching became necessary to make up the train, which was a mixed one composed of both passenger and freight cars, upon which the deceased was acting as brakeman.

The evidence shows that prior to the time of the accident two brakemen had been employed on this mixed train; but, on the day of the accident, the second brakeman failed to arrive on time, and the train was ordered to move without the second brakeman. The evidence further shows that there was work for two brakemen on the train, and that the train crew was insufficient in number because of the missing brakeman.

T. J. Roberts, yardmaster of the Louisiana & Arkansas Railroad, testified on behalf of plaintiff that the necessary crew to handle a mixed train, like the one in question, would be two brakemen, conductor, engineer, and fireman. And, asked why two brakemen instead of one were necessary, he said:

"If the man had a car to set out—suppose a man had a car to cut out on a curve, if one man had to do it, the engineer could not see him give the signal, but if there were two and they had a car to set out, one man could cut it off and the other man would set it."

De Loach, conductor on the Louisiana Railway & Navigation Company, testified: That one brakeman was not sufficient to operate a mixed train, "because the work the railroad company requires you to do on such routes is such that you must have a full crew." That if he did that work for 12 hours, "he would be all in at that time—I would. He would be all in before that time." That it was necessary to have two men, because, "one man cuts the cars off, uncouples the cars, and another man throws the switch; and if it is on a grade, one of them will have to go on top and set a brake." Asked whether he had ever been a conductor on a mixed train which used only one switchman, he answered, "Never in my life." When asked whether a mixed train might be operated with one brakeman in safety, he replied: "Well, sir, I say it cannot be operated with safety with one man, and I never worked for a road that did that."

[1] The absence of the second brakeman of the train crew was known to the train dispatcher of the defendant company, and the mixed train was sent out without this second brakeman. The evidence is clear on the point that the work requires that there

should have been two brakemen in the crew; and that the crew with only one was insufficient.

In the case of *Hill v. Lumber Co.*, 108 La. 162, 32 South. 372, 58 L. R. A. 346, while an employé was temporarily absent through accident, and a fellow workman's life was thereby endangered, the court say, in part:

"It will not do for defendant corporation to argue it had enough men behind the edger to do the work there. It was its duty to have had a sufficient number of men there, not only to do the work, but to do it with safety to those working in front of the edger.

"If Adam Cosman could not leave his post for five minutes without danger and death attending on his absence, the master should have provided against that contingency. There should have been an extra man there for just such purpose."

[2] In a similar case, where loaded coal cars in a mine got beyond control, owing to there being one man in charge instead of two, the Supreme Court of Virginia held the company responsible in damages. *South West Improvement Co. v. Smith*, 85 Va. 306, 7 S. E. 365, 17 Am. St. Rep. 59. It is well recognized that it is as much the duty of the master to furnish a sufficient number of servants to perform the duties assigned to them in a reasonable manner as it is to furnish them with a reasonably safe place in which to labor. It is the duty of a master to furnish proper tools and appliances for the safety of his employées, and this includes human instrumentalities as well as mechanical devices. *Hyland v. Telephone & Telegraph Co.*, 70 S. C. 315, 49 S. E. 879; *Illinois Central R. R. Co. v. Langan*, 116 Ky. 318, 76 S. W. 32, 25 Ky. Law Rep. 500; *Chesapeake & Ohio Ry. Co. v. Board*, 25 Ky. Law Rep. 1118, 77 S. W. 189; *Peterson v. American Grass Twine Co.*, 90 Minn. 343, 96 N. W. 913; *Hilton v. Fitchburg R. R. Co.*, 73 N. H. 116, 59 Atl. 625, 68 L. R. A. 428; *Denver & R. G. R. R. Co. v. Reiter*, 47 Colo. 417, 107 Pac. 1100; *Brown v. Rome Machine Co.*, 5 Ga. App. 142, 62 S. E. 720; *Standard Sanitary Mfg. Co. v. Minor*, 33 Ky. Law Rep. 972, 112 S. W. 572; *Melly v. St. Louis & S. F. Ry. Co.*, 215 Mo. 567, 114 S. W. 1013; *Di Bari v. J. W. Bishop Co.*, 199 Mass. 254, 85 N. E. 89, 17 L. R. A. (N. S.) 773, 127 Am. St. Rep. 497; *Coughlan v. Philadelphia, B. & W. Ry. Co.*, 6 Pennewill (Del.) 242, 67 Atl. 148; *Penn. Co. v. McCaffrey*, 139 Ind. 430, 38 N. E. 67, 29 L. R. A. 104.

[3] The evidence shows further negligence and fault on the part of defendant company. At the place of the accident it is shown that some of the ties were decayed to such an extent that the rails dipped while the cars were passing over them; and, it is to this dipping and jostling that the deceased attributed the accident which befell him, and which resulted in the loss of his life. Portions of the cross-ties under the tracks, where the tracks were joined at the place of the accident, were produced in court, and they showed very great decay. Two witness-

es testified that they went to the place and saw the passing of a passenger train as it went over that point in the track; and they testified that the rails dropped there when the train passed over it. The witnesses for the defendant testified "that the engine (in passing over the point) didn't rock much." But, it did rock; and this made it an unsafe place for the deceased to have worked in.

The surgeon of the defendant company testified as a witness for that company, and said:

"I asked him (the deceased) how it happened, and he prefaced his remarks by saying, 'Blank carelessness.' He told me that they had some cars to set out, and he got on the cars to ride them back to where they were going to set them out, and going on back he had one foot on the journal box and was holding onto the iron of the car, and that the car jolted for some reason; he didn't know what, and he slipped off. I asked him if he had both feet on, and he said he had one foot on the journal box and was trying to cut off the air with the other. I asked him if there were a bad track, and he said he didn't know; that something jarred him loose and he slipped off. He said it was something which caused his foot to slip off, and he supposed the car jolted."

The plaintiff testified that the deceased had made a somewhat similar statement to Dr. Peters, after the deceased had been taken to his home. She says:

"He said that he had uncoupled the car, and had started up to apply the brakes, and that when he put his foot on the journal to climb up on the car the car dropped down from some cause and threw him over."

The evidence is positive that the cross-ties at the place of the accident were in a very decayed condition, and that the passing of the train over the joint in the track at that place caused the joint known as a "low joint," and that the cars rocked in going over it. The deceased attributed the accident to the rocking or jarring of the car that he was attempting to climb at the time of the accident; and defendant is clearly responsible for what happened to the deceased at that unsafe place.

"Railroad companies should provide safe roadbeds, the cross-ties should be sound and the rails strong and securely laid." *Syllabus, McFee v. Railroad Co.*, 42 La. Ann. 790, 7 South. 720; *Rutherford v. Railroad Co.*, 41 La. Ann. 793, 6 South. 644; *Fuller v. Tremont Lumber Co.*, 114 La. 266, 38 South. 164, 108 Am. St. Rep. 348. In the latter case it is said:

"A railroad company must maintain a safe roadbed, undecayed and sound cross-ties, and see that the rails are in their proper position and level; \* \* \* or else, in case of an accident growing out of its unsafe condition which caused injury, it will be liable."

[4] The district judge has allowed plaintiff the sum of \$9,000, which he says is in line with the decision of this court in *Cross v. Lee Lumber Co.*, 130 La. 66, 57 South. 631.

The deceased was a young man, earning from \$60 to \$75 a month; married, with one



child. The child is not a party plaintiff in this litigation.

The amount allowed by the district judge is, in our opinion, about fair. In the case of *Dobyns v. Yazoo & Mississippi Valley R. R. Co.*, 119 La. 72, 43 South. 934, where the deceased was a railroad conductor earning about \$100 a month, the court reduced the verdict from \$25,000 to \$10,000.

In the case of *Elchorn v. New Orleans & C. Ry., Light & Power Co.*, 112 La. 236, 36 South. 335, 104 Am. St. Rep. 437, the sum of \$10,000 was allowed the plaintiff for the death of her husband, who was earning from \$200 to \$250 a month, and was 39 years of age.

In the more recent case of *Broussard, Widow, v. Louisiana Western Ry. Co.*, 140 La. 517, 73 South. 606, the court allowed the widow \$5,000, and each of the children \$2,000, making a total of \$15,000.

There is no sufficient reason apparent why the judgment of the lower court should be reduced; and it will be permitted to stand.

Affirmed.

(140 La. 379)

No. 22155.

VEAL v. VEAL.

(Supreme Court of Louisiana. Feb. 12, 1917.)

(Syllabus by the Court.)

DIVORCE — 27(1, 2)—SEPARATION FROM BED AND BOARD — CRUEL TREATMENT — SINGLE INSTANCE.

There is no unqualified rule in the jurisprudence of Louisiana that only one instance of cruel treatment of the wife by the husband is not a sufficient cause for her to obtain a decree of separation from bed and board. Her right to the decree on that ground depends upon whether the cruel treatment was of such a nature as to render her living with her husband intolerable or insupportable. In the determination of that question the court will consider not only the nature and extent of the cruel treatment, but the character and mode of living of the wife and whether there was provocation for the ill treatment.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 62, 63, 76, 81, 82.]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by Mrs. Rose J. Veal against Garland H. Veal. From judgment denying a decree of separation from bed and board, plaintiff appeals. Judgment annulled and reversed, and decreed that plaintiff be granted separation from bed and board.

Solomon Wolff, of New Orleans, for appellant. Edgar M. Cahn, of New Orleans, for appellee.

O'NIELL, J. The plaintiff has appealed from a judgment denying her a decree of separation from bed and board.

Her demand is based upon the allegation that her husband defamed her and was guilty of such outrages and cruel treatment

of her as to render their living together insupportable.

She alleged in her petition that during the nine years of their married life she had conducted herself properly, had done everything in her power to make the home comfortable and happy, and had not given her husband any cause or provocation for ill treatment. In a supplemental petition she referred particularly to an occurrence on the 24th of July, 1914, when, as she alleged, the defendant abused and struck her.

In his answer the defendant denied that he had ever struck or abused the plaintiff or had been guilty of any outrages or cruel treatment towards her; and he denied her allegations that she had always conducted herself properly, had done everything in her power to make the home comfortable and happy, and had not given him cause or provocation for ill treatment.

The case was tried before the passage of the Act No. 157 of 1916, permitting the husband and wife to testify for or against one another; hence we have not the testimony of either of them.

The only witness to the quarrel on the 24th of July, 1914, was the plaintiff's sister, Miss Marie Tatum, who resided in the home of Mr. and Mrs. Veal. She testified that she was there when they returned home quarreling, at about 6:30 that afternoon. When the witness opened the door for them, she heard the plaintiff say to her husband:

"I don't think I will ever speak to you again, because I never get a kind word from you."

Thereafter the plaintiff went on the porch where her husband was and asked him to come in to dinner. He remained on the porch, and, when the plaintiff went out again and asked him to dinner, he cursed her. When the witness and the plaintiff had dined and cleared off the table, Mr. Veal came in and told his wife he was going out that night. The witness also had an engagement to go out that night. Being afraid or unwilling to remain alone in the house, the plaintiff said to her husband:

"Garland, I am going up to see some friends, because you said you wouldn't be here, and I can't be left alone in the house."

He cursed her and replied that he presumed she was going out with some man. To which she replied:

"No; you can accuse me of anything else, but not of anything of that kind. From now on you get your lawyer and I will get mine."

She went upstairs very nervous and excited, where her husband followed her and the quarrel continued. Again cursing her, and saying he would end it all, he grabbed his wife by the throat and threw her into the corner of the room. The witness took hold of him and pulled him off of his wife. Continuing his cursing he left the room, and the witness immediately locked the door. He tried to re-enter the

room, and the witness screamed "Murder!" The plaintiff had fallen back into a chair, exhausted from the violence inflicted upon her. The witness then went to the window and called to a woman living next door to come to her assistance. The neighbor came immediately, and Mr. Veal then left the house. The plaintiff remained in the same house with Mr. Veal six days after that occurrence, but there was no reconciliation between them.

The neighbor who was called to the assistance of the plaintiff by Miss Tatum corroborated the latter's testimony. She said she heard a terrible scream, and her children asked her what it was. She said she thought it was some bad boys in the street. Then she heard her name called; and, going to the window, she recognized the voice of Miss Tatum, appealing to her to "please come over." Responding to the call, she met Mr. Veal as he was leaving the house, and asked if his wife was sick. He invited her in, telling her that the ladies were upstairs, and he immediately left.

The only testimony offered to contradict that of Miss Tatum and of the neighbor who responded to her call was that of another neighbor, who testified that he was at his home on the night of the occurrence in question, and did not hear the screaming or anything of the difficulty. He admitted, however, that Mr. Veal told him of the incident the next morning; and he admitted that it was possible for the lady next door to the Veal home to have heard the screaming without his hearing it. His residence and the Veal residence were situated back to back, facing in opposite directions, on parallel streets. The residence of the neighbor who responded to the call of Miss Tatum was beside the Veal home. It is not improbable that the neighbor whose window was opposite that of the room in which the difficulty occurred heard the screams of Miss Tatum, and that the neighbor whose house fronted in an opposite direction could not hear the screams, although the latter house was nearer.

The witness last referred to testified that he was well acquainted with Mr. and Mrs. Veal and had never observed any ill treatment of the plaintiff by her husband or quarreling between them.

Two other witnesses on behalf of the defendant testified that they were well acquainted with Mr. and Mrs. Veal and exchanged visits with them, but had never observed any disagreement between them. One of them, who lived a mile away from the Veal residence, was asked by the defendant's counsel whether he had heard any cries on the night of July 24, 1914, and replied that he did not hear them until a week after, from which we assume there were some echoes of the occurrence.

The evidence shows that the plaintiff is a lady of culture and refinement, and it is not

at all strange that her unhappy domestic relations were not made known even to her most intimate friends. Her sister, Miss Tatum, testified that she did not know there was any domestic trouble between the plaintiff and defendant until she resided in their home, and was then very much surprised to learn of the unhappiness of her sister. In this connection the defendant's failure to offer any evidence in support of his specific denial that the plaintiff had always conducted herself properly, and that she had not given him cause or provocation for ill treatment, is significant.

Although the allegations of the petition referred particularly only to the one instance of ill treatment that occurred on the 24th of July, 1914, the examination of the witnesses, especially by the defendant's counsel, disclosed that the defendant's conduct towards the plaintiff had made her life very unhappy, and that the assault he committed upon her on the 24th of July, 1914, was the culmination of the ill treatment on his part that rendered her living with him intolerable.

There is no reason to doubt the testimony of Miss Tatum or to believe that her description of the violent character of the assault was an exaggeration. The district judge had no doubt of the truth of her testimony. In his reasons for judgment or for refusing a new trial, he said that he was impressed with the veracity of all of the witnesses who had testified in this case, and that to a woman of such refinement as the plaintiff one assault, even of a less violent character than that shown to have been committed by the defendant, might make it intolerable for the wife to continue to live with her husband. But the learned judge concluded that the one instance of cruelty on the part of the husband towards his wife was not, within the meaning of the law, such ill treatment as to render her living with him insupportable.

In support of that view the defendant relies upon the doctrine announced in the case of *Fleytas v. Pigneguy*, 9 La. 419, and repeated in *Primeaux v. Comeaux*, 139 La. 549, 71 South. 845, to the effect that only one instance of ill treatment of a wife by her husband during a long cohabitation does not authorize a judgment of separation from bed and board.

*Fleytas v. Pigneguy* is the case in which Mr. Justice Martin, for the court, called to mind that husbands are men, not angels. In that case, however, it was found that the defendant husband did possess some angelic qualities, that he was "of a quiet, pacific temper and disposition," and that his wife, on the contrary, "was possessed of a violent and choleric temper and disposition." The refusal to grant the wife a separation from bed and board on account of the assault committed upon her by her husband in that case was based largely upon the conclusion that she had given her husband great provocation

for losing his temper. On that proposition, that the wife who is at fault in provoking her husband to quarrels and ill treatment is not thereby entitled to a judgment of separation from bed and board, the case has been cited with approval a number of times. See *Cooper v. Cooper*, 10 La. 251; *Rowley v. Rowley*, 19 La. 557; *De Lalande v. Jore*, 5 La. Ann. 33; *Trowbridge v. Carlin*, 12 La. Ann. 884; and *Lauber v. Mast*, 15 La. Ann. 593.

As was said in the case of *Cooper v. Cooper*, the question with this court is not whether it is best for the parties or for society that a separation should take place, in a case like the present, but whether the plaintiff presents a case within the law regulating that most important relation of social life.

In *Rowley v. Rowley*, the plaintiff wife was found to have been so much at fault that Mr. Justice Garland, for the court, felt constrained to express the doubt that all wives were possessed of the attributes which Mr. Justice Martin had denied to husbands.

In *De Lalande v. Jore*, the court found that the conduct of the plaintiff had been unfortunately marked by continual exasperation and violence towards her husband, for which his acts and deportment had afforded no provocation; and, citing *Fleytas' Case*, Chief Justice Eustis expressed the opinion of the court that, under such circumstances, the plaintiff's first remedy was to seek a reformation of her own conduct and deportment, and, if the evils complained of did not cease with the behavior that had produced them, the interference of the law might then be invoked.

In *Trowbridge v. Carlin*, it was observed that the law providing for a separation from bed and board in certain cases was intended for the relief of the oppressed party, not for interference by the courts in domestic quarrels in which both parties had committed reciprocal excesses and outrages.

In *Lauber v. Mast*, Chief Justice Merrick expressed the view of the court that the mode of life and habits of the married couple were to be considered in determining whether one occurrence of ill treatment of the wife by the husband was a sufficient cause for her to obtain a judgment of separation from bed and board.

In *Primeaux v. Comeaux*, 139 La. 549, 71 South. 845, the evidence showed that the plaintiff had struck her husband with a poker and in the scuffle he only slapped her lightly.

In each of the foregoing cases, the refusal to grant the wife a separation from bed and board was due to her own fault in the premises and rested upon conditions and circumstances not found in the present case. It has never been held unqualifiedly that only one instance of cruelty on the part of the husband towards his wife is not a sufficient cause for granting her a separation from bed

and board. On the contrary, each case must depend upon its own peculiar circumstances, such as the provocation for the assault, its mildness or violence, as the case may be, and perhaps to some extent upon the gentle or ungentle character and mode of living of the woman.

In the case of *Harrison v. Harrison*, 115 La. 817, 40 South. 232, this court took into consideration that a woman of gentility and refinement would shrink from the humiliation of exposure of the unhappiness of her married life, and would rather shield her cruel husband from public censure than to deliver him up to it. And it was said that, to a woman of culture and refinement, one instance of violent assault on the part of her husband might well render her living with him intolerable. We adhere to those views. To announce as a fixed doctrine that only one instance of assault by the husband upon his wife, however unprovoked and however violent, is not a sufficient cause for her to obtain a separation from bed and board, would condemn the unfortunate woman either to suffer the embarrassment of remaining actually, though not legally, separated from her husband, or to suffer further physical punishment or cruel treatment as the price of being freed from the embarrassing alliance.

It is not for the court to say that the wife shall, no more than it is for her to say that she will not, continue to suffer the ill treatment of which she complains. The only question is whether that ill treatment was of such a nature as to render her living with her husband intolerable or insupportable. Our conclusion is that it was of that nature, and that the plaintiff is entitled to the relief prayed for.

There are no offspring to suffer the humiliation of the judgment to be rendered in this case. If the plaintiff and defendant do not become reconciled and re-united within the year allowed by the decree of separation from bed and board, there will be no reason to believe that they might have done so without it.

The judgment appealed from is annulled and reversed, and it is ordered, adjudged, and decreed that the plaintiff, Mrs. Rose J. Tatum Veal, be, and she is hereby, granted a separation from bed and board from her husband, Garland H. Veal, and that the defendant pay the costs of both courts.

(140 La. 337)

No. 20592.

TREMONT LUMBER CO. v. TALBOT et al.  
(Supreme Court of Louisiana. June 30, 1916.  
On Rehearing, Feb. 12, 1917.)

(Syllabus by the Court.)

1. COURTS — 224(11) — JURISDICTION ON APPEAL — INJUNCTION — AMOUNT IN CONTROVERSY.

Where a tract of land is seized and advertised for sale to satisfy a judgment against

the owner, and a third party, claiming the forest timber and the right of entry on the land, obtains an injunction against any interference with his rights, and the defendant in the injunction suit concedes the plaintiff's ownership of the timber and right of entry on the land, but contends that they should not interfere with the collection of the debt due him, the amount of the debt, and not the value of the plaintiff's property rights, determines the jurisdiction of the injunction suit on appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 617.]

*(Additional Syllabus by Editorial Staff.)*

On Rehearing.

2. COURTS ~~224~~(9) — APPELLATE JURISDICTION—INJUNCTION—AMOUNT.

Where the sale of property is enjoined because not belonging to debtor in execution, the court's jurisdiction is regulated by the value of the property, and where the timber was sold in 1906 for \$120, and there was no showing of value to the Supreme Court's minimum jurisdiction of \$2,000, except a formal jurisdictional allegation in the sworn petition of injunction that the timber and right of entry, etc., were worth more than \$2,000, there was no proof of real value, and the cause would be transferred to the Court of Appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 617.]

Appeal from Fifth Judicial District Court, Parish of Jackson; Cas Moss, Judge.

Suit for injunction by the Tremont Lumber Company against S. N. Talbot and others. Judgment for plaintiff perpetuating the writ of injunction, and defendant Talbot appeals. Ordered that cause be transferred to Court of Appeal, to which appeals from parish of Jackson are returnable.

Wm. J. Hammon, of Jonesboro, for appellant. Grisham & Oglesby, of Winnfield, for appellees.

O'NIELL, J. On the 5th of October, 1905, Duncan Johnson mortgaged to Anderson Wiley about 52 acres of pine timber land, to secure the payment of a promissory note for \$337.50. On the 23d of June, 1906, for the cash consideration of \$120, Johnson sold the pine timber, with the right to construct tramways upon the land, to the Tremont Lumber Company. The right of the grantee to go upon the land to remove the timber was limited to four years from the date of the contract. On the written authority of Wiley, his mortgage was released and canceled in so far as it affected the timber sold to the Tremont Lumber Company. On the 11th of April, 1908, for the cash consideration of \$50, Johnson granted an extension of the time within which the timber was to be removed from his land, and within which the grantee had the right of entry and the right to use a tramroad on the land, to the 23d of June, 1915. On the 18th of November, 1908, Wiley obtained a judgment against Johnson on the mortgage note of \$337.50, with interest at 8 per cent. per annum from the 15th of November, 1907, and 10 per cent. attorney's fee. In December, 1913, a writ of fieri facias was is-

sued on the judgment at the instance of S. M. Talbot, claiming to be the transferee of the judgment rendered in favor of Wiley; and the 52 acres of land was seized and advertised to be sold by the sheriff on the 17th of January, 1914. On the 16th of January, 1914, the Tremont Lumber Company filed this suit and obtained a writ of injunction restraining the sale of the pine timber on the land and preventing any interference with the company's right to go upon the land with tramroads to remove the timber at any time before the 23d of June, 1915.

In answer to the injunction suit, the defendant Talbot admitted that the plaintiff in injunction was the owner of the timber, and that it was not subject to seizure in satisfaction of his mortgage note. He conceded that the plaintiff had the right to go upon the land with teams and remove the timber at any time before the 23d of June, 1915; his only contention being that his right to collect his mortgage note should not be impaired by the extension of the time within which the plaintiff might construct and operate a tramway, from the 23d of June, 1910, to the 23d of June, 1915. Judgment was rendered in favor of the plaintiff, maintaining and perpetuating the writ of injunction, restraining Talbot from interfering with the plaintiff's right to remove the timber, and to operate a tramroad on the land until the 23d of June, 1915. The defendant Talbot appealed.

As this case was not assigned for hearing in this court before the 23d of June, 1915, this is now perhaps a moot case. It is also apparent that the amount involved is not within our jurisdiction. The defendant does not dispute the plaintiff's title to the timber nor the plaintiff's right to enter upon the land. The only contest was as to whether the plaintiff's right to construct and operate a tramway until the 23d of June, 1915, could interfere with the right of the defendant Talbot to collect his note of \$337.50. There is no proof in the record to support the plaintiff's allegation that its rights were worth \$2,000; and our opinion is that the allegation is an exaggeration. Be that as it may, the plaintiff's property rights were never in contest, except in so far as they might interfere with the collection of the amount claimed by Talbot, which is far below our jurisdiction.

The appeal is therefore dismissed at the cost of the appellant.

On Rehearing.

PROVOSTY, J. Execution having issued upon a judgment, and a certain tract of timber land having been seized, plaintiff claims in this suit the ownership of the timber, as having acquired same from the defendant in execution, and claims also the right to go upon the land and construct thereon a tram-

road for the removal of the timber; and has enjoined the sheriff and the plaintiff in execution from proceeding with the said seizure in so far as the timber is concerned, and further from interfering with the construction of such tramroad and the removal of the timber.

Where property is enjoined from being sold, as not belonging to the debtor in execution, the matter in dispute is the property; and the jurisdiction of the court is regulated by its value. The said timber was sold to plaintiff in 1906 for \$120. The difference between that sum and the lower limit of the jurisdiction of this court—\$2,000—is so great that some showing should have been made on the question of jurisdiction; and none has been made, unless the mere formal jurisdictional allegation in the petition of injunction, that the said timber and the right to build said tramroad are worth more than \$2,000, is to be accepted as making such proof. True, the petition is sworn to; but, in so far as this allegation of value is concerned, this oath, too, we must consider to have been merely formal, and to be no proof of real value.

It is therefore ordered, adjudged, and decreed that this case be transferred to the Court of Appeal, to which appeals from the parish of Jackson are returnable.

(140 La. 891)

No. 20594.

XETER REALTY, Limited, v. BASLER et al.  
(Supreme Court of Louisiana. Feb. 12, 1917.)

(Syllabus by Editorial Staff.)

1. TAXATION §=734(3)—TAX TITLE—VALIDITY—ASSESSMENT.

A tax sale of a square is null where two lots had been sold by the owner of the square before the taxes were assessed, and the taxes on one of those lots were paid by the purchaser.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1470, 1471.]

2. TAXATION §=905(1) — TAX TITLE — PRESCRIPTION—POSSESSION.

The three-year prescription established by the Constitution of 1898 does not run against the owner of land previously sold for taxes who was in open possession thereof at the time the Constitution was adopted and remained in possession ever since, though such possession began some time after the sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1593, 1597.]

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Action by Xeter Realty, Limited, against William J. Basler, in which Thomas D. Boyd, Jr., and others were called in warranty. Judgment for the defendant, and plaintiff appeals. Affirmed.

Clive Wetherill Kernan, of Baton Rouge, and Wm. Winans Wall, of New Orleans, for appellant. T. Jones Cross, of Baton Rouge, for appellees Thomas D. Boyd, Jr., and

T. Sambola Jones, warrantors. Justin C. Dasplt, of Baton Rouge, for appellee Wm. J. Basler. Taylor & Porter, of Baton Rouge, for John B. Kroger and Baton Rouge Lumber Co., warrantors.

PROVOSTY, J. In 1884, the following square of ground in the city of Baton Rouge, to wit:

"Square No. D, 160 feet front on Spanish Town street by 748 feet in depth, American measure, bounded east by lands formerly E. Esteran and west by lands of W. P. Cox"

—was sold to the state at tax sale for taxes of 1883 assessed to Antoine L. Gusman.

In 1905 plaintiff purchased this property from the state; and in 1912 brought the present petitory action against the present possessors of it, who derive title from Gusman by private sale.

[1] There can be, and, in fact, is, no question but that the tax sale was null, for the reason that lot 2 of the square no longer belonged to Gusman at the time the assessment of 1883 was made, but to another person, to whom it was assessed for that year and who paid the taxes so assessed, and that also another of the lots had at that time been sold by Gusman; but the contention is that as to all of the square except the said lot 2 the said nullity has been cured by the prescription of three years established by the Constitution of 1898.

[2] We are of the opinion that this prescription cannot apply, for the reason that, at any rate since the latter part of 1887, the defendants and their authors in title have had actual possession of the property. In several cases it has been held that this prescription does not run against the tax debtor, or his assignee, in actual possession. *Carey v. Cagney*, 109 La. 77, 33 South. 89; *In re Seim*, 111 La. 562, 35 South. 744; *Bartley v. Sallier*, 118 La. 93, 42 South. 657; *In re Sheehy*, 119 La. 609, 44 South. 315. The principle of these decisions, which is that prescription cannot begin to run against the party in possession in favor of the party out of possession, applies to this case. When the Constitution of 1898 was adopted, and this prescription might have begun to run, the defendants and their authors in title had actual possession; and hence the prescription could not begin to run against them.

In all of the said cases, except in *Re Sheehy*, the actual possession extended back to the time of the tax sale, whereas in the present case it began some time afterwards; but we do not think that a legal distinction can be founded on that difference, since the idea is that prescription cannot begin to run against the party in actual possession, and the defendants and their authors in title were in actual possession at the date said prescription was created by the Constitution. Judgment affirmed.

(140 La. 893)

No. 21053.

## DENENA v. GEMELLI.

(Supreme Court of Louisiana. Feb. 12, 1917.)

*(Syllabus by the Court.)*1. PARTITION  $\S$  25(1) — SALE — MINOR DEFENDANTS.

Where minors are sued for the partition of property, indivisible in kind, the judge may order it to be sold for cash, without the advice of a family meeting, and without regard to the appraisement.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 77, 79.]

2. PARTITION  $\S$  26—SALE—DEBTS.

The existence vel non of debts has no bearing upon the question of the right of the owner of property held in indivision to provoke the sale, in order to effect a partition of the property so held.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 68-71, 75.]

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Suit by Leon Denena against Joseph Gemelli. Judgment for plaintiff, and defendant appeals. Affirmed.

Meyer S. Dreifus, of New Orleans, for appellant. Oliver S. Livaudais and J. Kenton Bailey, both of New Orleans, for appellee.

## Statement of the Case.

MONROE, C. J. Defendant prosecutes this appeal from a judgment condemning him to accept title to certain real estate which had been adjudicated to him at public auction. His reasons for refusing to accept the title, as stated in the brief herein filed by his counsel, are:

"That the interest of Michael O'Keefe, one of the heirs of Michael O'Keefe, deceased (plaintiff's author in title), had never been properly or legally divested; that the proceedings No. 77975, which purported to be a partition of the said property among the several coheirs of Michael O'Keefe, were irregular; that one of the heirs of Michael O'Keefe was an interdict, and that his interest was adjudicated, together with (that of) his several coheirs without the intervention of a family meeting to suggest whether or not the property should be sold on terms of credit, and without any evidence being offered to show that it was necessary to sell the said property for the purpose of paying debts."

The facts do not clearly appear in the transcript (from which the proceedings No. 77975 of the docket of the Civil District Court have been omitted, though offered in evidence), but it is apparently conceded, in the briefs of counsel, that the property in question was sold for cash at public auction by virtue of a judgment decreeing a partition at the instance of the major heirs of Michael O'Keefe; that Michael O'Keefe, a minor interdict, was one of the defendants in that suit, and that no family meeting was held to fix the terms upon which his interest should be sold.

## Opinion.

[1] It is well settled that, where minors are sued for the partition of property, shown to be indivisible in kind, the judge may order it to be sold, for cash, without the advice of a family meeting and without regard to the appraisement; the case of a licitation provoked by a coheir and coproprietor being an exception to the general rule, that the property of a minor can be sold only upon the advice of a family meeting and for its appraised value. Doucet v. Fenelon, 120 La. 40, 41, 44 South. 908, citing C. C. arts. 345, 1314; Jacobs et al. v. Lewis' Heirs, 8 La. 177; Shaffet v. Jackson, 14 La. Ann. 154; Life Association v. Hall, 33 La. Ann. 52; Bayhi v. Bayhi, 35 La. Ann. 530; Crawford v. Binion, 46 La. Ann. 1266, 15 South. 693; Johnson v. Barkley, 47 La. Ann. 99, 18 South. 659. See, also, Buddecke v. Buddecke, 31 La. Ann. 574; Succession of Becnel, 117 La. 749, 42 South. 256.

[2] The existence vel non of debts has no bearing upon the question of the right of an owner in indivision to provoke the sale, in order to effect a partition, of the property so held.

Judgment affirmed.

(140 La. 895)

No. 21471.

## JEROLLEMAN et al. v. NEW ORLEANS TERMINAL CO.

(Supreme Court of Louisiana. Feb. 12, 1917.)

*(Syllabus by the Court.)*APPEAL AND ERROR  $\S$  1002—VERDICT—CONFLICTING EVIDENCE—CONCLUSIVENESS.

Where, on the question of the negligence of the servants of the railroad company, in the case of a collision between one of defendant's trains and plaintiff's automobile, coming suddenly upon the track, the evidence is conflicting and contradictory, the verdict of the jury in favor of the railroad company will not be disturbed, when it does not appear to be clearly against the preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3987.]

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by Samuel Jerolleman and others against New Orleans Terminal Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Louis Henry Burns and Armand Romain, both of New Orleans, for appellants. Wise, Randolph, Rendall & Freyer, of Shreveport, and Farrar, Jonas, Goldsborough & Goldberg and Dufour & Dufour, all of New Orleans (E. H. Randolph, of Shreveport, and Abraham Goldberg and George Janvier, both of New Orleans, of counsel), for appellee.

LAND, J. Plaintiff sued individually to recover \$55,753.00, for personal injuries and damages, and for damages suffered by him

on account of the death of his minor son, and sued as natural tutor of his three minor children, Edith, Vera, and Harry, to recover \$40,000 damages sustained by them on account of the death of their mother.

The wife and son were killed on October 18, 1913, as the result of a collision between plaintiff's automobile and a train of the defendant company at a point where the latter's railroad tracks cross Canal boulevard in the city of New Orleans.

The petition alleged that on October 17, 1913, the plaintiff bought an automobile from the Ford Motor Car Company, which agreed to furnish, and did furnish, one of their regular employes to operate said automobile for the purpose of instructing the plaintiff, and that on the next day plaintiff, with his wife, son, and mother-in-law, took a ride in said car, which was in sole charge of a demonstrator furnished by said Motor Car Company, out to Spanish Fort, and the said collision took place at said crossing at about 8 p. m. on the return trip of the car to the city.

The petition alleged that his car was destroyed by the shock, and his wife, son, mother-in-law, and the demonstrator were horribly mangled and killed, and that the plaintiff was seriously and permanently injured.

The petition alleged 11 different items of negligence:

(1) That the engine was running backwards without a lookout.

(2) That the tender was ahead of the engine.

(3) That there was no lookout on the footboard of the engine.

(4) That no whistle was blown for the crossing.

(5) That the headlight on the tender was not burning.

(6) That no safety gates were erected at said crossing.

(7) That no flagman or signalman was stationed at said crossing.

(8) That the train was running within city limits and in yard limits at an excessive and dangerous rate of speed.

(9) That the night was dark and cloudy, and the train itself was dark and unlighted.

(10) That the automatic electric signal bell erected at the crossing to warn citizens of the approach of trains was worn out, and did not ring.

(11) That the engineer knew that he was approaching a crossing frequently used by pedestrians and automobiles, and that he failed to comply with the ordinary dictates of common prudence and did not have his train under control when he approached said crossing, although his view was obstructed by tall weeds then growing a short distance from the railroad track.

Defendant's answer admits the alleged collision and the death of the four persons

named in the petition, and that the plaintiff was injured to some extent.

The defendant avers that the accident was caused solely and entirely by the gross negligence of Ashton Close, the driver of the automobile, in attempting to cross the tracks of the defendant without stopping to look and listen to ascertain whether or not any train or engine was approaching.

The answer further denies any negligence on the part of the defendant, and in the alternative pleads the contributory negligence of the driver of the automobile, and avers that said driver was the agent of the plaintiff in the operation of said car.

The case was tried before a jury, which found a verdict in favor of the defendant.

Plaintiff filed a motion for a new trial, which was considered and overruled by the trial judge for reasons assigned, and from a judgment pursuant to the verdict plaintiff has appealed.

Plaintiff's testimony as to how the terrible accident happened may be briefly summarized as follows:

He purchased the car on October 17, 1913, and took a drive with Close, as demonstrator. The next evening they took a run out to Spanish Fort, plaintiff and Close occupying the front seat, and his wife, son, and mother-in-law filling the rear seat. On the trip out, Close, when he got to this same crossing, said, "Now stop. Stop the machine. Always stop, look, and listen"; and he stopped the car. On the return trip, Close stopped the car at the other side of the crossing, and looked around and saw nothing.

Plaintiff looked around with Close, the same as he did, and saw nothing. Close told him to pay attention, because he would have to run the car himself. Plaintiff looked, and saw nothing, listened, and heard nothing, and the car, starting at a distance of from 15 to 25 feet from the crossing, was struck as it ran on the first track, and the plaintiff was rendered unconscious.

Plaintiff was the only eyewitness called on his side of the case.

The crew of five and two car cleaners were on the train when it collided with the automobile of the plaintiff.

Two other witnesses testified that they were present on the same occasion. All seven testified in behalf of the defendant. A large number of other witnesses were called and examined by the respective parties. The testimony is conflicting and contradictory, and is too voluminous for repetition.

There was no exception to the charge of the judge, and the jury found a verdict in favor of the defendant. The presumption is that the verdict is correct.

It is hornbook law that when the evidence is contradictory, the verdict of the jury on the question of the credibility of the witnesses and other matters of fact peculiarly within its province will not be disturbed.

unless manifestly erroneous. See 1 Hennen's Digest, p. 92 (b) 1.

The first three charges of negligence are based on a misconception of the structure and purpose of switch engines.

The evidence shows beyond dispute that switch engines are made to run backward as well as forward, and in either case a lookout is kept by the engineer and fireman, standing in their proper positions on the locomotive.

As to charge 4, the engineer, fireman, and others testified that the whistle of the train was blown at City Park crossing less than a quarter of a mile away, and the noise could be readily heard at the Canal Boulevard crossing, and beyond. Besides, the defendant had been notified by the city authorities that the blowing of locomotive whistles in that locality should be avoided except in cases of necessity.

Charge 5, that the headlight on the tender was not burning, is refuted by evidence that the switch engine was equipped with two oil headlights, one in front, and the other on the rear of the tender, and both were burning at the time of the collision.

The evidence further shows that such headlights were in common use, with but few exceptions.

Charge 6, that no safety gates were erected, and charge 7, that no flagman was stationed at the crossing, are not supported by the production of any city ordinance requiring such safeguards, and the evidence shows that the defendant maintained an automatic electric signal at said crossing.

Charge 9, that the night was dark and cloudy, and the train itself was dark and unlighted, was met by evidence that the engine had two headlights, and that a parlor car, which was in the train, was lighted, and that it was not customary to light up empty passenger cars under such circumstances.

Charge 10, that the automatic bell at the crossing was worn and did not ring. This was one of the main contested issues in the case. The collision took place about 8:05 p. m.

John Maher, an engineer on a New Orleans & Northeastern train, testified that his train passed the same crossing on that evening, about 7:40 or 7:42, and that the bell was ringing as he passed.

Sexton, the engineer, and Coste, the fireman, on the switch train testified positively that the automatic bell was ringing at the time of the collision.

Faulkner and Botton, switchmen, and two colored car cleaners, on the same train testified to the same effect, as did Laughlin, the switch tender, and Charles Williams, colored.

Doubtless able counsel for the plaintiff vigorously assailed the credibility of several of these witnesses before the jury, as he has done before us.

We have no means of knowing what credit the jury attached to their respective stories.

But the jury might well have discredited three or four of said witnesses, and based a finding that the bell was ringing on the testimony of Maher, Sexton, Coste, Faulkner, and Botton, or any one or more of them, as against the negative testimony of the plaintiff that he did not hear the bell ring.

Evidence that the same bell, some three hours later, on a test, was found to ring but slightly or not at all does not prove that it was not ringing at the time of the collision, because the conditions may not have been the same, and the testimony on the subject cannot be reconciled except on the hypothesis of a change of conditions after the collision.

Several practical railroad men testified that the effect of holding a train on the same circuit for several hours is to exhaust the batteries, and to stop the ringing of the automatic bell.

Harry Oldham, general yard master, testified that he reached the crossing about an hour after the collision, and heard distinctly the automatic bell ringing the danger signal for the crossing; that he remained there until about 11:45 p. m., and shortly before he left a test of the electric circuit was made, and the bell responded weakly; would hardly ring.

This witness, in answer to the question whether a train resting in the bonded circuit tends to exhaust the power of the bell, replied:

"My observations, and our instructions are, not to allow cars to stand on them, because it will exhaust the battery and put them out of use."

Item 11 is a general charge of negligence against the engineer.

The evidence tends to show that the train was running from 12 to 15 miles an hour; that the fireman was ringing the bell as the train approached the crossing; that both the fireman and conductor were keeping a proper lookout; the plaintiff's automobile coming up on the fireman's side suddenly dashed towards the track; that the fireman immediately gave the danger signal to the conductor who at once applied the air brakes, and made an emergency stop within 521 feet; and that under the prevailing conditions, an emergency stop anywhere between 500 and 600 feet would have been a good stop.

There was also evidence tending to show that the mass of high weeds referred to by the plaintiff was not on the right of way of the defendant, on which the weeds had been cut.

On such a record, we cannot say that the verdict of the jury is contrary to the preponderance of the evidence, and construe the verdict as finding that the defendant was not guilty of negligence as charged by the plaintiff.

Judgment affirmed.

MONROE, C. J., takes no part.



(140 La. 902)

No. 22150.

**MULLER v. JOHNSON.**

(Supreme Court of Louisiana. Oct. 16, 1916.  
On the Merits, Feb. 12, 1917.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR §389(1)—DEVOLUTIVE APPEAL—APPEAL BOND.**

As the only bond required for a devolutive appeal is one to secure the payment of the costs of court, Act No. 156 of 1912, permitting a pauper to prosecute an action in the courts of this state without paying the costs of court as they accrue and without furnishing bond for costs, authorizes such litigant to prosecute a devolutive appeal without furnishing an appeal bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2072, 2073.]

**2. APPEAL AND ERROR §389(3) — APPEAL BOND—ORDER.**

An order of the district court authorizing a plaintiff or intervener to prosecute his or her suit without paying the costs as they accrue and without furnishing a bond for costs, according to the provisions of Act No. 156 of 1912, is sufficient authority for such litigant to prosecute a devolutive appeal from the judgment rendered in the case without furnishing an appeal bond. It is not necessary that the exemption from furnishing the appeal bond be repeated in the order granting the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2075.]

*On the Merits.***3. INJUNCTION §148(1) — FORECLOSURE OF MORTGAGE—BOND.**

An intervener or third opponent in an executory proceeding to foreclose a mortgage is not entitled to arrest the sale of the property on an injunction, without bond.

Act No. 156 of 1912, authorizing suits and other proceedings in forma pauperis, does not entitle the litigant to an injunction without bond.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 323-330, 333.]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Suit by A. E. Johnson against Mrs. Louise Muller, in which Mrs. Georgina T. Young filed an intervention and third opposition, with application for an injunction. From an order refusing to issue writs of injunction, the intervener and opponent appeals. Affirmed.

J. A. Morales, of New Orleans, for appellant. F. F. Teissier and Oscar Schreiber, both of New Orleans, for appellee.

O'NIELL, J. This appeal was taken by Mrs. Georgina T. Young, who had filed a petition of intervention or third opposition in the district court, in forma pauperis, under the provisions of the Act No. 156 of 1912.

The plaintiff in the original executory proceedings, defendant in the intervention or third opposition, has filed a motion to dismiss the appeal on the grounds: (1) That the appellant has not furnished an appeal bond;

(2) that, if it be held that the order of the district court, allowing the intervener or third opponent to prosecute her demand without furnishing a bond for costs or paying the costs as they accrue, exempted her from furnishing an appeal bond, then that the motion for an appeal should have contained the allegations required by the Act No. 156 of 1912, for permission to prosecute a suit without furnishing a bond for costs or paying the costs as they accrue, and that such allegations should have been supported by an affidavit; (3) that the proof required by the Act No. 156 of 1912 to prosecute a suit in forma pauperis was not made in the district court, and the judge was therefore not authorized to grant the order of appeal without requiring an appeal bond; (4) that the appellant is not a pauper, and is therefore not exempt from furnishing a bond for costs; and (5) that the judgment complained of is not appealable to this court.

[1] As the only bond required of an appellant to prosecute a devolutive appeal is a bond to secure the payment of the costs of court, it is well settled that the Act No. 156 of 1912, permitting a pauper to prosecute and defend in all of the courts of this state any action to which he or she may be a party, whether as plaintiff, defendant, or intervener, without paying the court costs as they accrue or furnishing bond for costs, permits the litigant to prosecute a devolutive appeal without furnishing an appeal bond. *Jackson v. Cousin*, 138 La. 197, 70 South. 96.

As to the second, third, and fourth grounds urged for demanding a dismissal of the appeal, it is sufficient to say that the proper allegations were made in the petition of intervention or third opposition, and were supported by the affidavits required by the Act No. 156 of 1912, to prosecute the suit in all of the courts of this state without paying costs or furnishing a bond for costs. The defendants in the opposition had the right, under the provisions of the statute, to traverse the allegations regarding the plaintiff's right to prosecute her intervention or third opposition without paying costs or furnishing security for the payment.

[2] The order of the district court, permitting the intervener or third opponent to prosecute her demand without paying costs or furnishing security for costs, carried with it permission to take a devolutive appeal from the judgment of that court without furnishing an appeal bond. It was not necessary for the appellant to repeat the allegation, that she was a pauper within the meaning of the statute in her motion or petition for an order of appeal; nor was it necessary for the court to repeat the dispensation in his order of appeal. The issue as to the right of the intervener or third opponent to prosecute her intervention or third opposition in the trial court and in the appellate court without pay-

ing costs or furnishing security for the payment was closed by the failure of the defendants in the intervention or third opposition to traverse the allegations at the proper time.

Taking up the fifth ground urged in the motion to dismiss the appeal, it appears that the appeal was taken from a judgment refusing to grant a preliminary injunction without bond. Appellee's attorneys argue that it must be presumed that the sheriff has sold the property which he had seized, and which the intervener or third opponent attempted to enjoin him from selling. It is contended that an appellant has no further right to prosecute a devolutive appeal when it appears or may be inferred that the judgment complained of has been executed. The record does not disclose that the sheriff has sold the property seized, and we will not assume that he has done so.

The motion to dismiss the appeal is overruled.

#### On the Merits.

LAND, J. [3] The plaintiff sued out executory process on two mortgage notes, under which the premises were seized and advertised for sale.

Mrs. Georgina T. Young filed an intervention and third opposition in the suit, claiming the ownership of said property, and seeking to annul her authentic sale of the same to the defendant, and the mortgages placed by him thereon, on the ground of error, mistake, and fraud, and alleging that the plaintiff is merely a party interposed.

Mrs. Young applied for an injunction without bond, under Act 156 of 1912, authorizing pauper litigants to sue "without the previous or current payment of costs and without giving a bond for costs," and also under the provisions of articles 739 and 740 of the Code of Practice relative to injunctions against executory process.

The trial judge first ordered the injunction to issue as prayed for, but subsequently recalled his order, and, after the trial of a rule nisi against the plaintiff, refused to order the issuing of writs of injunction.

The intervener and opponent has appealed from the order of refusal.

The title of Act 156 of 1912 reads as follows:

"To authorize litigants who are unable to pay costs to litigate as plaintiff, defendant, or intervener, in the courts of this state without the previous or current payment of costs and without giving a bond for costs, and fixing the extent, terms, conditions and manner of exercising the right herein granted."

The first section of the act provides, in part, as follows:

"This right to litigate without the previous or current payment of costs or without the giving of bonds for the payment of costs shall extend to all the services required by law in legal proceedings of clerks of courts, sheriffs and official stenographers, and to obtaining copies of notarial acts from public officers and

notaries and certificates from public officers in respect to records of their offices."

The costs referred to in the title, being limited by the act to all the services required by law of certain classes of officers, cannot by the most elastic rule of construction be stretched to cover *damages* that may be sustained by the defendant in injunction.

It needs no citation of authority to support the conclusion that in said law the word "costs" does not include *damages*; but we, however, refer to the cited case of *Howze v. Green*, 62 N. C. 245, where Reade, J. said:

"We are of opinion that the injunction ought not to have issued without bond. The statute provides that no injunction shall issue except upon security. Rev. Code, c. 32, § 14. And the statute allowing a suit in forma pauperis applies to costs, and does not embrace an injunction."

In the case of *O'Reilly v. Pietri*, 135 La. 4, 64 South. 922, this court held that only the defendant in executory process can arrest the sale by an injunction, without bond (C. P. art. 739), and that an intervener or third opponent in a foreclosure suit is not entitled to an injunction, without bond.

It is therefore ordered that the judgment appealed from be affirmed, and that the appellant pay costs of appeal.

(140 La. 907)

No. 20750.

HALL v. EWING et al.

(Supreme Court of Louisiana. Jan. 15, 1917.  
Rehearing Denied Feb. 12, 1917.)

(Syllabus by the Court.)

#### 1. PLEADING $\S$ 310—LIBEL AND SLANDER—EXHIBITS—QUESTION FOR COURT—CONCLUSIONS OF FACT—SUPPORT IN FACTS.

Under the practice of this state, where the whole case is developed by the petition and the documents attached thereto, the facts as recited or alleged are looked at to judge whether the conclusions of fact, drawn by the pleader are within the scope of the facts recited. The court is to say whether the facts charged are a legal foundation for the conclusions of fact drawn therefrom. Following this rule the inferences or interpretations placed upon the exhibits must be drawn from these exhibits or there is no case; this is peculiarly so here (in a case of libel), where the pleader points to the exhibit itself as showing its meaning to be what he says it means. It is perfectly clear that up to this point in the history of the case the exhibits are the case, and if they do not support the charge and do not show a cause of action, then an exception of no cause of action is good.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 845, 944, 946, 947.]

#### 2. LIBEL AND SLANDER $\S$ 4, 80 — ACTION — ALLEGATIONS — COMPENSATORY DAMAGES — MALICE.

The better view, undoubtedly, is that, except in the case of communications or publications which are qualifiedly privileged, malice on the part of the defendant in uttering or publishing the defamatory words is not necessary to entitle the plaintiff to recover in a civil action all the damages which he has sustained by reason of the libel or slander, but may be shown to entitle the plaintiff to recover punitive or exem-

plary damages. The law in Louisiana is that every act of man which occasions injury or damage to another obliges him by whose fault it has been caused to repair it. Civ. Code, art. 2315. All that is necessary for a party demanding damages from another is to allege a condition of things such as would show a "fault" on the part of the defendant, resulting in damages and injury to himself therefrom, and on the trial of his case to establish the truth of his allegations. Plaintiff may recover compensatory damages, regardless of whether there was any malice or not.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 111, 184-186.]

**3. LIBEL AND SLANDER — 51(1), 54 — ACTS OF PUBLIC OFFICER — CRITICISM — TRUTH — MALICE.**

The official acts of a public functionary may be freely criticized and entire freedom of expression used in argument, sarcasm, and ridicule upon the act itself, and then the occasion will excuse everything but actual malice and evil purpose in the critic; the occasion will not of itself excuse an aspersive attack upon the character or motives of an officer, and to be excused the critic must show the truth of what he has uttered of that kind.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 149, 152.]

Provosty and O'Neill, JJ., dissenting.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Suit for libel by Luther E. Hall against Robert Ewing and others. Exception of no cause of action sustained, suit dismissed, and plaintiff appeals. Affirmed.

Caffery, Quintero & Brumby, of Franklin, and J. Zach Spearing, of New Orleans, for appellant. Dart, Kernan & Dart and Stirling Parkerson, all of New Orleans, for appellees.

**SOMMERVILLE, J.** This suit for libel is set forth in the petition as follows:

"The petition of Luther E. Hall, a resident of the parish of Ouachita, and now residing, as Governor of Louisiana, in Baton Rouge, respectfully represents:

"(I) That petitioner is by profession an attorney at law, and that, for many years, he has devoted himself to the practice of his profession, and to the discharge of his duties in the several offices of trust to which he has been elected.

"That he is now filling the office of Governor of this state, for a term beginning in May, 1912; that when he received the nomination for Governor he had been elected to the Supreme Bench of Louisiana, from the Second Supreme Court district, but did not take his seat as Associate Justice, by reason of his election to the Governorship; that previously he had served a term upon the bench of the Court of Appeal, Second District, and another term as judge of the Sixth judicial district court, in the parishes of Ouachita and Morehouse; and that he had also represented the Twenty-Fifth senatorial district in the state senate.

"(II) Petitioner further represents that he has faithfully discharged all his professional and public duties, and has lived uprightly and honestly, so as to gain the confidence of a wide circle of friends, and to enjoy a reputation for straightforward and honorable dealing; and that the loss of such confidence and of such reputation would fall not only upon him, but upon

his family, and would cripple him in his future career, and in his future work for livelihood.

"(III) Petitioner represents that the Daily States, a newspaper published in the city of New Orleans, has lately published, and given wide circulation in New Orleans and throughout the state, to certain false, defamatory and libelous charges against petitioner, maliciously contrived and intended to injure him before the public.

"That on the 16th day of July, 1913, said newspaper published, and caused to be circulated and read by the public, an article hereto annexed, and made part hereof, marked Exhibit A.

"That said newspaper meant, in said Exhibit A, to charge and did charge that petitioner was a party to a deal in the public lands, which said newspaper claims was and is fraudulent; that petitioner had introduced a bill in the state senate in furtherance of said plan, or conspiracy, or deal, the introduction of said bill being chronicled as part of said plan, conspiracy or deal; that a fund to bribe the members of the board in charge of said public lands was paid out, by the purchasers of said land, with petitioner's connivance, aid, participation, or approval; that a case, setting forth the bribery, came before the court of which petitioner was then judge and that petitioner rendered judgment in said case in pursuance of his alleged approval, or connivance, aid, and participation in such corrupt transaction; and that petitioner has, since he became Governor, in making appointments on the new board, to succeed the one alleged to be bribed, as aforesaid, done so with the end in view that the new board might consummate such corrupt transaction by compromising the case for its annulment, and for the recovery of said lands, all of which was false, wanton, malicious, and libelous, and was published and uttered for the purpose of causing it to be believed that petitioner himself was devoid of integrity notwithstanding the knowledge on the part of the proprietor and manager of said newspaper that said charges were without any foundation in fact.

"(IV) That the said newspaper has repeatedly published articles of the same general tenor as that quoted above, and for the purposes alleged above, and has dwelt with emphasis and significance upon the alleged fact that one of the alleged parties to the deal, described as aforesaid in said newspaper, was a personal and political friend of petitioner, and that such circumstance has been reiterated in such articles so as to convey the impression that petitioner has, in some way, participated in such alleged misconduct, or is otherwise responsible for it, and tainted with it, all of which is untrue, maliciously and defamatory libelous as was well known to the proprietor and management of said newspaper; one of said articles which appeared on the editorial page of said newspaper, on the 17th of July, 1913, being that annexed hereto, and made part hereof, marked Exhibit B.

"Petitioner alleges that the said Exhibit B is false, malicious, untrue, and libelous, for the reason stated above, and also because it sets forth and infers that petitioner was so compromised by his alleged connection with the history of the so-called land deal as to make it necessary for the preservation of his honor to take the course indicated and described by the said newspaper, thus describing him as deprived of his gubernatorial discretion by reason of the circumstances set forth in said newspaper.

"(V) That the defamation to which petitioner has been subjected, as aforesaid, has caused him great annoyance, and has wounded, harassed, and mortified him; that it has injured him in the estimation of the public, and of his friends and neighbors; and that, for reparation, and by

way of punitive justice against such wanton and malicious attacks, he is entitled to recover from the responsible publishers of said newspaper the sum of one hundred thousand dollars (\$100,000.00).

"(VI) That the Daily States is published by the Daily States Publishing Company, Limited, a corporation organized under the laws of this state and having its domicile in the city of New Orleans, of which Robert Ewing, also of the city of New Orleans, is the president and manager, as petitioner believes, and therefore alleges, and the said Robert Ewing as such manager directs and controls the policy of said newspaper, and that J. Walker Ross, also of the parish of Orleans, is managing editor of said newspaper, and that the said corporation, said Ewing and said Ross are responsible for the utterances of said newspaper; that the aforesaid libel upon petitioner was conceived and prepared by said Ewing and said Ross for the said corporation and the said newspaper, and they used said newspaper for the dissemination of said libel, for the purpose of injuring, damaging, and harassing petitioner, and that they, the said corporation, the said Ewing and the said Ross are liable in solido for the damages set forth herein.

"Wherefore, petitioner prays that the Daily States Publishing Company, Limited, Robert Ewing and J. Walker Ross be cited to appear and answer hereto, and that after due hearing, that there be judgment in favor of petitioner and against the said Daily States Publishing Company, Limited, Robert Ewing and J. Walker Ross, in solido, for the sum of one hundred thousand dollars (\$100,000.00), with legal interest from date of the judgment, and cost of court. Petitioner prays for general and equitable relief."

The exhibits attached to and made parts of the petition follow:

#### Exhibit A.

"Pleasant will Not be Halted Except by Governor.

"Going to Monroe Aug. 1 to Take Default in Tensas Delta Scandal.

"Not Believed that Hall will Interfere.

"Presiding Judge in 1902 When Scandal First Tried; Decided for Lacey Estate.

"Summary of the Tensas Land Deal.

"July, 1898—Bill by Senator Luther E. Hall, now Governor Hall, passed removing the domicile of the Tensas Basin Levee Board from Rayville, Richland parish, to Monroe, Ouachita parish.

"September, 1898—Deal entered into between J. W. Brown, of Memphis, J. W. Simms, land agent of the board, and Jas. D. Lacey and associates and members of the Tensas Levee Board for the sale of the lands.

"October, 1898—The lines laid for the sale of 900,000 acres of land in the parishes of Richland, Ouachita, La Salle, Catahoula, Morehouse, Caldwell, Franklin, West Carroll, at 14½ cents per acre, James D. Lacey, in pursuance of the deal with Simms entered into in September, organized the Tensas Delta Land Company, Lacey and S. Wood Beal were placed in active charge of the company.

"November, 1898—The Tensas Delta Land Company organized and willing to spend \$200,000 for the lands, although the lands were then worth at least \$500,000; Tensas Levee Board transferred same to the company, through Jas. D. Lacey for \$130,000.

"November 7th to 30—Division of the slush fund set aside to bribe members of the Levee Board, its employees and prominent men, amounting to \$20,000 in cash and stock in the Tensas Delta Land Company, amounting to \$18,750.

Of this, the Attorney General charges, \$3,000 in cash and \$3,750 in stock, went to John P. Parker, Sr., personal and political friend of Governor Hall, and then president of the Levee Board.

"1902—James W. Brown, who represented Jas. D. Lacey, and who, with J. W. Simms and J. D. Lacey, put the deal through, filed suit at Monroe for the liquidation of the Tensas Delta Land Company and for a division of the spoils.

"Same year—The case being No. 5634 of the docket of the Sixth District Court of Ouachita, the suit was tried before Judge Luther E. Hall, now Governor Hall, and all the facts were developed; judgment rendered against Brown in favor of the Tensas Delta Land Company and J. D. Lacey by Judge Hall.

"October, 1909—The Tensas Basin Levee Board, which succeeded the Parker board, learned for first time of the fraud that had been practiced by its predecessors in office, it being made clear that only John P. Parker, J. A. Helmer, R. E. Yancey and R. R. Blanks, who subsequently became president, were possessed of knowledge of the deal.

"November, 1909—Suit entered by the state of Louisiana against the Tensas Delta Land Company at Rayville for the purpose of setting aside the sale on allegations of fraud and bribery.

"March, 1910—Suit brought by the Attorney General on behalf of the Tensas Basin Levee Board against the Tensas Delta Land Company in conformity with a decision of the Supreme Court, and on motion of the land company was transferred to the United States Circuit Court, Western District of Louisiana.

"May, 1913—United States Circuit Court of Appeal, Judge Shelby speaking, reversed decision of Judge Boardman dismissing suit and sent the case back to the District Court for trial on the merits, declaring the courts should not allow wrong to triumph through mere technicality of pleading, etc.

"July, 1913—Tensas Basin Levee Board, appointed by Governor Luther E. Hall, now chief executive of the state, compromised the allegations of fraud for \$100,000.

"Lands sold for \$130,000 in 1898, now held to be worth \$3,400,000.

"In the absence of specific orders from Governor Luther E. Hall, who is the only man in Louisiana authorized to call him off, Attorney General Ruffin G. Pleasant will, on August 1, 1913, move that judgment be entered in the United States Circuit Court at Monroe in favor of the state and the Tensas Levee Board by default.

"This action is predicated upon the assumption that Henry Bernstein and Edgar H. Farrar, attorneys for the Tensas Delta Land Company, will stand on the legality of the compromise which Mr. Bernstein put through at the meeting of the Tensas Basin Levee Board last Thursday at Rayville.

"No word has come from the executive rooms at the St. Charles Hotel on the Tensas land scandal. Governor Hall, although declaring that he did not give his approval to the deal, has given no intimation of what he will do.

"Believe Governor will Not Interfere.

"The Tensas scandal, in the light of the attempted compromise, is a subject of comment all over the state. The opinion was expressed Wednesday here that if the Governor knew all the gossip in circulation he would not only refuse to check the Attorney General, but insist on his pressing the suit to trial.

"The Attorney General is understood to have a mass of evidence to be submitted in support of his case. In that connection it is said that if the case ever comes to trial the state may be able to show the distribution of every dollar of money and stock which was used in putting the deal over. It is no secret that when the

state made its first investigation in the Sanders administration it was unable to trace one small block of stock.

"Although Colonel Pleasant received from Rayville the notarial deed which seals the compromise made by the Levee Board, the charge of fraud still stands so far as the state's legal department is concerned, there will be no compromising the record as it stands in the courts until specific orders come from the Governor.

**"Colonel Pleasant Says Law and Duty Clear.**

"My authority comes from the Governor," said Colonel Pleasant. "Under Act 3, of 1910, Governor Sanders directed Attorney General Gulon to take charge of the suit, and that authority has never been revoked by the Governor. I feel I must obey and respect that order."

"My action is clear," continued the Attorney General, and he quoted the act under which he is prosecuting the case, which reads:

"Be it further enacted by the General Assembly of the state of Louisiana, that it is hereby made the duty of the Attorney General of the state, upon the request of the Governor, to represent the Governor or any political agency or subdivision thereof in any suit in court involving the title of any land belonging to the state of Louisiana or any of its political agencies or subdivisions where the title of the land is vested in or appear in the name of the state or any of its political agencies or subdivisions."

**"Text of Compromise Made at Rayville.**

**"Following is the Compromise Made at Rayville:**

**"The Compromise.**

"Before me, the undersigned authority, personally came and appeared T. R. Gilbert, Sr., president of the Board of Levee Commissioners of the Tensas Basin Levee District, a political corporation created by the laws of the state of Louisiana and domiciled in the town of Rayville, in the parish of Richland, state of Louisiana, duly authorized and fully empowered to act herein for and on account of and in the name of the Board of Levee Commissioners of the Tensas Basin Levee District aforesaid, by a resolution of said board duly adopted in regular session on the 11th day of July, A. D. 1913, a certified copy of said resolution, under the corporate seal of said Levee Board, being attached herein and made a part of this act; and Tensas Delta Land Company, Limited, a limited liability partnership association, organized and created under the laws of the state of Michigan, with its domicile and principal place of business in the city of Grand Rapids, represented herein by Henry Bernstein, its general agent in the state of Louisiana, who is duly authorized to act for and in its stead and in its name in the matters herein set forth.

"And the said appearers declare unto me, notary, in the presence of the undersigned witnesses, that in order to put an end to the litigation now pending between them in the suit entitled "Board of Levee Commissioners of the Tensas Basin Levee District versus Tensas Delta Land Company, Limited," being No. 694 on the docket of the United States District Court in and for the Western District of Louisiana in Equity, and to forever end and set at rest all of the matters and things set up and contained in the allegations of the original and amended bills of complaint filed in said cause, and forever to set at rest all questions relating to the validity of the titles of the Tensas Delta Land Company, Limited, to the lands situated in the parishes of Ouachita, Morehouse, Caldwell, Catahoula, Franklin, Richland, West Carroll, and La Salle, in the state of Louisiana, purchased by it from the Board of Levee Commissioners of the Tensas Basin Levee District on the 8th day of November, A. D. 1898, as appears by the seven deeds of said date, on file and of record in each of the seven parishes above

named (the parish of La Salle having been created since said transaction), and to finally adjust and settle all disputes, differences and matters at issue between the Board of Levee Commissioners of the Tensas Basin Levee District and the said Tensas Delta Land Company, Limited, in any matter affecting the sale of said lands or relating thereto, or affecting in any manner the execution of said transaction and sale, and especially the matters and things set forth in the bill of complaint and amended bills of complaint herein above referred to. They have agreed, contracted and entered into the following act of compromise, which each of them prefers to the hope of gaining, balanced by the fear of losing, in said litigation, namely:

"The said Tensas Delta Land Company, Limited, agrees to pay to the said Board of Commissioners of the Tensas Basin Levee District aforesaid, the sum of one hundred thousand and no/100 (\$100,000.00) dollars, which payment is made contemporaneously with the signing of these presents, by delivery of draft for said sum payable ten days after presentation.

"In consideration of said payment, the receipt of which is hereby acknowledged, the Board of Levee Commissioners of the Tensas Basin Levee District agrees to dismiss, at its cost, the litigation and suit now pending and herein above referred to, being suit No. 694 in equity, on the docket of the United States District Court in and for the Western District of Louisiana, entitled "Board of Levee Commissioners of the Tensas Basin Levee District versus Tensas Delta Land Company, Limited," from the docket of said court, and hereby authorizes the dismissal of said suit to be done either in open court or on motion filed by the Attorney General of the state of Louisiana, or the attorney of record of the Tensas Delta Land Company, Limited, to all of the lands specifically described in its seven deeds from said Board, set forth by government subdivisions, by metes and bounds or by tracts, and specially ratifies, confirms, approves and recognizes its act of compromise heretofore made by it, acting through its president, W. H. Holloman, under authority of a resolution of said Board, dated 9th day of July, 1913, with said Tensas Delta Land Company, Limited, and ratifies and confirms all acts by either of the parties thereto heretofore done or performed thereunder, it being expressly understood that this act of compromise above referred to, and intended to forever settle all questions as to the insufficiency of said previously executed act of compromise.

"This done, executed and signed on the date hereinabove written in the presence of the witnesses whose names are hereto subscribed, and by me, notary. Tensas Delta Land Company, Limited, by Henry Bernstein, Agent. Board of Levee Commissioners of Tensas Basin Levee District, by T. B. Gilbert, President. Witnesses: C. H. McHenry and W. S. Peck.

**"G. F. Purvis, Clerk of Court."**

**"Too Late for Arrest.**

**"But Facts were Brought Out When Judge Hall Tried Brown Case.**

**"Special to The States.**

"Monroe, La., July 16th.—District Attorney Odom, when asked as to why criminal prosecutions have not been attempted in the Tensas Basin Levee Board Case, stated that to his mind the prescription of more than one year would estop any criminal prosecutions.

"It is certain that the proper officers of the law had authentic knowledge of the alleged fraudulent transaction at least ten years ago. Mr. Odom was not district attorney when the sale was made, nor when the facts were developed in court.

"In 1902, J. W. Brown et al. entered suit against the Tensas Delta Land Company applying for a receiver of the company, alleging mis-

management. Brown was represented by Madison and Madison, one of whom was district attorney at the time, the Delta Land Company was represented by Hudson, Potts & Bernstein.

"On November 30, 1903, the case came up for trial before Judge Luther E. Hall, now Governor.

"Almost all of the sensational testimony which has since startled the people of the state was detailed at that trial. Governor Hall, then the presiding judge, rendered a decision in favor of the Tensas Delta Land Company. This case was appealed to the Supreme Court, but withdrawn on request of Brown.

#### "Several Suits; Other Compromises.

"J. W. Brown is the man who now is ready to assist the Attorney General in prosecution of the case. He is the man who engineered the deal. Before Judge Hall was elected he was a state senator and introduced the bill to remove the domicile of the Tensas Basin Levee Board from Rayville to Monroe. Later he was elected district judge, and then it was that the first suit against the Tensas Delta Land Company was filed.

"During Governor Heard's term of office, while Senator W. T. Barnam was president of the levee board, H. Flood Madison, brother of the then district attorney, and Col. Frank Stubbs, represented the Levee Board. This case never came to trial as it was compromised.

"The next suit was filed by George Weasley Smith, who, it is said, obtained all of his facts from the record in the suit before Judge Hall. This suit was also compromised."

#### Exhibit B.

##### "The Governor's Duty to the State.

"The strange coincidence by which the latest phase of the malodorous Tensas land deal and the Dock Board imbroglio 'broke' together has left the Governor in the middle of a very bad fix.

"That he can ever retrieve his Dock Board blunder seems impossible. But if he will follow the path of duty so clearly blazed for him in the Tensas case, if he will apply there the principle he applied here of dismissing the board that refused to accept his policy, if he will put the honor of the state above the claims of personal and political friends caught in a disgraceful transaction and crying for his successor, if he will take his stand with the courageous young law officer of the state who refuses to sanction a compromise of fraud, it is not too late for him to save himself from the consequences of an infinitely greater blunder.

"It is unfortunate for the Governor that from its inception to the present time his name has been linked with this scandalous episode in the history of the state. He may be as innocent as the driven snow of any ulterior connection with the affair. But, by a strange concatenation of events, he has been placed in a relationship to it that requires on his part the utmost caution if his good faith is not to be impugned.

"It has been charged that the motive for moving the domicile of the levee board from the struggling village of Rayville to Monroe was to facilitate the consummation of the deal by which the Attorney General charges the taxpayers of the district were swindled. The Governor may have had no more knowledge of that purpose than the states. Yet it was the Governor, while state senator, who in 1898 introduced and passed the bill that effected the removal.

"After the deal was put through in the latter part of 1898, and the alleged 'slush' fund distributed among certain members of the Levee Board and the inner group that helped in the transaction, J. W. Brown, the agent of the Lacey Syndicate, sued those who made up the syndicate and asked a receiver for the land company. It was before Judge Hall that the case was tried, and, as our correspondent telegraphed us yes-

terday from Monroe, 'all the sensational testimony which has since startled the state' was developed at that trial. Judge Hall may have held the scales with an even balance; the law and the facts may have left him no honest alternative; but the decision he rendered was against the agent and in favor of the syndicate, and it apparently prevented the institution at that time of the criminal proceedings which the facts justified.

"Among those who were thus protected, and whom the Attorney General has since charged in legal records with having shared in the slush fund is John P. Parker, then president of the board. Mr. Parker was then, as now, the personal and political friend of Governor Hall, and so close was and is their intimacy that it is Mr. Parker who is credited with having persuaded Judge Hall to make the race for Governor.

"Nor does the Governor's connection with the case end here. When the Supreme Court held that the state surrendered her title to the lands in donating them to the Levee Board, and hence could not stand as plaintiff, Governor Sanders, under an act of the Legislature specially passed directed the Attorney General to appear for the Levee Board, and it was the Sanders board that instituted the suits now pending in the federal courts.

"The Sanders board has since gone the way of most of the Sanders officeholders. In its stead there was named a new board by Governor Hall. It is this board, responsible to the Governor for its acts and its policy, which has compromised the fraud charged by the Attorney General and again saved the Governor's intimate, personal and political friend and those whom the state alleges were the recipients of the corruption fund of the Lacey syndicate.

"We have said that the unfortunate association of his name so frequently with this unholy transaction does not of itself involve the Governor in either moral or legal turpitude. But can there be any question that, for his own sake and for the honor of the state, it leaves the Governor no alternative but to repudiate the action of the board by summarily dismissing its members and to support the Attorney General with all of the means in his power in defeating the Rayville compromise and compelling a trial of the case in the courts?"

Defendants filed exceptions of no cause of action, which were sustained; and plaintiff has appealed.

Newell on Slander and Libel, pp. 270, 271, divides defamatory words into five classes, as follows:

"(1) Words obviously defamatory.

"(2) Words ambiguous, which, though apparently defamatory, are still on their face susceptible of an innocent meaning.

"(3) Words meaningless until some explanation is given; slang expressions; foreign languages; words used in some special, technical, or customary sense.

"(4) Words apparently innocent, but capable of a defamatory meaning ironically spoken.

"(5) Words obviously innocent and capable of a defamatory meaning."

[1] Plaintiff does not allege that the words of the two exhibits attached to his petition are obviously defamatory, or are ambiguous, or are meaningless; but that they are defamatory in meaning and intention, and that they are false.

He says that the defendants, in Exhibit A, meant to charge and did charge that petitioner was a party to a deal in public lands, which defendants term a fraudulent deal; but plaintiff does not point to any portion of

the exhibit charging that he was a party to such deal, or where he, a state senator, in furtherance of such deal, had introduced a bill in the Legislature as a part of said deal, or that he connived, aided, participated in, or approved of the paying out of a fund to bribe the members of the Tensas levee board, or that he, as district judge, had rendered a judgment in pursuance of his approval or connivance, aid, and participation in the corrupt transaction just above referred to; or that he, as Governor of the state, made appointments to the new levee board with the end in view that the new board might consummate such corrupt transaction by compromising the suit for its annulment; or for the recovery of the lands.

The court fails to find in the exhibits the inferences set out by plaintiff in his petition.

The Exhibit A chronicles the events connected with the Tensas land scandal, which has occupied the attention of the public, the Legislature, the executive department, and the courts of the state for several years past. And while plaintiff's name has been and is connected with some of these events in his several official capacities as state senator, judge, and Governor, there is no word found in the article, or in Exhibit B, which charges him directly or indirectly with knowledge of, or approval of, or participation in, any of these things. On the contrary, the articles disclaim any such knowledge or belief by defendants.

[3] The articles declare a great interest on the part of defendants in a great public matter, and there is given in the newspaper, defendant, a history of that matter. Defendants inform the public and the chief executive of the state of the events connected with this public matter, and they call upon the chief executive to follow a suggested line of conduct to save to the state the public lands involved.

There is no intimation in the exhibits that plaintiff has done or will do anything which a man of integrity, or an official in the honest discharge of his duties, would do.

There are the words and warnings of interested citizens of the state addressed to the chief executive in these articles. The right to address public officials on public matters, or to criticize them, in respectful language, is reserved to every citizen and to the press. Such communications are privileged. *Hamilton v. Eno*, 81 N. Y. 116; *Black's Constitutional Law*, §§ 553, 554.

The closing paragraph of Exhibit B fully describes the attitude of the defendants towards the whole matter and towards the plaintiff, and that is not unfriendly towards or defamatory of plaintiff.

As the articles in question contain no defamatory words, or words capable of a defamatory meaning, towards plaintiff, the exception of no cause of action was properly sustained by the district court.

In a supplemental brief, just filed by plaintiff, it is said:

"The best argument that can be made by defendants is that they did no more than raise a suspicion of the plaintiff's integrity in connection with the reprobated transaction. What is it but the worst kind of a libel to subject a man to such suspicion?"

The defendants have made no such admission in the plea they have filed, and there is no suggestion in the publications complained of that plaintiff had been suspected by defendants or any one else that plaintiff was connected with the reprobated transaction referred to in the publications. If plaintiff suspects defendants with having charged him with connection with the reprobated transaction he fails to point to any word or clause upon which his suspicion is founded. And such word or clause is not to be found in the published articles.

Again, it is argued in the brief:

"It is not necessary in alleging malice to set out the facts which it is intended to prove as establishing malice. The allegations in the instant case are clear, explicit and direct that the defendants were actuated by malice in the publications referred to. Moreover, there is the direct charge and allegation in the petition that the articles were 'published' for the purpose of causing it to be believed that petitioner was himself devoid of integrity notwithstanding the knowledge on the part of the proprietor and manager of said newspaper that said charges were without any foundation whatever in fact.

"Clearly, if that allegation be true—and it must be so considered and treated for the purpose of the exception—the petition alleges a cause of action."

[2] It has been held that it is not necessary to allege malice in a civil prosecution for libel. Plaintiff alleges that the publications are "false, malicious, untrue, and libelous," but if his petition does not really allege a libel of himself by the defendants he cannot prove that the alleged libel was maliciously published. He must first show that a libel has been published to sustain his cause of action against defendants. If the publications complained of are not libelous, then it is immaterial whether defendants bear malice against plaintiff or not. The suit is for damages for libel, and not for malice. Malice or malicious feelings on the part of defendants towards plaintiff is not the cause of action upon which the suit is based; and in disposing of the exception of no cause of action to the suit for libel it is not necessary to consider the allegation of malice at all, if there is no libel.

Plaintiff alleges that the publications were—

"for the purpose of causing it to be believed that plaintiff himself was devoid of integrity, notwithstanding the knowledge on the part of the proprietor and manager of said newspaper that said charges were without any foundation in fact."

That is a conclusion on the part of plaintiff, which is not sustained by the articles alleged to be libelous, and which are attached to and made parts of the petition. It is



to these published articles, made parts of plaintiff's petition, to which the court must turn to determine whether they are libelous or not; and if they do not cause the ordinary mind to believe that plaintiff is therein charged to be devoid of integrity, then they are not libelous, and the exception of no cause of action should be sustained.

The reasons for judgment of the district judge are found in the record, and they are made the basis of the opinion of the court. They are as follows:

"The Governor of Louisiana has sued the Daily States newspaper for libel, basing his cause of action on two publications, which are annexed to and made part of the petition, marked Exhibits A and B. The petition interprets the publications as charging that the Governor was a party to certain deals in public lands, and that he gave his aid and countenance to the nefarious actions of those who set the same on foot and who consummated the same, and under this interpretation it is alleged that the said publication is untrue and is malicious and libelous, and written for the purpose of attacking the petitioner's integrity.

"Two exceptions are urged: The first a prayer foroyer of other articles of similar tenor to which the petition makes reference in the beginning of paragraph IV—if the said articles are intended to be relied on—and the second that the petition sets forth no cause of action. As to the first exception, plaintiff has made no effort to amend, on the assumption, perhaps, that the nature of the articles is sufficiently indicated in Exhibit B, because in the conclusion of paragraph IV they are said to be of like tenor or import; from this point of view, the argument on the exception of no cause of action is applicable to the whole petition.

"The fact that the libels are annexed to the petition, as part of the same, and that the petition charges that the publisher 'meant in said Exhibit A to charge and did charge' that the petitioner was party to a deal, etc., makes the case an ideal one for the application of the exception of no cause of action, because it is palpable that if the reading of that exhibit does not substantiate the allegation, then the charge of libel falls. The same may be said of Exhibit B, to which the petition adds an additional interpretation 'because (says the pleader) it sets forth and infers that petitioner was so compromised by his alleged connection with the history of the so-called land deal as to make it necessary for the preservation of his honor to take the course indicated and described by said newspaper,' etc.

"It is the universal rule that: 'The official act of a public functionary may be freely criticized, and entire freedom of expression used in argument, sarcasm and ridicule upon the act itself; and that then the occasion will excuse everything but actual malice and evil purpose in the critic; \* \* \* the occasion will not of itself excuse an aspersive attack upon the character and motives of the officer; and that to be excused, the critic must show the truth of what he has uttered of that kind.' *Hamilton v. Eno*, 81 N. Y. 116.

"The rule is stated by Black, Constitutional Law (2d Ed.) 553, 554, as follows: 'In the class of conditionally privileged communications are included criticisms upon the official character or conduct of a public officer. Such criticisms are not actionable if made with an honest design to enlighten the public and for their interest and benefit, but they are punishable if made with a malicious design to injure or degrade the individual.' Further, in applying the rule of fair and reasonable comment upon the public conduct of an officer, the courts will not be liberal in measuring the degree of warmth and

vigor which the writer may infuse into his language.'

"Other authorities might be cited, if needed, such as *Commonwealth v. Blanding*, 3 Pick. (Mass.) 304, 15 Am. Dec. 220, approved in *Fitzpatrick v. Daily States Pub. Co.*, 48 La. Ann. 1116 [20 South. 173].

"Following these principles, and reading by their light the Exhibits A and B, can it be said that either of the publications is susceptible to the interpretation placed on it by the petitioner? The first exhibit is merely a chronological statement or history of the events in the Tensas land deal; the petition does not dispute the correctness of the facts as related, but draws an inference therefrom which the court cannot draw. If one reading the publication cannot find the charge which petitioner says is charged therein, even this branch of the action fails, because it is what appears in or can be inferred from that article which is the cause of complaint.

"The second exhibit is an editorial which besides the complaint above recited is additionally complained of because it describes the Governor 'as deprived of his gubernatorial discretion by reason of the circumstances set forth in said newspaper.' Almost any other reader of the article would draw a contrary impression. The close of the article is in accord with the tone of the whole:

"We have said that the unfortunate association of his name so frequently with this unholy transaction does not of itself involve the Governor in either moral or legal turpitude. But can there be any question that, for his own sake and for the honor of the state, it leaves the Governor no alternative but to repudiate the action of the board by summarily dismissing its members and to support the Attorney General with all the means in his power in defeating the Rayville compromise and compelling a trial of the case in the courts?"

"It is clear that this editorial falls within that class of criticism of an official which is regarded everywhere as being within the right of the citizen and of the press, and it cannot be judicially condemned without overthrowing that privilege.

"A cold self-possession, a complete tranquillity are out of place in matters of such grave import; the language of the free and equal does not have to be couched in the speech of the courtier.

"Under our practice, where the whole case is developed by the petition and the documents attached thereto, the facts as recited or alleged are looked at to judge whether the conclusions of fact drawn by the pleader are within the scope of the facts recited. The court is to say whether the facts charged are a legal foundation for the conclusions of fact drawn therefrom. Following this rule the inferences or interpretations placed on the exhibits must be drawn from these exhibits or there is no case; this is peculiarly so here, where the pleader points to the exhibit itself as showing its meaning to be what he says it means. It is perfectly clear that up to this point in the history of the case the exhibits are the case, and if they do not support the charge and show a cause of action, then the exception is good.

"The case of *Dr. Martin v. The Picayune*, 115 La. 983 [40 South. 376, 4 L. R. A. (N. S.) 861], quoted by plaintiff is an illustration. It shows that there must be a cause of action stated; in that case it was that the printed article praising the surgeon had the effect of placing the petitioner in the category of 'quacks'; that that was the ad damnum clause which saved the petition.

"In what part of the plaintiff's petition in this case can you find the similar and necessary allegations of fact outside of the libel itself?

"The fact that the petitioner further charges that the publication was made with malice does



not affect the situation. If the criticism and comment are in the words and character within the rule of privilege, that is, if it is not aspersive or defamatory, it is not actionable. The damages are claimed as 'punitive' damages; the defendant is to be punished for 'maliciously' publishing something which is not on its face or on its inference false or libelous. It matters not whether the claim is for actual or punitive damages. The general doctrine in Louisiana is correctly stated in *Covington v. Robertson*, 111 La. 341, 342 [35 South. 586, 593], as follows:

"The better view, undoubtedly, is that, except in the case of communications or publications which are qualifiedly privileged, malice on the part of the defendant in uttering or publishing the defamatory words is not necessary to entitle the plaintiff to recover in a civil action all the actual damages which he has sustained by reason of the libel or slander, but may be shown to entitle the plaintiff to recover punitive or exemplary damages." The law in Louisiana is that every act of man which occasions injury or damage to another obliges him by whose fault it has been caused to repair it. C. C. art. 2315. All that is necessary here for a party demanding such damages from another is to allege a condition of things such as would show a "fault" on the part of the defendant, resulting in damages and injury to himself therefrom, and on the trial of his case to establish the truth of his allegations. Plaintiff may recover compensatory damages, regardless of whether there was any actual malice or not. The question of actual malice only arises when punitive damages are claimed.

"In oral argument it was contended that the pleader's inferences are matters he should be allowed to go to the jury to prove, but how can an inference be a fact, when you point to the thing which you say is the inference and the thing thus pointed to does not bear out the charge?

"The charge of malice in the publication is overwhelmed by the larger proposition that the thing complained of does not authorize the suit at all—the general doctrine in the cases relied on by the plaintiff has no application to the case of a public official; in that case the preliminary question lying across his path is the character of the act itself. If on its face and with all of its inferences it does not bear out the charge of libel, it cannot be punished.

"For these reasons the exceptions are maintained, and plaintiff's suit is dismissed."

Affirmed.

PROVOSTY, J. (dissenting). I concur in the analysis made by Mr. Justice O'NIELL of the publications complained of.

It is contended that they do not charge that plaintiff was a participant in the fraud in question, and that, even if they do, they are not actionable; being legitimate newspaper criticism of a public officer, and therefore qualifiedly privileged.

Certain events, separate in time and place, are brought together, and related in sequence, for constituting a chain of circumstantial evidence to make out against plaintiff a case of participation in the fraud in question; and, as thus concatenated, and divorced from all other events and surrounding circumstances which might throw a different light upon them, they do make out such a case, and the dullest reader is not left to draw the inference for himself, but it is drawn for him, by the comment that the case thus made out gives rise to gossip, or,

in other words, is accepted by public opinion as proved, and that plaintiff will stand convicted unless he clears himself by following the course marked out by defendant newspaper, namely, remove the levee board.

It is no defense to say that each separate statement is true. The complaint of plaintiff is not that the statements are not true, but it is that they are combined in such a manner as to create a false impression, and that this was done designedly, and with knowledge of the falsity of the impression thus sought to be created.

A charge in order to be libelous need not necessarily be made unequivocally or by positive assertion; it may be made by implication or insinuation. The effect and tendency of the language used, and not its form, is the criterion. 25 Cyc. 360; 18 A. & E. E. of L. 969.

The question of qualified privilege cannot arise. By a qualified privileged communication is meant one made in good faith, in the belief of its being true (25 Cyc. 385; 18 A. & E. E. of L. 1028); whereas, in the present case, the petition expressly alleges that the defendants knew that the said charge was unfounded; and this allegation must be taken for true for all purposes of the trial of this exception of no cause of action.

The privilege of a newspaper to make statements of fact and to comment upon them is no greater than that of an individual. *Levert v. Daily States*, 123 La. 504, 49 South. 206, 23 L. R. A. (N. S.) 726, 131 Am. St. Rep. 356; 15 Am. & Eng. Cases, p. 4, note.

I therefore dissent.

O'NIELL, J. (dissenting). In determining whether the plaintiff has a cause of action, we assume to be true every allegation of fact contained in his petition, except such allegations as are contradicted—if any are contradicted—by the publications complained of, Exhibits A and B, annexed to the petition. Although the majority of the members of this court have interpreted these publications as having an innocent and harmless meaning, it can hardly be said that they could not reasonably have the defamatory meaning ascribed to them by the plaintiff in his petition. If the publications are capable of both an innocent and a defamatory meaning, the question whether they were intended to convey and did convey the innocent or the defamatory meaning is a question of fact to be decided from all the evidence to be heard on the trial. That is what this court decided in the case of *Dr. Martin v. The Picayune*, 115 La. 979, 40 South. 376, 4 L. R. A. (N. S.) 861. In passing upon the demurrer or exception of no cause of action, we must assume to be true the plaintiff's allegation that the defendants intended the publications to convey the insinuation that he (the plaintiff) had been a party to the fraudulent transaction whereby the state

was swindled. The defendants ought to be required to answer that allegation of fact, after which either party would be entitled to a trial by jury.

Newell on Slander and Libel, p. 280, lays down the doctrine, which seems to be universally recognized, that, when the language complained of is capable of a defamatory and an innocent meaning, it is a question of fact for the jury to decide which meaning the readers or hearers would reasonably have given to it, on the occasion in question.

In this connection, I think the plaintiff is entitled to have the court consider his allegation, in paragraph IV of his petition:

"That the said newspaper has repeatedly published articles of the same general tenor as that quoted above, and for the purposes alleged above," etc.

That allegation was disposed of by the district judge (in the reasons which are made the basis of the judgment of this court) with the expression:

"Plaintiff has made no effort to amend, on the assumption, perhaps, that the nature of the articles is sufficiently indicated in Exhibit B."

The district judge seems to have overlooked the fact that the plaintiff was never ordered to amend his petition or to produce the publications of which the defendants prayed for oyer. Each defendant's prayer for oyer was:

"Wherefore exceptor prays that plaintiff may be ordered to amend his petition in the particulars hereinabove described, and to make oyer of the several publications charged in the portions of the petition herein referred to, *within a delay to be fixed by the court, and, in default, for such proper judgment on that issue as the case requires.*" (Italics mine.)

The defendants, exceptors, were not entitled to have, and did not ask, the court to hold the plaintiff responsible for failing to annex to his petition the publications mentioned in paragraph IV, without first ordering him to produce them and fixing the time within which he should comply with the order.

Referring to the Exhibits A and B, annexed to the plaintiff's petition, the majority of members of this court make the following observations, in the foregoing opinion, in which I do not concur, viz.:

"The court fails to find in the exhibits the inferences set out by plaintiff in his petition. The Exhibit A chronicles the events connected with the Texas land scandal, which has occupied the attention of the public, the Legislature, the executive department, and the courts of the state, for several years past. And, while plaintiff's name has been and is connected with some of these events in his several official capacities, as state senator, judge, and Governor, there is no word found in the article, or in Exhibit B, which charges him, directly or indirectly, with knowledge of or approval of or participation in any of these things. On the contrary, the article disclaims any such knowledge or belief by the defendants."

I think it is a mistake to say that the editorial marked Exhibit B disclaims any knowledge or belief by the defendants that the

plaintiff had knowledge of, or approved of, or participated in the fraudulent land deal. The disclaimers are to the effect merely that the circumstances related in the publications do not, of themselves, prove that the plaintiff was involved in moral or legal turpitude. But each disclaimer is followed by such a "but" and a qualification that it leaves the inference that the defendants did believe, and that a prosecution of the state's suit might prove, that Senator Hall and Judge Hall and Governor Hall had knowledge of and approved of and participated in the fraudulent transaction. That there may be no mistake about this, I reproduce all four of the disclaimers that appear in the publication, with their respective "buts" and "yets" and qualifications, viz.:

(1) "It is unfortunate for the Governor that, from its inception to the present time, his name has been linked with this scandalous episode in the history of the state. He may be as innocent as the driven snow of any ulterior connection with the affair. But, by a strange concatenation of events, he has been placed in a relationship to it that requires on his part the utmost caution if his good faith is not to be impugned.

(2) "It has been charged that the motive in removing the domicile of the levee board from the straggling village of Rayville to Monroe was to facilitate the consummation of the deal by which, the Attorney General charges, the taxpayers of the district were swindled. The Governor may have had no more knowledge of that purpose than The States. Yet it was the Governor, while state senator, who, in 1898, introduced and passed the bill that effected the removal.

(3) "After the deal was put through, in the latter part of 1898, and the alleged slush fund distributed among certain members of the levee board and the inner group that helped in the transaction, J. W. Brown, the agent of the Lacey syndicate, sued those who made up the syndicate and asked a receiver for the land company. It was before Judge Hall that the case was tried, and, as our correspondent telegraphed us yesterday from Monroe, 'all the sensational testimony which has since startled the state' was developed at that trial. Judge Hall may have held the scales with an even balance; the law and the facts may have left him no alternative; but the decision he rendered was against the agent and in favor of the syndicate, and it apparently prevented the institution at that time of the criminal proceedings which the facts justified.

(4) "We have said that the unfortunate association of his name so frequently with this unholy transaction does not, of itself, involve the Governor in either moral or legal turpitude. But can there be any question that, for his own sake and for the honor of the state, it leaves the Governor no alternative but to repudiate the action of the board by summarily dismissing its members and to support the Attorney General with all the means in his power in defeating the Rayville compromise and compelling a trial of the case in the courts?"

These protestations, taken in connection with the direct insinuation that the plaintiff, as state senator, judge, and Governor, did have knowledge of and approve of and participate in the fraudulent transactions by which the state was swindled, do not, in my opinion, amount to a disclaimer of any

knowledge or belief by the defendants that the plaintiff was so implicated.

It is said in the opinion from which I dissent:

"The articles declare a great interest on the part of defendants in a great public matter, and there is given in the newspaper, defendant, a history of that matter. Defendants inform the public and the chief executive of the state of the events connected with this public matter, and they call upon the chief executive to follow a suggested line of conduct to save to the state the public lands involved."

The defendants did not declare, in the publications calling upon the chief executive to follow the line of conduct suggested by them, the purpose to be "to save to the state the public lands involved." If that was their purpose, they ought to say so in an answer to the plaintiff's petition. On the contrary, they say, in the editorial complained of, that he should follow the line of conduct suggested by them: (1) "To save himself from the consequences of an infinitely greater blunder than his dock board blunder"; (2) to save "his good faith" from being "impugned"; and, finally, the editorial says that the plaintiff has no alternative but to follow the line of conduct suggested by the defendants, "for his own sake and for the honor of the state." These are the expressed objects and purposes for which the Governor is called upon to follow the line of conduct suggested by the defendants; that is, "to repudiate the action of the board by summarily dismissing its members," etc.—"put the honor of the state above the claims of personal and political friends caught in a disgraceful transaction and crying for his succor."

I cannot agree with the declaration in the majority opinion that there is no intimation in the exhibits that the plaintiff will fail to do anything which a man of integrity or an official in the honest discharge of his duties would do. The exhibits are, in my opinion, teeming with insinuations that the plaintiff would not dare to let the state's case go to trial for fear of an exposure of his connection with the fraudulent transaction. Without any imagination on my part, the purpose of the editorial appears to have been to convey the inference that, if the Governor would not repudiate the compromise and allow the state's case to be tried, it would be because he was himself implicated in the fraudulent land deal. The purpose and trend of the editorial appears to me to have been to make out such a strong case of circumstantial evidence of criminal conduct on the part of the plaintiff, as state senator, judge, and Governor, as to lead the public to conclude that if the Governor would permit the state's case to be tried in the courts his guilt would be proven, and that, if he would not permit the state's case to be tried in the courts, it would be because of his fear of the exposure. In the public opinion, the plaintiff was to be damned if he would, and be damned if he wouldn't, let the state's case be tried.

The big bold headlines of Exhibit A declare that the Attorney General will not be halted except by the Governor; that it is not believed that the Governor will interfere; that he was the presiding judge in 1902 when the scandal was first tried and decided for the Lacey estate.

In the body of the editorial, the fact is dwelt upon, and the statute is quoted to prove, that the plaintiff, as chief executive, is the only person having authority to prevent the Attorney General from repudiating the compromise and prosecuting the suit. The first paragraph, in the chronological statement of events, declares that a bill was introduced in the Senate by Senator Luther E. Hall, now Governor Hall, removing the domicile of the Tensas Basin levee board from Rayville, Richland parish, to Monroe, Ouachita parish. And in the editorial it is said that it has been charged that the motive in removing the domicile of the levee board from the straggling village of Rayville to Monroe was to facilitate the consummation of the deal by which, the Attorney General charges, the taxpayers of the district were swindled.

The next four paragraphs explain the fraudulent sale by the members of the levee board, and declare that a certain part of the slush fund went to the president of the board, who was a personal and political friend of the plaintiff.

The next two paragraphs recite that James W. Brown, who represented James D. Lacey and put the fraudulent deal through, filed suit to liquidate the land company that had been the purchaser in the fraudulent sale, and that "the suit was tried before Judge Luther E. Hall, now Governor Hall, and all the facts were developed; judgment being rendered against Brown and in favor of the Tensas Land Company and J. D. Lacey by Judge Hall."

Then follows what I consider a bold insinuation that the plaintiff got a part of the slush fund, either directly or through his personal and political friend. In this connection it is related that the members of the levee board appointed by Governor Sanders, succeeding the board of which the plaintiff's personal and political friend was president, learned for the first time of the fraud that had been practiced by their predecessors in office, and entered suit in the name of the state against the land company to set aside the sale on allegations of fraud and bribery; and that the members of the levee board, subsequently appointed by Governor Hall, compromised the allegations of fraud for \$100,000. If the following statement is not an oblique insinuation that if the Governor would permit the state's case to be tried in court it would disclose that he, directly or through his personal and political friend, received "one small block of stock" that formed a part of the slush fund, the defendants

should be required to answer and say to whom this insinuation has reference, viz.:

"The Tensas scandal, in the light of the attempted compromise, is a subject of comment all over the state. The opinion was expressed Wednesday here that, if the Governor knew all the gossip in circulation, he would not only refuse to check the Attorney General, but insist on his pressing the suit to trial. The Attorney General is understood to have a mass of evidence to be submitted in support of his case. In that connection, it is said that, if the case ever comes to trial, the state may be able to show the distribution of every dollar of money and stock which was used in putting the deal over. It is no secret that, when the state made its first investigation in the Sanders administration, it was unable to trace one small block of stock."

If the foregoing hint is, of itself, too mild and general to attract the attention of the readers to the personal character of the plaintiff for honesty and integrity, I submit that the innuendo in the editorial explaining it leaves nothing to the imagination, viz.: After declaring that the decision rendered by Judge Hall apparently prevented the institution of the criminal proceedings which the facts justified, this is said:

"Among those who were thus protected, and whom the Attorney General since has charged in legal records with having shared in the slush fund, was John P. Parker, then president of the board. Mr. Parker was then, as now, the personal and political friend of Governor Hall, and so close was and is their intimacy that it is Mr. Parker who is credited with having persuaded Judge Hall to make the race for Governor."

"Nor does the Governor's connection with the case end here. When the Supreme Court held that the state surrendered her title to the lands in donating them to the levee board and hence could not stand as plaintiff, Governor Sanders, under an act of the Legislature specially passed, directed the Attorney General to appear for the levee board, and it was the Sanders board that instituted the suits now pending in the federal courts."

"The Sanders board has since gone the way of most of the Sanders officeholders. In its stead there was named a new board by Governor Hall. It is this board, responsible to the Governor for its acts and its policies, which has compromised the fraud charged by the Attorney General, and again saved the Governor's intimate, personal, and political friend and those who the state alleges were the recipients of the corruption fund of the Lacey syndicate."

The plaintiff alleges that the publications complained of set forth and charged that he was so compromised by his connection with the fraudulent land deal that he was deprived of his gubernatorial discretion. My opinion is that the publications are susceptible of that construction or inference. They appear to me to have been written with the careful and deliberate purpose of leading the public mind to believe that the plaintiff was so implicated in the fraudulent transaction by which the state was swindled that he had lost his official discretion and would let his personal welfare reconcile his mind to infamy.

I concur in the opinion that a newspaper editor is not to be hampered with the wearing of kid gloves in handling swindlers and

bribe takers discovered in the public service. He may go very far with his freedom of expression in his criticism of the official conduct of the public servants. But when he indulges in an aspersive attack upon the private character or motives of an officer, either by a direct charge or by insinuation or innuendo, he should be prepared, when called upon, to prove the truth of his accusation, or should suffer the consequence.

As was said in the case of John Fitzpatrick v. Daily States Publishing Co., 48 La. Ann. 1116, 20 South. 173:

"The authorities generally, English and American, hold the editor and publisher of a newspaper to the same rigid responsibility with any other person who makes injurious communications. Malice on his part is conclusively inferred if the communications are not true. \* \* \* It is no defense that the source of information was stated at the time of publication, and that the editor or publisher believed it to be true. The freedom of speech and the liberty of the press were designed to secure constitutional immunity for the expression of opinion; but that does not mean unrestrained license, nor does it confer the right upon the editor and proprietor of a newspaper to write or publish whatever he may choose, no matter how false, malicious, or injurious it may be, without full responsibility for the damage it may cause."

"The modern rule with regard to the conditional privilege which newspaper publishers enjoy is that when the publication is made in good faith, in the ordinary course of the publisher's business, with good motives and for justifiable ends, and without any intention to work injury to the reputation or character of the subject of it, the party injured will be restricted in his recovery to actual damages."

"While it is undoubtedly true that the preservation of good and pure government, either in city or state, greatly depends upon a free and fearless expression of public sentiment through the columns of the journals of the country, yet it is equally true that same must and can be accomplished through the instrumentality of cogent, temperate, and well-reasoned editorials, predicated upon facts, and not by means of hasty, intemperate, and opprobrious criticisms and abuse, having no other foundation than the current local items published in some other paper. This rule, if adhered to, will greatly tend to the promotion of truth, good morals and good government."

The decision in the Fitzpatrick Case was quoted with approval in *Billet v. Times-Democrat Publishing Co.*, 107 La. 761, 32 South. 17, 58 L. R. A. 62, and in *Luzenberg v. O'Malley*, 116 La. 708, 41 South. 41. In the case quoted, the accusation against the public official was more direct than it is in the case before us. But that makes no difference. If the insinuation is plain enough to convey a defamatory meaning with regard to the character or motives of a public officer, it is actionable.

"The effect and tendency of the language used, not its form, are the criteria by which to determine the actionable quality of the words. It is immaterial that the words used concerning the plaintiff are indefinite and uncertain in their meaning if on the whole they are defamatory and were so intended and understood, for, as has been just remarked, calumny may be as effectually conveyed

in artful allusions to collateral matter and oblique insinuations as by the most explicit assertions; and it is well settled that in actions of libel and slander it is permissible to aver and prove that words which have a covert meaning were intended to defame and were understood in a defamatory sense by those who heard or read them.

"Although the words do not contain a direct affirmative charge that a crime has been committed, yet if they are calculated to induce the hearers to suspect that the person spoken of has committed a crime, they are actionable, and it would seem that the same rule applies not only to imputations of crimes, but also to imputations of other acts or circumstances to charge which directly is actionable." 18 Am. & Eng. Ency. of Law (2d Ed.) pp. 969, 970, citing many decisions.

"At one time, defamatory words were construed in *mitiori sensu*, the object being to discourage litigation; but this doctrine has long since been exploded, and the rule now is that the words are to be taken in their plain and natural meaning and to be understood by courts and juries as other people would understand them, and according to the sense in which they appear to have been used and the ideas they are adapted to convey to those who hear or read them. \* \* \* Words used in a publication, even if not actionable in and of themselves, may become so if they convey a hidden and covert meaning and are understood in their concealed sense by the person or persons addressed." 25 Cyc. pp. 355-358.

See, also, Newell on Slander and Libel, pp. 264-280.

The plaintiff alleges in his petition that the insinuation and innuendo by which the defendants have attacked his character and motives are untrue, to the knowledge of the defendants, and that they made the accusation maliciously, to defame and degrade him. I am of the opinion that the insinuation and innuendo make the accusation plain enough to require the defendants to answer the allegations of the petition.

Hence I respectfully dissent from the opinion and decree rendered in this case, dismissing the plaintiff's suit on the demurrer or exception of no cause of action.

(140 La. 925)

No. 22317.

STATE v. DAVIS.

(Supreme Court of Louisiana. Feb. 12, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW §656(4) — APPEAL — HARMLESS ERROR—REMARKS OF TRIAL JUDGE.

Where on the trial of the accused charged with shooting with intent to murder, the district attorney in the course of his argument said, "The prosecuting witness did not even have a pocketknife on him when he was shot," to which remark counsel for the accused objected, and requested the judge to instruct the jury to disregard the same, and thereupon the judge stated, in the presence and hearing of the jury, that he distinctly remembered that it had been testified by many witnesses that the prosecuting witness did not have a knife on his person at the time of the shooting, to which comment on the evidence by the judge in the presence and

hearing of the jury, counsel for the accused excepted, *held*, that the remarks of the judge were in plain violation of section 991 of the Revised Statutes of 1870, prohibiting the judge from stating or recapitulating the evidence, or stating or repeating the testimony of any witness, or giving any opinion as to what facts have been proved or disproved, to the jury or in its presence or hearing, and that such remarks constitute reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1529.]

Appeal from Twenty-First Judicial District Court, Parish of Pointe Coupee; Joseph E. Le Blanc, Jr., Judge.

Berryman Davis was convicted of shooting with intent to murder, and he appeals. Verdict and sentence reversed and cause remanded for a new trial.

R. P. Claiborne, of New Roads, for appellant. A. V. Coco, Atty. Gen., and J. H. Morrison, Dist. Atty., of New Roads (Vernon A. Coco, of Marksville, of counsel), for the State.

LAND, J. The defendant was charged on information with the crime of shooting with intent to murder.

He was tried, found guilty, and sentenced to confinement at hard labor in the state penitentiary for not less than 1 nor more than 21 years.

Defendant has appealed, and his counsel relies for reversal mainly on bill of exceptions No. 5, which reads as follows:

"Be it remembered that on the trial of this cause that the district attorney in his opening argument stated to the jury that the prosecuting witness did not have even a pocketknife on him when he was shot, to which remark counsel for the accused objected and requested the court to instruct the jury to disregard this statement of the district attorney and the court stated, in the presence and hearing of the jury, that, 'I distinctly remember that it has been testified to by many witnesses that the prosecuting witness did not have a knife on his person at the time of the shooting,' and refused to instruct the jury to disregard these remarks made by the district attorney as requested so to do by counsel for the accused, to which refusal and ruling of the court and comment on the evidence by the court in the presence and hearing of the jury, counsel for the accused excepted, and now tends this bill of exceptions for the signature of his honor, the presiding judge, after presentation to the district attorney.

"Per Curiam. The remark attributed to the court in this bill is substantially correct, but it was addressed to counsel for the accused and not to the jury.

"The court is not informed as to whether the jurors heard said remarks or not, but I cannot see, in the light of all the evidence in the case, how the jury could have been prejudiced, if they heard the remark, because not a single witness in the case, even those for the defense, testified that the prosecuting witness did have a knife, and therefore the question of whether he had a knife or not was not debatable, and the court's statements, if heard, could not, for this reason, have influenced the mind of the jury."

The facts stated by the presiding judge doubtless furnish good grounds for the overruling of defendant's objections to the remark made by the district attorney, but af-

ford no excuse for the judge's statement of such facts in the presence and hearing of the jury.

This case is on all fours with that of *State v. Iverson*, 136 La. 986, 68 South. 99, in which the court said:

"But the judge should have reserved the statement of his reason for refusing the instruction, and should have given it only in the bill of exception, instead of commenting on the evidence in the presence and hearing of the jury" (citing a number of cases).

In that case the judge said:

"I find no evidence in the case to justify such a charge."

In this case the judge said:

"I distinctly remember that it has been testified to by many witnesses that the prosecuting witness did not have a knife on his person at the time of the shooting."

Since the adoption of Act No. 272 of 1853, p. 249, now section 991 of the Revised Statutes of 1870, in charging the jury in criminal cases, the judge has been required to limit himself to giving them a knowledge of the law applicable to the case, and has been expressly prohibited from stating or recapitulating the evidence so as to influence the decision on the facts, or from stating or repeating to the jury the testimony of any witness, or from giving any opinion as to what facts have been proved or disproved.

It has been uniformly held that the said prohibition applies to whatever the judge may say in the presence of the jury during the progress of the trial, whether in his charge to the jury, or in overruling objections of counsel for the accused. See *Marr's Crim. Juris. of La.* § 459, and notes.

Article 179 of our Constitution provides that the jury in all criminal cases shall be judges of the law and of the facts on the question of guilt or innocence, having been charged as to the law applicable to the case by the presiding judge.

Under such a provision, reinforced as it is by the prohibition of the statute, the comments by the judge on the facts in the case at bar necessarily constitute reversible error.

We find no sufficient merit in the other bills of exception for the reversal of the verdict.

It is therefore ordered that the verdict and sentence appealed from be reversed, and that this cause be remanded for a new trial and further proceedings according to law.

(140 La. 928)

No. 22212.

STATE v. NEJIN.

(Supreme Court of Louisiana. Oct. 16, 1916.)

Appeal from City Court of Shreveport; David B. Samuel, Judge.

F. A. Nejin was convicted of operating a blind tiger in violation of law, and he appeals. Affirmed.

Charles F. Crane, of Shreveport, for appellant. A. V. Coco, Atty. Gen., and W. A. Mabry, Dist.

Atty., and S. I. Foster, Asst. Dist. Atty., both of Shreveport (Vernon A. Coco, of Marksville, of counsel), for the State.

O'NIELL, J. The defendant was found guilty of operating a blind tiger, in violation of Act No. 8 of 1915, was sentenced to pay a fine and be imprisoned, and has appealed. He relies upon a bill of exceptions reserved to the overruling of his motion in arrest of judgment. The grounds urged in the motion and the issues presented in this appeal are identically like those in the case of *State v. Emile*, 74 South. 163, No. 22210, in which the conviction and sentence were this day affirmed.

For the reasons assigned in that case, the conviction and sentence herein appealed from are affirmed.

(73 Fla. 241)

DONEGAN v. BAKER & HOLMES CO.

(Supreme Court of Florida. Feb. 2, 1917.)

(Syllabus by the Court.)

1. CORPORATIONS §550(7) — CREDITORS — TRUST FUND.

A corporation being heavily indebted, and whose debts exceeded its available assets, after consultation with some of its creditors, executed a deed to D., conveying certain real property for a stated consideration, and took from D., the creditors consenting, a paper writing in which D. agreed to hold the amount agreed upon as the purchase price for the real estate, for the following purposes: "First, deduct the recorded mortgage indebtedness against the property and pay the same; second, take the remaining moneys and disburse to the best advantage for the creditors as shown by the list below, it being understood that this list shows the names and amounts due all the creditors to whom the Ludlam and MacDonough Company (the corporation) are indebted." Held, that the fund in the hands of D. constituted a trust fund for the benefit of certain creditors to be disbursed by D. according to his directions "to the best advantage of the creditors."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2197, 2198.]

2. NOVATION §3 — EXTINGUISHMENT OF DEBTS—TRUST.

The transaction recited in the above head-note was not a novation because the debts of the corporation were not extinguished by it, nor were the claims of the named creditors canceled by the trustee's obligation.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 3.]

For other definitions, see Words and Phrases, First and Second Series, Novation.]

3. TRUSTS §366(1)—SUIT BY CESTUI QUE PARTIES.

In a suit by a cestui que trust for a distribution of a trust fund, the trustor or person creating the trust is not a necessary party.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 574-578.]

4. EQUITY §39(1)—JURISDICTION.

Where a court of chancery assumes jurisdiction of a cause for one purpose, which is the principal object of the suit, it will proceed to the settlement of the entire case.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-109, 111, 114.]

Appeal from Circuit Court, Osceola County; Jas. W. Perkins, Judge.

Bill by the Baker & Holmes Company against Arthur B. Donegan. From an inter-

locutory decree overruling a demurrer to the bill of complaint, defendant appeals. Affirmed.

Johnston & Garrett, of Kissimmee, for appellant. Stockton & Osborne, of Jacksonville, for appellee.

ELLIS, J. This appeal was taken from an interlocutory decree overruling a demurrer to the bill of complaint.

The bill seeks to subject a fund in the hands of appellant to the payment of complainant's claim which, according to the bill, was one of the objects for which the fund was created. Ludlam & MacDonough Company, a Florida corporation, was heavily indebted to many creditors, such indebtedness exceeding its available assets. The involved corporation owned certain lands which the corporation, after consulting with complainant and other creditors, agreed to convey to the defendant for the sum of \$7,000, which was to constitute a fund in the hands of defendant to be used, first, to pay off two mortgages amounting to \$4,099.83, afterwards other indebtedness of Ludlam & MacDonough Company, aggregating \$6,394.16. The terms under which the defendant held the money as shown by the instrument containing the agreement, and attached to the bill as a part of it, are as follows:

"First, deduct the recorded mortgage indebtedness against the property and pay same.

"Second, take the remaining moneys and disburse to the best advantage for the creditors, as shown by the list below, it being understood that this list shows the names and amounts due all the creditors to whom the Ludlam & MacDonough Company are indebted."

The bill alleges that the land was conveyed to the defendant pursuant to the agreement that the two mortgages were paid off and canceled, and that the sum of \$2,900.17 still remained in the defendant's hands, to be applied according to the agreement to the claims of the remaining creditors consisting of "bills payable," "accounts," purchase price of a dredge, and wages and salaries; that the complainant was one of the creditors of Ludlam & MacDonough Company; that the debt of the latter company to complainant amounted to \$955.02, and was included in the list aggregating the above sum of \$6,394.16; that \$1,000 of the above total indebtedness was due for a dredge purchased from Fairbanks, Morse & Co., who had reserved title and taken the dredge into their possession, thereby extinguishing its claim; that complainant had placed its claim in judgment several months after the defendant became the purchaser of said property under the agreement with Ludlam & MacDonough Company and its creditors, which judgment complainant offers to cancel upon the receipt by it of the sum due under the terms of the trust. The bill alleges that the complainant has never received any part of the trust fund; that the defendant refused to render an accounting of the money to be paid out under the afore-

said agreement, and prays that the defendant be declared a trustee for complainant and others similarly situated; that a master be appointed to state an account of the amount remaining unpaid on account of the trust, and of the proportionate part due to the complainant; that a reasonable sum be allowed for the services of the solicitors for complainant to be paid from the fund; that the defendant be ordered to pay to complainant and others similarly situated the sums found to be due, and for general relief. The bill was filed by Baker & Holmes Company in its own behalf, and on behalf of "others similarly situated who may intervene and contribute to the expenses of the proceedings."

A demurrer was interposed to the bill by the defendant, which, among other questions, raises the four following ones, which are discussed by appellant: First, Ludlam & MacDonough Company is not joined as a defendant; second, there is an adequate legal remedy for the complainant; third, no grounds exist for an accounting; and, fourth, the transaction amounts to a novation and the remedy against the defendant is at law. The demurrer was overruled, and the defendant appealed.

[1, 4] In the first place we think that the fund in the hands of the defendant was a trust fund for the benefit of certain creditors to be disbursed by the defendant according to his discretion, "to the best advantage for the creditors." While the amount which was originally placed in his hands was definitely ascertained and a certain part of it set apart for the payment of two obligations of superior dignity, which left a certain sum remaining, that sum was to be apportioned between certain other creditors to their best advantage. Involved in the distribution of this sum was the question of whether the claim of Fairbanks, Morse & Co. for \$1,000 had been extinguished, and whether any part of the trust fund was expended for that purpose.

[2, 3] The suit is nothing more than one for the distribution of a trust fund in which the complainant has an equitable interest. If that is true, the question whether an accounting may be had does not arise, because it would be decreed as incident to the equitable relief. See 6 Pom. Eq. Juris. § 927; 1 R. C. L. p. 370; Wiggins & Johnson v. Williams, 36 Fla. 637, 18 South. 859, 30 L. R. A. 754; Farrell v. Forest Investment Co., 74 South. 216, decided at the present term. There are few limitations or restrictions on the kind or nature of property which may be the subject of a trust; the rule being that a trust may exist in any property, real or personal, legal or equitable, which is in existence and which in the eye of a court of equity is of value. See 39 Cyc. 36; 1 Perry on Trusts (6th Ed.) §§ 67, 68; Underhill's Law of Trusts and Trustees, p. 54. This includes choses in action. 1 Perry on Trusts, supra. According to the allegations of the bill the transaction



between Ludlam & MacDonough Company, its creditors, and the defendant constituted the creation of a trust in the proceeds of the sale of the property for the payment of certain creditors of Ludlam & MacDonough Company according to the schedule contained in the letter of defendant to that company. See 2 Perry on Trusts (6th Ed.) § 585; Gravelle v. Lamkin, 120 Ala. 210, 24 South. 756. The suit for the distribution of the trust fund may be brought by the trustee or the parties claiming to be cestuis que trust and others claiming to be the cestuis que trust. 2 Perry on Trusts (6th Ed.) § 928; 39 Cyc. 510; Clark v. Brown (Tex. Civ. App. 1908) 108 S. W. 421; Wyble v. McPheters, 52 Ind. 393. The transaction was not a novation because the debts of the Ludlam & MacDonough Company were not extinguished by it, nor were the claims of the named creditors canceled by the trustee's obligation, which is an essential requisite of a novation, and not a result. The Ludlam & MacDonough Company was not a necessary party, having parted with its interest in the property which appears to have been the case from the second paragraph of the bill. See Carter v. Uhlein (N. J.) 36 Atl. 956.

There was no error in overruling the demurrer, and an interlocutory decree is affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and WHITFIELD, JJ., concur.

(73 Fla. 227)

SEEBBA v. WOLF BROS. SHOE CO. et al.  
(Supreme Court of Florida. Feb. 2, 1917.)

(Syllabus by the Court.)

1. PLEADING  $\S$  216(1) — DEMURRER — PROVINCE.

It is not the province of a demurrer, either in an action at law or suit in equity, to set out the facts; it involves only such facts as are alleged in the pleading demurred to, and raises only questions of law as to the sufficiency of the pleadings which arise on the face thereof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 535, 536, 539.]

2. PLEADING  $\S$  216(1) — DEMURRER — MATTERS DEHORS THE BILL.

In passing upon a demurrer to a bill in equity, matters dehors the bill cannot be considered, but only such matters as appear upon the face of the bill.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 535, 536, 539.]

Appeal from Circuit Court, St. Johns County; George Couper Gibbs, Judge.

Bill in chancery by William F. Seeba against the Wolf Bros. Shoe Company and others. Demurrer of the Wolf Bros. Shoe Company sustained, and complainant appeals. Order reversed.

Alex. St. Clair-Abrams, of Jacksonville, for appellant. E. Noble Calhoun, of St. Augustine, and Butler & Boyer, of Jacksonville, for appellees.

SHACKLEFORD, J. William F. Seeba filed his bill in chancery against Philip Kukowsky, Gussie Kukowsky, his wife, Wolf Bros. Shoe Company, a corporation, and Stringfellow & Doty Company, a corporation, for the enforcement of several liens upon certain described real and personal property, alleged to have been created by the execution of mortgages by Philip Kukowsky and his wife to the complainant for the purpose of securing the payment of certain indebtedness due to the complainant from Philip Kukowsky. Wolf Bros. Shoe Company and Stringfellow & Doty Company were made defendants for the reason that they claimed to have liens upon the land described in the bill, the allegations as to the liens of such two defendant corporations being as follows:

"And, further complaining, your orator says that he is informed and believes that the Wolf Bros. Shoe Company, a corporation doing business in Columbus, Ohio, and Stringfellow & Doty Company, a corporation under the laws of the state of Florida and doing business in Jacksonville, Duval county, Fla., claim a lien on the land herein described, the said Wolf Bros. Shoe Company by virtue of a judgment against the said Philip Kukowsky for \$392.54, dated April 1, 1912, and the said Stringfellow & Doty Company by virtue of a judgment against the said Philip Kukowsky for \$320.78, dated March 6, 1911.

"And your orator says that on the 6th day of December, 1910, the Wolf Bros. Shoe Company, with other creditors, filed a petition to declare the said Philip Kukowsky a bankrupt, and afterwards the said Philip Kukowsky filed a schedule of his entire indebtedness up to the 6th day of December, 1910, and included in said schedule the names of the Wolf Bros. Shoe Company and the Stringfellow & Doty Company, two of the defendants herein.

"And your orator says that, under and in pursuance of the bankruptcy laws of the United States, as shown from the record of the bankruptcy proceedings, due notice was forwarded to all of the creditors of the said Philip Kukowsky, including the defendants the Wolf Bros. Shoe Company and the Stringfellow & Doty Company; that in the petition of the creditors to declare the said Philip Kukowsky a bankrupt the Wolf Bros. Shoe Company represented that the said Philip Kukowsky was indebted to it in the sum of \$348.37; and in the schedule of indebtedness filed the said Stringfellow & Doty Company is represented as being a creditor in the sum of \$195.09. And your orator says that, pursuant to the bankruptcy laws, both the Wolf Bros. Shoe Company and the Stringfellow & Doty Company were duly notified to appear and prove their claims. And your orator says that after due and proper proceedings the said Philip Kukowsky, by a decree of discharge made and ordered in open court by the Honorable Jas. W. Locke, judge, was discharged from all debts and claims which are made provable by the Bankruptcy Act of Congress against his estate and which existed on the 6th day of December, 1910, on which day the petition for adjudication was filed against him, the said Philip Kukowsky, excepting such debts as are by law excepted from the operation of the discharge in bankruptcy.

"And, further complaining, your orator says that the debt and claim of Stringfellow & Doty Company, a corporation, existed on and prior to the 6th day of December, 1910, and the debt of Wolf Bros. Shoe Company, a corporation, existed on and before the 6th day of December,



1910, and were not debts excepted from the operation of the discharge in bankruptcy.

"And your orator further says that the said Philip Kukowsky was, by virtue of the proceedings in bankruptcy, as herein set forth, discharged from the debts and claims of the said Wolf Bros. Shoe Company, a corporation, and Stringfellow & Doty Company, a corporation.

"And your orator further says that the judgment against Philip Kukowsky in favor of Stringfellow & Doty Company, dated March 6, 1911, was for an indebtedness existing on and before the 6th day of December, 1910, and was not for any indebtedness contracted with the said Stringfellow & Doty Company after the 6th day of December, 1910, and was embraced in the schedule of indebtedness in the bankruptcy proceeding. And your orator further says that the indebtedness to the Wolf Bros. Shoe Company on which the judgment for \$392.54 was obtained on the 1st day of April, 1912, was and is a debt existing on and before the 6th day of December, 1910, and embraced in the schedule of indebtedness in the bankruptcy proceedings, wherefore your orator says that, by reason of these facts, the defendants Wolf Bros. Shoe Company, a corporation, and Stringfellow & Doty Company, a corporation, have no lien or claim against the real estate herein described; that the said Philip Kukowsky was discharged from all of said debts and claims by virtue of the order of discharge hereinbefore set forth."

A decree pro confesso was entered against Philip Kukowsky and Gussie Kukowsky. Stringfellow & Doty Company filed an answer to the bill, to which the complainant filed the usual general replication, but, so far as is disclosed by the transcript, no further proceedings have been had thereon. As will presently appear, we are in no wise concerned with these defendants upon this appeal. Wolf Bros. Shoe Company interposed a demurrer to the bill, which, omitting the caption and purely formal parts, is as follows:

"This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill, and for cause of demurrer shows that:

"First. There are not facts alleged in the bill of complaint by which the court may conclude as a matter of law that the obligations or indebtedness due by Philip Kukowsky to this defendant has been discharged in bankruptcy.

"Second. The allegations of said bill of complaint fail to show that the lien of the mortgage given by Philip Kukowsky and wife, in so far as it affects the real estate therein described, is superior to the lien of this defendant, as judgment creditors of said Philip Kukowsky.

"Third. A judgment rendered by a court of general jurisdiction, after a discharge in bankruptcy, on a suit pending at the time of the institution of the bankruptcy proceedings, is not barred or released by such discharge in bankruptcy of the judgment debtor, and creates a valid subsisting lien on any real property acquired by such bankrupt subsequent to the filing of the petition in bankruptcy, in the county of the rendition of such judgment."

This demurrer was set down by the complainant for argument, and the court made the following ruling thereon:

"This demurrer having been argued and submitted, it is, upon consideration, ordered, ad-

judged, and decreed that said demurrer be, and the same is hereby, sustained upon the second and third grounds thereof."

From this interlocutory order the complainant has entered his appeal and made all of the defendants appellees, whether properly so or not we are not called upon to determine. The only appellee appearing here is Wolf Bros. Shoe Company.

The sole assignment of error is that the court erred in sustaining the demurrer, and this is the only point which is presented for determination.

[1] As we have several times held:

"It is not the province of a demurrer to set out the facts; it involves only such facts as are alleged in the pleading demurred to, and raises only questions of law as to the sufficiency of the pleadings which arise on the face thereof." State ex rel. Railroad Com'rs v. Atlantic Coast Line R. Co., 67 Fla. 441, 63 South. 729, where prior decisions of this court are cited.

Although these cases were actions at law, the principle announced therein with regard to the province of a demurrer, which we have just copied above, applies with equal force to suits in equity.

[2] As we read the bill of complaint, it does not allege that the action at law of Wolf Bros. Shoe Company against Philip Kukowsky was pending at the time bankruptcy proceedings were instituted against him. We cannot tell from the allegations of the bill, to which we are confined, when such action at law was instituted, whether before the institution of such bankruptcy proceedings or after the discharge in bankruptcy of Kukowsky. It seems to us that the defense upon which this appellee relies would have to be raised either by a plea or answer, and is not open for consideration on the demurrer. In other words, we are of the opinion that the court erred in sustaining the demurrer, and that the interlocutory order must be reversed, at the cost of the appellee Wolf Bros. Shoe Company.

Order reversed.

BROWNE, C. J., and TAYLOR, WHITEFIELD, and ELLIS, JJ., concur.

(73 Fla. 152)

RICKMAN v. WHITEHURST et al.

(Supreme Court of Florida. Jan. 31, 1917.)

(Syllabus by the Court.)

1. COUNTIES §196(4) — FISCAL AFFAIRS — RIGHTS OF TAXPAYER — COUNTY OFFICERS — INJURY.

A citizen and taxpayer of a county may maintain a bill in chancery against public officials of the county to restrain the unlawful expenditure of public funds, upon a showing made in such bill of peculiar injury to him which may result from such unlawful expenditure of such funds.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308.]

## 2. INJUNCTION ~~vs~~ 74—GROUNDS—INJURY.

To entitle any one to relief against real or imaginary evils or injuries which are supposed to flow from unauthorized acts of public officials, he must bring his case under some acknowledged head of equity jurisdiction and show what special injury he will sustain from such unauthorized acts distinct from that suffered by every other inhabitant.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 142, 150.]

Appeal from Circuit Court, De Soto County; F. A. Whitney, Judge.

Bill for an injunction by P. O. Rickman against L. W. Whitehurst and others, as board of county commissioners of De Soto county, and A. B. Tucker and others, bond trustees of Punta Gorda Special Road and Bridge District. Demurrer sustained, injunction denied, and leave to amend the bill granted, and complainant appeals. Order affirmed.

Treadwell & Treadwell, of Arcadia, for appellant. John W. Burton, of Arcadia, and J. H. Hancock, of Punta Gorda, for appellees.

ELLIS, J. Under the provisions of chapter 6208, Laws of Florida 1911, a special road and bridge district was created in De Soto county and called the Punta Gorda special road and bridge district. After the special road district was created a special tax was levied to pay the interest upon and retire the bonds issued under the act and pursuant to the election. The bond issue amounted to \$200,000. The money which was realized from the sale of the bonds was turned over to the bond trustees. The act under which the special road and bridge district was created and the bonds issued requires the board of county commissioners to have prepared proper plans and specifications for the construction of the roads and bridges in the newly created special district, and after advertising the same as the law prescribed, to award the contract for such construction to the lowest responsible bidder.

The county commissioners of De Soto county, however, did not let a contract for the construction of the roads, but in 1915 the bond trustees filed with the county commissioners a written request that the county commissioners purchase the necessary machinery and have the work of road construction in the special district done by labor hired by the day. This request was acted upon by the county commissioners who proceeded with the work as requested by the trustees, and refused to let the work out by contract to the lowest responsible bidder.

P. O. Rickman, the appellant, a citizen and taxpayer of De Soto county, and the owner of real estate situated in the Punta Gorda special road and bridge district, as he alleges, filed his bill of complaint in the circuit court for that county against the county commissioners and the bond trustees of the special road and bridge district, setting up the fore-

going statement of facts, and praying for an injunction to restrain the board of county commissioners and bond trustees from using the moneys derived from the sale of the bonds in constructing the roads and bridges in the special road district by day labor or otherwise, except under contract to be let to the lowest responsible bidder.

The county commissioners and bond trustees answered the bill, justifying their conduct under the provisions of chapter 7002, Laws of 1915, which is a special act entitled:

"An act to empower the board of county commissioners of De Soto county, Florida, to make changes in roads and manner of improving same in the Punta Gorda special road and bridge district."

This special act, approved May 29, 1915, has two sections, which are as follows:

"Section 1. That the board of county commissioners of De Soto county, Florida, be authorized to make such changes in the construction of the roads in the Punta Gorda special road and bridge district as the bond trustees of said district shall unanimously ask to be made, and that when both the board of county commissioners and the bond trustees are unanimously of opinion that the work can be done to the best advantage by day labor, the county commissioners may direct that the work be done in that manner.

"Sec. 2. This act shall take effect and be in force from and after its passage and approval by the Governor."

The answer also averred that part of the work of construction had been let by contract; that they prepared proper plans and specifications for the construction of the roads, and diligently sought bids for the construction of roads and bridges, and that the bids received were considered to be excessively high, and were unsatisfactory, and would have required the expenditure of a larger sum of money than that voted to be spent for such purpose in the district; that the policy of letting the work of construction out by day labor as suggested by the bond trustees could be done within the limit of the amount voted for the purpose and to the best advantage, and was unanimously agreed to by the county commissioners and the bond trustees; that only about one-fourth of the money voted for that purpose has been expended, and that the work done by day labor had been done at a saving of about "30 per cent. over contract prices proposed."

A demurrer was also interposed by the defendants to the bill, upon the ground that the complainant had shown no right to maintain the bill; that the special act (chapter 7002, Laws of 1915) was not unconstitutional; that the bill showed no equity and no damage resulting from the acts of the defendants, and that complainant has no vested right by virtue of the legislative acts, or any facts stated in the bill.

The cause came on to be heard upon the application for an injunction as prayed for in the bill. The demurrer was sustained, the injunction denied, and leave to amend the

bill as desired was granted. The complainant appealed from this order.

[1, 2] In the first place the complainant has the right to maintain the bill if the acts complained of were unauthorized and not within the powers of the board of county commissioners, and tended to produce a resultant injury to the complainant by increasing the burden of his taxes. The right of a citizen and taxpayer to maintain a suit to prevent the unlawful expenditure by public officials of public moneys, unless otherwise provided by legislative enactment, is generally recognized. The nature of the powers exercised by county commissioners who are vested by law with the power of levying taxes for county purposes and the expenditure of county funds, the danger of the abuse of such powers which are delegated to them by legislative enactment and the necessity for prompt action to prevent their flagrant abuse and irremedial injuries flowing therefrom would seem to fully justify courts of equity in interfering upon the application of a county taxpayer and citizen. See *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070; 5 *McQuillin's Municipal Corp.* § 2575; 1 *Joyce on Injunctions*, § 361; *Peck v. Spencer*, 26 Fla. 23, 7 South. 642; *Cotten v. County Commissioners of Leon County*, 6 Fla. 610; *Chamberlain v. City of Tampa*, 40 Fla. 74, 23 South. 572; *Crawford v. Gilchrist*, 64 Fla. 41, 59 South. 963, Ann. Cas. 1914B, 916. The principle on which the right rests is that the taxpayer is necessarily affected and his burdens of taxation increased by any unlawful act of the county commissioners which may increase the burden to be borne by the taxpayers of the county, and no relief from such injury is obtainable elsewhere than in a court of equity. The right of the complainant to maintain this suit therefore would seem to depend upon the peculiar injury which may result to him from the expenditure of the funds realized from the sale of the bonds in a manner other than by letting the contract for road construction to the lowest responsible bidder as chapter 6208, Laws of 1911, requires. The taxpayer's injury specially induced by the unlawful act is the basis of his equity, and unless it is alleged and proved, there can be no equitable relief. His position is not contradistinguished from that of all other taxpayers, or citizens who are not taxpayers, and therefore cannot invoke the aid of equity merely to prevent an unlawful corporate act however much the act may shame his sense of pride in the faithful observance by public officials of the obligations of their public duties.

The bill in this case does not attack the validity of the bond issue, nor does it question the propriety of the expenditure of the funds in road and bridge construction within the special road district. The right of complainant to maintain the bill is placed square-

ly upon the proposition that: Whereas the general act of the Legislature (chapter 6208, Laws of 1911), under which the special road district was created and the bonds issued, required the work of road and bridge construction to be let out by contract to the lowest responsible bidders, the county commissioners propose to and are actually constructing the roads and bridges by day labor. There is no allegation of special injury to the complainant, nor that the cost of constructing the roads and bridges by the method proposed will entail a greater cost than the method prescribed by the general act, nor that the money is being wasted or improvidently expended. What, then, gives the complainant his standing in equity? Is it the mere abstract conception that an act done by the county officials not in strict conformity of law ipso facto operates to injure a citizen of the county? If so, then any citizen of the county, whether taxpayer or not, whether he resides in the special road district or beyond its limits, may maintain the action.

No authority has been submitted by appellant's counsel in support of his equity. We have upon investigation of the authorities, including text-books and decisions from other jurisdictions, found no case in which such a suit has been maintained where it did not appear that special injury would result to the complainant as a taxpayer in the increased public burden as the result of the unauthorized act. The principle is universally recognized that to entitle a party to relief in equity he must bring his case under some acknowledged head of equity jurisdiction. In a case where a public official is about to commit an unlawful act, the public by its authorized public officers must institute the proceeding to prevent the wrongful act, unless a private person is threatened with or suffers some public or special damage to his individual interests, distinct from that of every other inhabitant, in which case he may maintain his bill. This seems to be the principle which should control this decision. See 2 *Dillon's Munic. Corp.* (4th Ed.) § 920 et seq.

The demurrer to the bill, we think, was correctly sustained, and the order appealed from is therefore affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and WHITFIELD, JJ., concur.

(73 Fla. 233)

CARR et al. v. LESLEY.

(Supreme Court of Florida. Feb. 2, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §—1009(1)—QUESTIONS OF FACT—CHANCELLOR'S FINDINGS.

While the findings of the chancellor on the facts, where the evidence is heard by him and the witnesses are before him, are entitled to more weight in the appellate court than where such findings are made in a cause where the tes-

timony was not taken before him, yet in either case the chancellor's findings should not be disturbed by an appellate court, unless shown clearly to be erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970, 3978.]

## 2. TENANCY IN COMMON §—15(7, 8)—POSSESSION—NOTICE.

The possession of one tenant in common is prima facie the possession of all, and one tenant in common cannot hold possession adversely to his cotenant until he brings home to his cotenant the knowledge that such possession is in hostility to, and a denial of, the other's title, or that the character of his possession in the qualities of openness, hostility to, and exclusiveness of his cotenant is such as to reasonably put such cotenant on notice.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 49.]

## 3. TENANCY IN COMMON §—8—CONVEYANCE—RIGHTS OF GRANTEE.

Where one acquires an interest in land from one of several owners or tenants in common, he becomes tenant in common with such others in place of his grantor.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 20.]

## 4. TENANTS IN COMMON §—43—CONTRACT OF SALE—RIGHTS OF PURCHASER.

Where an intended purchaser of lands owned by several persons agrees, with one representing himself to be their agent, to buy such lands, and causes a deed to be prepared, which is to be executed by all the tenants in common, and pays down the purchase money for the land to such pretended agent, who procures the signature of only one of the owners to such deed, and notifies the purchaser that the others refuse to sign, such purchaser does not acquire by such transaction the entire interest in the land.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 130-132, 136, 137.]

Appeal from Circuit Court, Hillsborough County; F. M. Robles, Judge.

Bill by Theodore Lesley against Ida V. Carr and J. O. Carr, her husband, and others. Decree for complainant, petition for rehearing overruled, and defendants appeal. Reversed, and bill dismissed.

C. C. Morgan, of Ft. Ogden, for appellants. H. S. Phillips, of Tampa, for appellee.

PER CURIAM. Theodore Lesley, in January, 1915, filed his bill in the circuit court for Hillsborough county against the appellants, alleging that he was the owner of a certain tract of 10 acres of land in Hillsborough county, which was described; that in April, 1901, his father, Capt. John T. Lesley, as agent for the complainant, purchased the land from E. O. Morgan, paying him therefor the sum of \$400; that in making the sale E. O. Morgan acted as agent for the appellants, and promised to have them execute a deed of conveyance to the land and deliver the same to the complainant; that complainant took possession of the lands in April, 1901, inclosed the tract with a substantial fence, and used the land for years as a pasture, and maintained the fence in good condition; that he has held himself out as

the owner of the property continuously ever since, and claimed it adversely to all, alleging that his possession had ripened into title by adverse possession. The complainant alleged in the bill that the defendants, who are the appellants here, had some claim upon the land, "the extent of which" was alleged to be unknown, but that the same was a cloud upon his title. The prayer was that complainant's title to the land be quieted, that defendants be required to execute a deed conveying the lands to complainant, or, in default thereof, that complainant be declared to have the title to the lands, and for general relief.

A demurrer to the bill was interposed in behalf of Mrs. Carr, which was overruled, and she filed a sworn answer, denying the material allegations of the bill. The other two defendants also answered the bill, but not under oath. The complainant filed a general replication, and the cause came on to be heard upon the pleadings and testimony.

The chancellor decreed the title to be in complainant; that the defendants be barred and precluded from any right or title or interest in the property. This decree rested upon the finding by the chancellor that complainant had acquired title to the property described in the bill by adverse possession, under the provisions of section 1722, General Statutes of Florida 1906.

Within five days after this decree was rendered the defendants below filed their petition for a rehearing upon the ground that the testimony failed to show such possession of the premises by the complainant as was sufficient to ripen into title by adverse possession, because the complainant and the defendants were shown by the testimony to own the property jointly between them; in substance, that the property was owned in common by the complainant and defendants, and the testimony failed to show an ouster by complainant of his cotenants. The petition was overruled, and an appeal taken from the final decree and the order overruling the petition for rehearing.

[1] We have arrived at the conclusion that the decree was erroneous, and the petition for a rehearing should not have been denied. We are mindful of what this court has said in many cases, to the effect that the findings of the chancellor on questions of fact should not be reversed, unless the evidence clearly shows that in such findings the chancellor erred. See *Mock v. Thompson*, 58 Fla. 477, 50 South. 873; *Lucas v. Wade*, 43 Fla. 419, 31 South. 231; *Sarasota Ice, Fish & Power Co. v. Lyle & Co.*, 58 Fla. 517, 50 South. 993. But these cases make a distinction between the conclusions and findings of a chancellor where the testimony is not taken before him and where it is, holding that in the former case the findings are not entitled to the same

weight as they are in the latter. Nevertheless this court holds that in either case the findings of the chancellor will not be disturbed by an appellate court, unless they are shown clearly to be erroneous.

[2] We think that the facts in this case show that Mr. Theodore Lesley's possession of the land described was that of a cotenant with the complainants; that when the negotiations for the purchase of the land were being carried on by Capt. J. T. Lesley, the complainant's father, acting as complainant's agent, and the father of the defendants, Mr. E. O. Morgan, Capt. Lesley knew that the title to the land was in the four daughters of Mr. Morgan. Mr. Morgan and Capt. Lesley had some business dealings together, which involved the handling of cattle and the use of the land in dispute, and some lands adjacent thereto, as a pasture for their cattle. The pasture was surrounded by a substantial inclosure, which took in the particular 10 acres in dispute. Mrs. Lizzie Jackson owned this 10-acre tract, and complained to Mr. Morgan and Capt. Lesley about putting a fence on her lands. She instituted suit against them for damages. They both called upon her, and settled their difficulties by agreeing to purchase the land from Mrs. Jackson; Captain Lesley himself writing to her and instructing that the deed be made to the four daughters of Mr. Morgan. The deed was executed according to those instructions on August 24, 1900. The grantees named were Jennie K. Lesley, Emma Morgan, F. H. Alderman, and Ida V. Carr, the four daughters of E. O. Morgan—Mrs. Jennie K. Lesley being the wife of E. L. Lesley, a son of Capt. J. T. Lesley and brother to complainant. Now, in 1901, Capt. Lesley desiring to purchase the land, requested his son, E. L. Lesley, to ascertain from Mr. Morgan if he would sell, and at what price. Mr. Morgan said he would take \$500 for it, \$100 of which Mr. E. L. Lesley might retain. So Mr. Lesley wrote to his father what Mr. Morgan had said, and that if the captain would deposit \$400 in a bank in Tampa to Mr. Morgan's credit, E. L. Lesley would release his claim to the \$100. This was done, and a deed was thereupon drawn, to be signed by the four daughters of Mr. Morgan named as the grantees in the deed from Mrs. Jackson. This deed, which was to have been executed by the four daughters, named Theodore Lesley as grantee. Mr. Morgan told Mr. E. L. Lesley, who was acting for his father, that the daughters would not sign the deed; "that he could not do anything with the girls—could not make them sign the deed." For several years, according to the testimony of the complainant, he has had a quitclaim deed to the land from his brother and the latter's wife, who was one of the grantees in the deed from Mrs. Jackson. In the testimony of Mr. E. L. Lesley, the following questions were propounded, and answers given:

"Q. Was it your understanding that your father, Capt. Lesley, bought this property; that he bought it for Theodore Lesley? A. The deed was made to Theodore Lesley. Q. Theodore Lesley, your brother? A. Yes. Q. You say that the deed which was sent to you, and which you and your father signed, conveyed the property to Theodore Lesley? A. Yes, sir. Q. Did you ever have any conversation with Mr. Morgan about it, after you found out the deed had not been signed? A. I was down at his place some time after my father wrote me and asked me about the deed, and I asked Mr. Morgan if the deed had ever been signed and returned; he said the girls would not sign it, but if he could ever get them all together, and get Ida V. Carr over there, he would get them to sign it."

This testimony shows that the deed which was prepared and sent to E. L. Lesley was intended to be executed by the four daughters, one of whom was E. L. Lesley's wife. It seems that he and his wife signed. The word "father" is evidently a misprint, as Capt. Lesley was not a party to the deed. However, it is perfectly clear from the testimony, as well as the allegations of the bill, that the complainant took possession of the property after the negotiations with E. O. Morgan and a knowledge that it was held in common by the latter's four daughters. A one-fourth interest was actually acquired by the complainant, either in 1901, when his father sent the deed to E. L. Lesley to be executed by him and his wife and the other three daughters of E. O. Morgan, or afterwards, when the quitclaim was obtained. There is nothing whatever in the evidence to show that the complainant's possession was actually hostile to the defendants; in fact, he had no other purpose seemingly than to claim title under them, and not in hostility to them.

[3, 4] This court has many times said, in discussing the law of adverse possession as applied to one who claims title against a cotenant, that:

"The possession of one tenant in common is prima facie presumed to be the possession of all, and such possession does not become adverse to the other cotenants, unless they are actually ousted, or unless the possession of the one is exclusive of and openly hostile to his cotenants, and the character of such possession is brought home to them by actual notice of such adverse holding, or that such possession is so open and notorious in its hostility to, and exclusiveness of, them as to put them on notice of its adverse character."

See Gracy v. Fielding, 71 Fla. 1, 70 South. 625. See, also, Anderson v. Northrop, 30 Fla. 612, 12 South. 318.

The evidence shows that the complainant knew the address or place of residence of his cotenants; they lived within the state, in cities not far distant, and yet he did not attempt to bring to them actual notice of his adverse claim or possession, if indeed his possession was adverse in fact. So far as they knew he was merely using the place for the purpose to which it had been used when their father and complainant's father were in business together; that the taxes

were paid by him as compensation for such use. The evidence does not show that there had been brought home to them a knowledge that complainant claimed the land in open hostility to their title seven years before the institution of the suit.

We think, therefore, that the decree should be reversed, and the bill dismissed; and it is so ordered.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

(73 Fla. 6)

JOHNSON et al. v. BAKER et al.  
(Supreme Court of Florida. Jan. 15, 1917.)

*(Syllabus by the Court.)*

1. QUIETING TITLE ¶28—BILL IN EQUITY—CONSTRUCTION OF STATUTE.

Section 1950 of the General Statutes of Florida of 1906, providing for the removal of clouds from the title to real estate by bills in equity, was intended to enlarge the jurisdiction of courts of chancery.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 62.]

2. QUIETING TITLE ¶34(1)—PLEADING—POSSESSION.

When from the language used in several paragraphs of a bill it appears that the complainant is in the exclusive possession of the lands from the title to which the cloud is sought to be removed, the bill will on demurrer, be deemed to be sufficient so far as the allegation of possession by the complainant is concerned.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 69, 76, 77.]

3. EVIDENCE ¶1—JUDICIAL NOTICE—IDENTITY OF PERSON.

The court will not take judicial knowledge that Joseph H. Drake and Joseph H. Burke are one and the same person.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1.]

4. QUIETING TITLE ¶34(5) — DEMURRER — GROUNDS.

A bill in equity to remove a cloud from complainant's title to lands, which by its allegations shows that the deed constituting the cloud rests upon no right, title, or interest in the lands possessed by the grantor in such deed, is not demurrable for that reason alone.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 71, 72.]

Appeal from Circuit Court, Volusia County; Jas. W. Perkins, Judge.

Bill in equity by Lizzie R. Johnson and others against Smiley A. Baker and another. Demurrer to bill sustained, and complainants appeal. Order sustaining demurrer reversed.

Stewart & Stewart, of De Land, for appellants. Landis, Fish & Hull, of De Land, for appellees.

ELLIS, J. The appellants, who were complainants below, exhibited their bill in chancery against Smiley A. Baker and Joseph H. Burke, in the circuit court for Volusia county, to quiet the title to certain lands located in that county and described in the bill, and

alleged to be owned by the complainants and in their possession.

The bill attacks the validity of a tax deed which was based upon the sale of June, 1899, for taxes due for the year 1898. It is alleged that the state of Florida became the purchaser, and that the certificate which was numbered 22 was assigned by the clerk of the court in April, 1902, to one Joseph H. Drake; that a deed based upon that certificate was made to Joseph H. Drake and duly recorded; that Joseph H. Burke, by deed dated May 8, 1902, conveyed the land to the Atlantic Lumber Company, and that corporation on October 25, 1904, quitclaimed to Smiley A. Baker.

The complainants acquired the title, so it is alleged, as the heirs of Jack W. Johnson, who obtained title by mesne conveyances from the Jacksonville, Tampa & Key West Railroad Company, who acquired it from the state of Florida through the trustees of the internal improvement fund.

It is alleged that the assessment roll of Volusia county for the year 1898 did not have attached thereto the assessor's warrant under seal. The warrant was attached to the roll, but was not under seal; that a state tax of 4½ mills was levied against the property, although the act of 1897, c. 4516, entitled "An act to provide for the levy of taxes for the years 1897 and 1898," only authorized a levy of 4¼ mills; that the county tax levied for the general revenue and the fine and forfeiture funds exceeded by one mill the millage authorized by the said statute for the two funds; that the assessment rolls of 1898 did not have the affidavit of the assessor attached thereto, to the effect that the assessment roll contains a true statement and description of all persons and property in the county subject to taxation, etc.; that the notice of tax sale which was published was not in the form prescribed, in that the description of lands preceded the name of the owner; that the notice was not published once a week for 5 weeks, or 35 days, prior to the sale, but was published once in each week for 5 weeks; that no affidavit was filed by the publisher of the newspaper that he had forwarded to the clerk weekly a copy of the newspaper containing the publication of the notice, and that neither Burke, the Atlantic Lumber Company, nor Baker ever had possession of the property, and that the tax deed to Drake, the deed from Burke to the Atlantic Lumber Company, and its deed to Smiley are void and constitute a cloud upon complainant's title. The bill prays that complainants be declared to be the owners of the land in fee simple; that complainants' title be quieted, and that the defendants' claim to the land be decreed to be void, and that the defendants be permanently enjoined from asserting any right or title to the lands and be restrained from prosecuting any suit in chancery or at law to obtain possession of the

lands or from asserting any title thereto, and for general relief.

The defendants demurred to the bill upon the grounds for want of equity; that the allegation of possession by the complainants was inconsistent with the allegation that the land was vacant and unoccupied; that it does not contain a sufficient offer to do equity by complainants; that the allegations as to the invalidity of the tax deed are insufficient, and that the allegation that complainants are in possession of the land is sufficient and there is no allegation that the land is wild and unoccupied. This demurrer was sustained, and from that order the complainants appealed.

[1] Section 1950 of the General Statutes of Florida 1906, Florida Compiled Laws 1914, provides that a bill in equity may be brought and prosecuted to a final decree by any person or corporation, whether in actual possession or not, claiming title, legal or equitable, to real estate against any person or corporation not in actual possession who claims an adverse estate or interest, legal or equitable, therein, for the purpose of determining such estate or interest and quieting or removing clouds from the title to such real estate. The section also provides that it shall be no bar to the relief sought that the adverse claim, estate, or interest against which the bill is brought is void upon its face, or though not void on its face, requires evidence extrinsic of itself to establish its validity.

Courts of equity may entertain a bill of quia timet for the purpose of preventing a possible future injury, and thereby quieting men's minds and estates. 3 Blackstone's Com. 331; 2 Story's Eq. Jur. § 826, referred to and quoted in *Griffin v. Orman*, 9 Fla. 22. See 32 Cyc. 1305. It has also been held that to entitle complainant to the relief he must establish his title as against the claim of defendants, and if he fails to show documentary title or adverse possession he is not entitled to relief, nor will he obtain the relief when his title is doubtful. See *Stewart v. Stewart*, 19 Fla. 846; *Baltzell v. McKinnon*, 57 Fla. 355, 49 South. 546; *Hill v. Da Costa*, 65 Fla. 371, 61 South. 750; *Morgan v. Dunwoody*, 66 Fla. 522, 63 South. 905; *Levy v. Ladd*, 35 Fla. 391, 17 South. 635; *Peninsular Naval Stores Co. v. Cox*, 57 Fla. 505, 49 South. 191.

In the case of *Reyes v. Middleton*, 36 Fla. 99, 17 South. 937, 29 L. R. A. 66, 51 Am. St. Rep. 17, it was held that a deed void upon its face, and that cannot sustain an action in the absence of rebutting proof, cannot be said to be such a cloud upon a title as will authorize the interposition of equity for its removal. That case was cited by the court in *Hughey v. Winborne*, 44 Fla. 601, 33 South. 249, decided at the June term, 1902. Chapter 4739, Laws of Florida 1899, which constitutes section 1950 of the General Statutes, was intended to enlarge the jurisdiction of the courts of chancery. See *Briles v. Bradford*,

54 Fla. 501, 44 South. 937; *Simmons v. Carlton*, 44 Fla. 719, 33 South. 408.

[2] The allegations of the bill are sufficient as to complainants' ownership and possession of the land. In paragraph 2 of the bill it is alleged that the complainants "are the owners in fee simple and in possession of the lot, tract, or parcel of land," etc. In the fourth paragraph it is alleged that the "said tract of land is open, uninclosed timber land, and has been since August 19, 1886, and prior thereto, and vacant and unoccupied, except by your orators and their predecessors in title." In other portions of the bill complainants' title is deraigned from the United States government. We think that the allegations of paragraphs 2 and 4, when taken together, convey the idea that complainants are in the exclusive possession of the lands; that is to say, it is vacant and unoccupied except by them, who are the owners and in possession thereof.

[3, 4] It is alleged in the bill that the tax certificate was assigned by the clerk to Joseph H. Drake in April, 1902, and that the tax deed covering the land was made to Joseph H. Drake. This allegation of fact is admitted by the demurrer. While it is true that the affidavit of the publication of the notice of application for the tax deed, which is attached to the bill as Exhibit B and made a part of the bill, recited that Joseph H. Burke was the purchaser of the certificate, there is nothing in the bill contradictory of the allegation that the deed was made to Drake. We cannot assume that the allegation of the bill that the certificate was assigned and the deed made to Drake was a clerical error, and that the name Drake should be read Burke. So far as this court is informed to the contrary from the record Joseph H. Drake and Joseph H. Burke are two persons. If that be true—and the demurrer admits it to be so—the bill shows that when Joseph H. Burke executed the deed to the Atlantic Lumber Company, purporting to convey the lands in dispute, he was wholly without any right, title, interest, or claim in the lands, and of course conveyed none to the Atlantic Lumber Company, which also conveyed nothing to Smiley A. Baker by its quitclaim. According to the bill the claim of Baker rests upon the interest or right which Burke had when he executed the deed to the Atlantic Lumber Company. But from the allegations of the bill admitted by the demurrer, Burke was without any right, title, interest, or claim of any nature or character whatsoever to the lands. We cannot say that his rights began with the tax certificate in the face of the admission of the demurrer to the contrary.

The allegations of the bill require an answer, and the demurrer should have been overruled. The order sustaining the demurrer is therefore reversed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and WHITFIELD, JJ., concur.

(73 Fla. 294)

ARMOUR & CO. et al. v. HULVEY et al.  
(Supreme Court of Florida. Feb. 8, 1917.)

(Syllabus by the Court.)

**HOMESTEAD §62—EXTENT—BUILDINGS AND IMPROVEMENTS.**

Section 1 of article 10 of the Constitution of Florida of 1885, which provides for exemption from forced sale, under process of any court, a homestead to the extent of 160 acres of land owned by the head of a family residing in this state, does not limit such exemption to the dwelling house of the owner and the subsidiary buildings located on the land, but extends to the entire 160 acres, and the improvements on the real estate, when the land is actually occupied and lived on by the owner and head of the family and his family.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 90.

For other definitions, see Words and Phrases, First and Second Series, Homestead.]

Appeal from Circuit Court, Duval County; Daniel A. Simmons, Judge.

Bill by Armour & Co., and others against George W. Hulvey and W. H. Dowling, as Sheriff of Duval County. Bill dismissed, and complainants appeal. Affirmed.

Milam & Milam, of Jacksonville, for appellants. W. M. Toomer and W. H. Surrency, both of Jacksonville, for appellees.

ELLIS, J. The appellants had recovered judgments at law against George W. Hulvey, upon which executions had issued and were levied by the sheriff of Duval county, W. H. Dowling, upon certain lands in that county comprising about 6 acres and known as "Murray Hill Park."

After the levy of the executions and advertisement of the property for sale thereunder, George W. Hulvey by proper proceedings designated the property as his homestead and claimed the same as exempt from forced sale. The sheriff thereupon refused to sell the lands under the aforementioned executions.

The appellants filed their bill against the sheriff and Hulvey to subject the property to the satisfaction of the said judgments.

The cause was heard upon bill, answers of the two defendants, and a stipulation as to the facts. The chancellor decreed the equities to be with the defendants, and dismissed the bill, from which decree this appeal was taken.

The property involved in this litigation comprises about 6 acres of land, and is not situated within the corporate limits of any town or city in this state. Located upon the property are several buildings and an open air gymnasium. The defendant George W. Hulvey conducts upon the property a preparatory school, known as the "Florida Military Academy," at which "rooming and dining" accommodations are provided for the students and cadets. Mr. Hulvey holds the property under a deed from the Jacksonville

Development Company, a corporation, dated June 1, 1913, which contains the following provisions:

"(1) The grantor does give, grant, bargain, sell, alien, remise, release, enfeoff, convey and confirm unto said grantee and his heirs and assigns, in fee simple, the lands situate in Duval county, state of Florida, described as follows: "That certain irregular tract, parcel or piece of land called "Murray Hill Park" on the map of Murray Hill Heights, as recorded in Plat Book 2, page 87, of the current public records of Duval county, Florida, and bounded easterly by Park Terrace and Madison avenue; westerly by Edgwood avenue and Seventeenth street; northerly by unplatted and irregular tract of land, numbered on said plat as 76 in large numerals, and containing six acres more or less," for school, college or educational purposes.

"(2) To have and to hold the same, together with the tenements and hereditaments, unto the said grantee and his heirs and assigns in fee simple, but subject to the following limitations: 'And it is expressly covenanted on the part of the said grantee, for himself and his heirs and assigns, that in the event the said described land and building erected thereon shall within ten years hereafter cease to be used for school, college or educational purposes, then this deed shall be null and void, and all right, title, equity, interest, claim and estate whatever of said grantee, his heirs and assigns, shall be forfeited, and said grantor, its successors and assigns, shall own said land, hereditaments and appurtenances in all respects as if this deed had not been executed.'

By the stipulation the parties agreed that the complainants had obtained the judgments at law against Hulvey, that writs of execution had issued thereon and were levied upon the lands described above, and that Hulvey had designated the land as his homestead and claimed the same to be exempt from forced sale, and that several buildings are located on the property, the main building being about 200 feet in length, 50 feet in width, three stories in height, and has a wing 30 feet by 40 feet, two stories in height; on the first floor are kitchen, dining room, superintendent's apartments, offices, sitting room, library, reading room, and bedrooms for 16 or more cadets; the second floor contains study hall, seven classrooms, and lobby and lounging hall, and on the third floor are located rooms for 60 or more cadets, baths, wash-rooms, commandant's quarters, and club-rooms. The stipulation also contained the following agreement as to the facts:

"That ever since the defendant George W. Hulvey became the owner of the premises described in the complainant's bill of complaint, and the same were made suitable and fit for habitation through the erection of the necessary buildings thereon, the defendant and his family have lived upon and continuously occupied the same as their bona fide home, residence, and permanent place of abode. That the defendant's family actually occupy for living quarters and for uses directly connected with the family, as such, a portion of the first floor of the main building in extent slightly more than one-sixth of the space comprised by that floor, consisting of bedrooms and dining room, grouped at one end of said building, and one room, used as a library and living room, at the opposite end of said building on the same floor, the library being also the one used by the students



in connection with the Academy, together with a room located about midway said building on the third floor thereof, used as a guest's chamber. That said premises are so occupied and used by the said defendant and his family, both when the Florida Military Academy is in session and during vacation thereof, the annual session of said school lasting for a period of approximately 8½ months during each school year. That said defendant's family consists of himself and his wife, Anna Hulvey, who have been for some time past, and are now, engaged in conducting upon said premises a private school for boys and young men, known as the Florida Military Academy. That in conducting the said school the services of from seven to nine teachers and assistant teachers are required, including the services of a retired United States army officer detailed to said school for military instructions. That by means of the operation and conduct of said school the defendant's family earn their livelihood, and that the defendant has no employment, profession, or occupation other than that afforded by the operation of said school. That the premises in question are heavily mortgaged, and that the school conducted thereon is hardly more than self-sustaining at the present time. That in claiming said property to be his homestead the defendant did so in good faith, with no intention of ultimately defeating the claims of the complainants in this suit, or any other of his creditors. That the defendant admits the justness of the judgment demands of said complainants and professes his willingness to meet the same as soon as his circumstances will permit."

The section of the Constitution under which the appellee claims his right to designate the described property as his homestead to which attaches the exemption from forced sale under process of any court is section 1 of article 10, and is in the following words:

"A homestead to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this state, together with one thousand dollars' worth of personal property, and the improvements on the real estate, shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists. But no property shall be exempt from sale for taxes or assessments, or for the payment of obligations contracted for the purchase of said property, or for the erection or repair of improvements on the real estate exempted, or for house, field or other labor performed on the same. The exemption herein provided for in a city or town shall not extend to more improvements or buildings than the residence and business house of the owner; and no judgment or decree of execution shall be a lien upon exempted property except as provided in this article."

The judgments obtained by the appellants were not based on any obligations contracted for the purchase of the property, nor for the erection or repair of improvements on the land, nor for house, field, or other labor performed on the same. It is not denied that the appellee George W. Hulvey is the head of a family, who with him reside and have their habitation and abode upon the lands described.

Appellants' counsel contend that the word "homestead" is the dominating word in the section of the Constitution quoted above, and that the facts in any case where the benefits of the homestead and exemptions clause of

the Constitution are claimed should be studied in the light of the generally accepted definition of the word. They quote from Funk & Wagnall's New Standard Dictionary which defines the word "homestead" as "the place of a home; the house, subsidiary buildings and adjacent land occupied as a home," and conclude that the words "subsidiary buildings" implies "that the house, the shelter, is the primary feature of the homestead, and the phrase "occupied as a home" means that a *commercial* enterprise of such an extent that it overshadows the home is not contemplated in the word. Building upon the Standard Dictionary definition of the word "homestead," counsel suggest a rule by which doubtful cases of this kind may be measured. "The property," they say, "must be used primarily as a home, and any other uses must be incidental and auxiliary to this chief and primary purpose. Should its chief use be for a purpose other than as a home, immediately it loses its character as such, and the exemption does not attach."

In the definition of the word "homestead," as given in the dictionary mentioned, the words "subsidiary buildings" are used, and the rule resting upon this definition is narrowed to and confined within the limits of counsel's interpretation of those words. Whereas the Constitution seemingly does not limit the improvements upon the land to a "house and subsidiary buildings"; on the other hand, it definitely prescribes the number of acres which may be held as a homestead, and in words simple, yet comprehensive and seemingly definite in meaning, provides that "the improvements on the real estate" shall be included in the exempt property. As if the framers of the Constitution themselves had interpreted the words "and the improvements on the real estate" to mean any valuable addition or betterment, of whatever character, they in the same section provided that the exemption, when claimed in a city or town, should not extend to more improvements or buildings than the residence and business house of the owner.

We think that the words "and the improvements on the real estate" have a broader meaning than the idea conveyed by the words "buildings subsidiary to a residence or dwelling." The exemption of a half acre within the limits of any incorporated city or town would doubtless include such outhouses, barns, wagon houses, garages, wood or coal sheds, chicken houses, and fences, etc., as were appurtenant and subsidiary to and used in connection with the residence as conveniences and auxiliaries, although they are not expressly mentioned as being included in such exemption. If such subsidiary buildings and improvements are included in an exemption of city property, the framers of the Constitution must have thought that the words "and the improvements on the real estate," as applied to the exemption not within a

city, meant more than a residence, subsidiary buildings, and business house.

The Constitution of 1868, providing for a homestead and exemptions in so far as its extent is concerned, is almost identical with the provision of the Constitution of 1885. In the case of *Greeley v. Scott*, 2 Wood, 657, Fed. Cas. No. 5,746, Mr. Justice Bradley, of the Supreme Court of the United States, in commenting upon the homestead exemption provision of the Constitution of Florida of 1868, said:

"That the preservation of a householder's means of carrying on his business, as well as a house for shelter, is within the constitutional purpose, is evident from the clause relating to city property, namely, that in a city or town the exemption shall not extend to more improvements or buildings than the residence and business house of the owner, showing that the business house as well as residence is included."

Again:

"Whether the provision is politic or impolitic is a question with which the courts are not concerned. In the eye of the philosophic economist, taking a broad view of the interests and objects of human society, it has many reasons in its favor; and the creditor cannot complain of injustice, for he understands the conditions when he gives the credit. It is a pure question of policy, namely, whether the advantages obtained by the exemption are equivalent to the disadvantages arising from the unwillingness of capital to remain in a community where such an exemption exists; or whether, from the latter cause, the law will not operate too depressingly upon enterprise. Speculation, however, is unnecessary. The people of \* \* \* Florida have, in their Constitution, declared what their will is on the subject, and that declaration is binding on both the people and the courts."

In that case the person seeking to exempt his homestead was engaged in the business and trade of sawing lumber, and asked to have his mill, which adjoined his dwelling, reserved as a part of his homestead. Judge Bradley held that the mill, in the sense of the Constitution, is appurtenant to and a part of the debtor's homestead. In other words, the property considered as the homestead of a lumberman running a sawmill was exempt under the provisions of the Constitution. In the case of *McDougall v. Meginniss*, 21 Fla. 362, this court said:

"In our view the owner is only required by the Constitution to live on the land, and the whole 160 acres is exempt."

In the *Greeley-Scott Case*, Mr. Justice Bradley undertook to draw a distinction between the buildings and improvements erected by the owner of a homestead in the course of his business by which he earned a living, and those improvements representing an investment of his surplus earnings or capital, and held that the latter would not be included in the exemption. Mr. Chief Justice McWhorter, in the case of *McDougall v. Meginniss*, supra, did not approve of this view, however, and, after referring to the language expressing such idea, said:

"We have no authority, if the person who claims the land for a homestead resides thereon, is a resident of the state, the head of a family, and there is no more than 160 acres in the tract, to add any other conditions than

those expressed in the Constitution. To say how the homesteader should use his land, whether as a 'farm,' or for a 'sawmill,' or a 'gristmill,' or a 'carding and fulling mill,' would be to impose a judicial condition not found in the Constitution of the state. The Constitution does not prescribe the manner in which the tract shall be used beyond residing thereon."

This language is clear, and it is significant that the framers of the Constitution of 1885, when they came to write the homestead and exemption clause for that Constitution, used the language of the Constitution of 1868 on the subject of the homestead's extent, which had been construed by a judge of the Supreme Court of the United States to mean that all improvements made by the homesteader in the course of his business or occupation were exempt, and by the Supreme Court of Florida, which had held that nothing more was required than for the homesteader to live on the tract to render the whole 160 acres exempt, and the Constitution did not prescribe the manner in which the land should be used beyond residing on it.

As to the policy of a constitutional clause securing such a liberal exemption, the courts are not concerned. It is evident, however, from the language used in the Constitution of 1868, and its repetition in the Constitution of 1885, after the decision of this court in the *McDougall and Meginniss Case*, supra, that the framers of the Constitution concluded that the advantages to the state to be derived from a liberal policy of homestead exemptions was greater than the benefits which might accrue from laws permitting a creditor to pursue his debtor to the very threshold of his home.

In this case the person claiming the homestead carries on the business of conducting a military school. The nature of the business requires the construction of buildings to accommodate the students in the matter of lodging and board; there must be bedrooms and halls, classrooms and libraries, club-rooms and offices, quarters for the officers or teachers, and apartments for the principal and his family. If the owner had erected for himself and family a residence apart from the main building, under Judge Bradley's view of the Constitution as expressed in the *Greeley-Scott Case*, supra, all these improvements would have been exempt as preserving the householder's means of carrying on his business, as well as a house for shelter. There can be no doubt that they would be exempt under the view expressed by this court in the *McDougall-Meginniss Case*.

The homesteader is not required to live in a house of any particular design nor style, nor is he required, in cases of exempt property outside the limits of an incorporated city or town, to have his residence separate and apart from his business house. He may, if he desires, erect a dormitory for boys and dwell with them in the "midst of

alarms," or may retreat to some quiet corner and dwell with his family in peace; the improvements on his 160-acre tract are exempt from forced sale under process of any court, certainly to the extent that such improvements are useful or necessary to his business or occupation by which he earns a living for himself and family.

We think that the deed under which Mr. Hulvey holds the land conveys such an estate in the land as to support the privilege of a homestead exemption.

The order of the chancellor, dismissing the bill, is affirmed.

**BROWNE, C. J., and TAYLOR, SHACKLEFORD, and WHITFIELD, JJ., concur.**

(73 Fla. 65, 67)

**BROWN et al. v. BOOTH.**

(Supreme Court of Florida. Jan. 24, 1917.  
On Rehearing, March 2, 1917.)

(*Syllabus by the Court.*)

**1. BILLS AND NOTES §454—ACTION—VENUE.**

Where a promissory note is executed in a county by a resident of that county, action thereon should be brought in that county, though the note was made payable in another county.

**2. PLEADING §111—PLEA OF PRIVILEGE—JUDGMENT.**

Where a plea of privilege as to the venue is sustained, the judgment should be that the action abate; not that the defendant go hence without day.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 234-236.]

Error to Circuit Court, Hillsborough County; F. M. Robles, Judge.

Action by Charles H. Brown and others against George Booth. Judgment for defendant, and plaintiffs bring error. Reversed, and cause remanded for proper judgment.

H. S. Hampton and F. J. Hampton, both of Tampa, for plaintiffs in error. Thomas Palmer and Dickenson & Dickenson, all of Tampa, for defendant in error.

**PER CURIAM.** An action was brought in Hillsborough county on a promissory note. A plea averred that the note was in fact executed and delivered in Pinellas county; that the defendant resides in and was served with process in the cause in Pinellas county, and claims his privilege of being sued in such latter county. A demurrer to the plea was overruled, and, the plaintiffs not desiring to further plead, judgment was rendered that the plaintiffs take nothing by their plaint, and that the defendant go hence without day. On a writ of error it is contended that as the note is made payable at a bank in Hillsborough county, the cause of action accrued

in that county, and that the action was properly brought in Hillsborough county.

[1, 2] The provisions of sections 3006, 3008, of the General Statutes of 1906, relative to the place and time for presentation for payment of negotiable instruments made payable at a bank, do not make a cause of action accrue in a county where a note is made payable, when the note was in fact made in another county by a resident of such other county. In this case, upon sustaining such plea of privilege, the judgment should have been that the declaration be quashed and the action abated, as such plea did not present any issue affecting the merits of the controversy between the parties. See *E. O. Painter Fertilizer Co. v. Du Pont*, 54 Fla. 288, 45 South. 507.

The judgment as rendered is reversed, and the cause is remanded for a proper judgment.

**BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.**

On Rehearing.

Where suit is brought in the county where the cause of action accrued, and service is made on the defendant in the county where he resides, and not in the county where the action is brought, the defendant may plead his privilege to be sued in the county of his residence.

Rehearing denied.

On Further Rehearing.

A rehearing is asked on the grounds that as the promissory note on which the action is brought appears from its date line to have been made at Tampa in Hillsborough county, the plea that was sustained on demurrer permits the terms of the written instrument to be varied by parol; and that the cause of action accrued in Hillsborough county, the place of payment of the note where the alleged breach occurred.

The first ground need not be considered, since, as the service on the defendant was made in Pinellas county, where he resides, and not in Hillsborough county, where the note was made payable, the defendant could claim his privilege to be sued in the county of his residence where he was served. See *Russ v. Mitchell*, 11 Fla. 80.

Though under section 1397, General Statutes of 1906, the writ may "run throughout the state," the defendant may plead his privilege of being sued in the county of his residence in the state unless the action is brought in a county where the cause of action accrued and proper service is made on him in that county.

Rehearing denied. All concur.

(73 Fla. 239)

**BALL v. PETERSON-McNEILL CO.**

(Supreme Court of Florida. Feb. 6, 1917.)

*(Syllabus by the Court.)***TRIAL — 169 — DIRECTED VERDICT — EVIDENCE.**

It is reversible error to direct a verdict for the defendant, where there is evidence tending to prove the issue substantially as made by the pleadings.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 164, 165.]

Error to Circuit Court, Pasco County; F. M. Robles, Judge.

Action by Annie Ball against the Peterson-McNeill Company, a corporation. Judgment for defendant, and plaintiff brings error. Reversed.

Annie Ball, in pro. per.

**PER CURIAM.** Annie Ball brought an action against the Peterson-McNeill Company, a corporation, for trespass upon lands. The defendant pleaded not guilty, thereby putting in issue "the trespass alleged," which is that the defendant, on July 1, 1910, and divers other days and times between said date and the commencement of the suit, June 3, 1912, broke and entered certain described lands of the plaintiff and cut therefrom large quantities of pine timber. The court directed a verdict for the defendant, on which judgment was rendered for the defendant, and plaintiff took writ of error.

A discussion of the technical differences, if any in law really exist as to the materiality of allegations and proofs of time in actions for a single trespass and for a continuing trespass, is not necessary in the disposition of this writ of error.

It cannot be said there is no evidence tending to prove the issue as to the commission of a trespass substantially as alleged, and the cause should have been submitted to the jury.

Judgment reversed.

**BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.**

(73 Fla. 191)

**FARRELL v. FOREST INV. CO.**

(Supreme Court of Florida. Jan. 31, 1917.)

*(Syllabus by the Court.)***1. EQUITY — 42(1)—JURISDICTION—CONSENT.**

Where a court of equity hears and determines a controversy of such character that jurisdiction may be given by consent, and the parties, without objection or question as to the mode of procedure, go on to a hearing, neither should be heard to complain afterwards as to the court's jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 119.]

**2. PARTITION — 83—EQUITY—JURISDICTION.**

Where a bill in equity has for its principal object a partition of lands, and other ques-

tions arise as to complainant's interests which are sought to be determined as incidental to the main relief, and such questions arose out of the relations existing between complainant and defendant at the time when the incidents occurred giving rise to the differences between them, the court will determine the entire controversy.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 228, 229.]

**3. EQUITY — 148(1)—MULTIFARIOUSNESS.**

A bill in equity is not necessarily multifarious because there may be united in it several causes of action. If all the different causes of action united in the bill grew out of the same transaction, and all the defendants are interested in the same rights, the bill will be maintained.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341, 347.]

**4. EQUITY — 330(2) — MULTIFARIOUSNESS — OBJECTION AT TRIAL.**

The objection of multifariousness, when made for the first time at the hearing, will not be sustained, where the real point in the controversy can be determined as well in the one cause as if there were many separate suits, and the objection does not appear to be so grave as to interpose an obstacle to the proper administration of justice.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 663.]

**5. EQUITY — 147 — MULTIFARIOUSNESS — GROUNDS.**

In considering the question of multifariousness the matter particularly involved is convenience in the administration of justice, and if this can be accomplished by the mode of procedure adopted, an objection for multifariousness should not be allowed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 340.]

**6. EQUITY — 39(1) — JURISDICTION — DETERMINATION OF ALL MATTERS PRESENTED.**

Where a court of equity takes jurisdiction of a cause for one purpose, it will proceed with the determination of all the matters presented.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-109, 111, 114.]

**7. PARTITION — 81 — ISSUES — COPARTNERSHIP.**

Where a corporation entered into copartnership with an individual, and the copartnership transacted business and dissolved, and one of the copartners seeks a partition of lands held by the members of the partnership in common, the court will not consider the question of the validity of such copartnership where the interests of third parties are not involved.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 226.]

**8. APPEAL AND ERROR — 1009(1)—REVIEW—CHANCELLOR'S FINDINGS—CONCLUSIVENESS.**

The chancellor's findings and conclusions on the facts will not be reversed, unless it clearly appears that he erred in such conclusions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970, 3978.]

**9. EQUITY — 345—ANSWER—TRUTH.**

Where an answer to a bill in equity is made under oath, the averments contained in it which are responsive to the bill, and set up facts to which other testimony could be received, are to be taken as true, unless disproved by evidence of greater weight than the testimony of one witness.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 715-724.]

**10. EQUITY ⚡343 — ANSWER — EVIDENCE — RULE OF PRACTICE.**

A sworn answer is evidence in the defendant's favor in so far as its statements are responsive to the allegations of the bill. Under rule 41 of the Rules of Practice in the Courts of Equity of the United States as prescribed by the Supreme Court of the United States, and amended in 1871, which by statute were made the Rules of Practice in Courts of Equity in this state, the complainant in order to avoid the effect of an answer was required to expressly waive in the bill the oath of the defendant to the answer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 702.]

**11. EQUITY ⚡343 — BILL — WAIVER OF ANSWER UNDER OATH—RULES OF PRACTICE.**

The new rules of practice for the Courts of Equity in the United States as promulgated by the Supreme Court of the United States in November, 1912, make no provision for the complainant waiving in his bill an answer under oath, and as the new rules abrogated the old ones; and, as there is no provision in the rules prescribed by this court on the subject as applied to the practice in the courts of this state, a complainant cannot deprive the defendant of the benefit of his answer under oath by expressly waiving it in the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 702.]

**12. EQUITY ⚡340—ANSWER UNDER OATH—EFFECT AS EVIDENCE.**

A sworn answer does not have the effect of evidence in defendant's behalf as to averments of fact set up by way of affirmative defense, nor as to averments of fact which testimony would not be admissible to prove.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 697-701.]

**13. CORPORATIONS ⚡661(2)—FOREIGN CORPORATIONS—SUIT—STATUTE.**

Section 2682 of the General Statutes of Florida, 1906, does not expressly prohibit a foreign corporation from bringing a suit in this state until it has complied with the requirements of the statute.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2544.]

**14. CORPORATIONS ⚡672(2)—FOREIGN CORPORATIONS—RIGHT TO SUE—OBJECTION.**

When the defendant desires to raise the question of a foreign corporation's right to maintain a suit in this state, the defense should be specifically made.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2646.]

Appeal from Circuit Court, St. Johns County; George Couper Gibbs, Judge.

Suit by the Forest Investment Company against R. L. Farrell. Decree for plaintiff, and defendant appeals. Affirmed.

The Forest Investment Company, a foreign corporation, commenced its suit in the circuit court for St. Johns county in November, 1913, against R. L. Farrell for partition of certain lands, to declare a trust in certain of them, and for an accounting for the proceeds arising from the sale of cypress timber taken from the said lands by the defendant.

The bill alleges that the complainant, Forest Investment Company, the appellee here, is a foreign corporation doing business in the state of Florida, "having duly complied with the laws pertaining to foreign corporations";

that the complainant and R. L. Farrell, the appellant here, are owners in fee simple as tenants in common of the following described lands, viz.: All of sections 5, 6, 7, 8, 16, and 18, and all of section 17 except the N. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , all in T. 9 S., R. 29 E., in St. Johns county, and consisting of about 4,447 acres of land. Also all of sections 32 and 33, and all of section 31 except the W.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$  and S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  in T. 8 S., R. 29 E. That Farrell acquired the title to said land, except 120 acres in section 31 described as the S.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  and N. W.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$ , from R. C. Wilson and wife, and conveyed to complainant an undivided one-third interest in it; that the 120 acres above described were purchased by Farrell from the Model Land Company, a corporation, but that before the purchase Farrell represented to complainant the necessity for the purchase of that tract by complainant and Farrell, and after complainant agreed that it should be bought by Farrell & Co., in which complainant had a third interest, Farrell took the title in his own name; that \$400 of the purchase price of the land was paid with the funds of the company, and complainant was ready to pay, and tendered, the balance of its part in the purchase price; that by reason of these facts complainant was entitled to a third interest in the 120-acre tract, and Farrell should be declared to hold the same in trust for complainant.

That the S.  $\frac{1}{2}$  of section 8 T. 9 S., R. 29 E., was sold by complainant and Farrell to Charles Yelvington upon Farrell's representation that it was to their interest to sell, that it was sold for a price lower than its value, of which complainant was ignorant, and that after the sale Farrell within a month purchased it from Yelvington in his own name, and thereby sought to profit by the transaction at the expense of complainant. The complainant offered to return to Farrell the money received by it from the sale, and claimed that by reason of this transaction Farrell should convey to complainant a third interest in said lands. The complainant prayed that both the above-described tracts of land be included in the petition.

The bill also alleged that in February, 1911, the complainant conveyed to Farrell its "undivided third interest in the license and right to cut, box and work for turpentine purposes all the pine timber suitable for such purposes for a period of three (3) years" upon all the lands above described except the W.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  and the S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  of section 31 in T. 8 S., R. 29 E. The bill further alleges that the lands above described are owned by the complainant and Farrell in common, the complainant having a one-third interest and Farrell a two-thirds interest; that Farrell has cut, removed, and sold the cypress and other timber, other than

the pine timber from the land without authority from complainant; that the proceeds have been applied to defendant's own use and never accounted to complainant for the same.

The bill waives an answer under oath, and prays that the complainant may be decreed to have a third interest in common with Farrell in the S.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  and N. W.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of section 31, T. 8 S., R. 29 E., upon the payment by complainant to Farrell of \$266.67 tendered as alleged; that Farrell be required to convey to the complainant a third interest in the S.  $\frac{1}{2}$  of section 8, T. 9 S., R. 29 E., upon the payment to Farrell of the money received by complainant with interest as its share of the price of same received from Yelvington; that a partition of the lands be decreed to be made, and that if the land cannot be partitioned without injustice to the parties, it be sold and the proceeds of the sale, after paying costs and a reasonable attorney's fee, be divided between the complainant and defendant according to their respective rights; that their rights be ascertained and declared, and that an account be taken of the cypress and other timber except pine timber that has been cut, removed, and sold by Farrell, and that he be decreed to pay to the complainant its part thereof that may appear to be due, the complainant on its part to pay to the defendant what, if anything, shall appear to be due from it to the defendant upon taking the account; that Farrell be restrained from collecting and receiving any money from the sale and disposition of any more cypress and other timber except pine timber from the said lands, and for general relief and subpoena.

The bill was answered by Farrell under oath, in which it was admitted that complainant and defendant owned sections 5, 6, 7, 8, 16, and 17, except N. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , and section 18 in T. 9 S., R. 29 E. The answer denied that they owned any lands in sections 31, 32, and 33 in T. 8 S., R. 29 E. It avers: That defendant bought the land in section 31 during the spring of 1910 from the Florida East Coast Railway Company for the sum of \$1,200 upon the following terms, viz.: One-third cash and interest on deferred payments. That defendant drew a draft on the Peninsular Naval Stores Company for \$400 of the purchase price, and the same was charged to the turpentine account of Farrell & Co. That about the same time he bought 40 acres of land in section 31 and gave his check for a third of the purchase price. That in February, 1911, he bought the turpentine interest of Farrell & Co. from the complainant, in which the draft for \$400 was charged to defendant who paid the amount in full. That in 1911 he paid the Florida East Coast Railway in full, and received a deed from the Model Land Company for the 120 acres. It denies that complainant has any interest in any lands in section 31, and admits that defendant and his wife conveyed to com-

plainant an "undivided one-third interest in and to the lands then owned by the defendant."

The answer denies that defendant in 1911 made any representations to the complainant as to the necessity for the purchase of the 120 acres in section 31, but in 1910 defendant did represent the necessity of the purchase of the land for an outlet to their lands, but complainant complained of the price, and defendant purchased it on his own account. It admits that complainant sold its interest in the turpentine licenses in 1911 as alleged, but that the account of Farrell & Co. was charged to defendant, in which the \$400 paid for the 120 acres in section 31 was included, and that when the sale was made all licenses had expired except upon sections 6, 7, and 18, in T. 9 S., R. 29 E. It denies that complainant was ignorant of the value of the land sold to Yelvington, the S.  $\frac{1}{2}$  of section 8, T. 9 S., R. 29 E.; that the sale was made in good faith, as was also the sale back from Yelvington to defendant. The answer avers that the sale was made because of the remoteness of the land from railroad and post office conveniences, and sets out the facts attending the sale and reasons therefor, all of which it is alleged complainant had full knowledge. It is averred that when the land was sold the log road of the Upchurch Lumber Company was regarded as the south line of the section, and the land was sold to Yelvington with that understanding between complainant and defendant; after the sale a survey showed that the line was further south and "took in the house" in which defendant was living; that defendant then purchased the land back from Yelvington, paying him for all improvements he had made; "that this purchase had nothing to do with the partnership matters of R. L. Farrell & Co., and was done with the full understanding of petitioner and its officers." The answer denies that all the lands described in the bill are subject to partition, and denies that complainant has a third interest in all of the lands described in the bill. The answer denies the allegations of the bill as to ownership in common between complainant and defendant of the lands described; that the defendant has tried to make a settlement with complainant of the "personal and real property in which it has an interest," but the complainant has refused all offers of the defendant. It admits that the defendant has cut the cypress timber from the lands to the extent of about "34,000 or 35,000 ties," but that the cypress timber was his separate property, which he bought from R. C. Wilson and wife when he purchased the "other timber" from them, and defendant paid them therefor, and complainant never paid any part of the price thereof; that defendant stated these facts to complainant, who knew that it had no interest in the cypress timber on the lands of "R. L. Farrell & Co."; and denies that complainant is entitled to any part of the money which

defendant realized from the sale thereof; that in 1907, when defendant purchased the lands in T. 9 S., R. 29 E., from R. C. Wilson and wife, "together with the turpentine privilege and leases," that Wilson claimed that the cypress timber belonged to the estate of his father, H. S. Wilson, and defendant then purchased it; that the cypress timber was not mentioned in the deed, and formed a separate transaction. The tenth paragraph of the answer is given herewith in full; it is as follows:

"This defendant, further answering, says: That during January or February, 1908, Peninsular Naval Stores Company sent a man to inspect the lands and timber purchased by the defendant from Wilson, and it was proposed to the defendant that the Peninsular Naval Stores Company would buy a half interest in the said lands, and that said company would put in the money to finance it, and would also buy 11,000 acres of land adjoining the lands bought by the defendant from Wilson. The defendant refused to give a one-half interest, but did agree to sell the Peninsular Naval Stores Company an undivided one-third interest upon the condition that they would put up the cash to buy the 11,000 acres of land when the business needed the timber. That the defendant sent the deed he received from R. C. Wilson and wife to complainant, and that the deed which was drawn by complainant's officers was from the defendant and wife to Forest Investment Company; the cypress timber was not accepted from that deed, and was not included in the deed. This defendant further says that when he approached the complainant and requested it to buy the 11,000 acres adjoining the Wilson land purchased by defendant, Mr. Blount, one of complainant's officers, said the price was too high, and refused to buy it, but that said land has since sold for a much greater price, and that said refusal greatly endamaged the defendant, and that said complainant then and there failed and refused to keep its partnership promise and to buy said land or to advance the money for the purchase of the same."

The answer then denies that the complainant is entitled to the relief prayed, or any part thereof, prays the same advantage of the answer as if he had pleaded or demurred to the bill, and prays to be dismissed with costs.

The record does not show that any replication was filed, but does contain a recital of an order by the court appointing a special master.

The special master attached to the report of his findings all the evidence adduced before him. The report sets out fully the special master's findings, and the reasons upon which he based them, and contains a statement that it had been agreed by the solicitors for the respective parties that if the master should find that the complainant was entitled to an accounting, he should state in the report the "amounts he found due, without further testimony."

The special master reported his findings to be: First, that the 120 acres of land located in section 31 and particularly described in both the bill and answer, was paid for partly with funds of the complainant and defendant as R. L. Farrell & Co., whose account was carried with the Peninsular Naval Stores

Company, naval stores factors, and was not paid by the defendant individually; second, that the S.  $\frac{1}{2}$  of section 8, which the complainant and defendant agreed to sell to Yelvington because of the reasons advanced by the defendant, but which shortly after the execution of the deed were discovered to be unfounded, and was thereupon repurchased by Farrell from Yelvington, should be held by the defendant for the benefit of himself and complainant. The master does not find that there was any misrepresentation by the defendant to the complainant in this transaction, but found that, in view of the mistaken circumstances under which the sale was made to Yelvington, and the relations existing between complainant and defendant, the latter should have recovered the land for their joint benefit. It was also pointed out by the master, whose report was very thorough and comprehensive and showed a most careful examination and analysis of the evidence, that the deed from the complainant and defendant to Yelvington did not describe the land at all, and that the legal title therefore did not pass. And although the pleadings did not mention the mistaken description, the master found the equities to be with complainant, and that the deed to Yelvington should be treated as a nullity; the legal title remaining in the defendant and complainant as before the attempted conveyance. The master did not allow defendant credit for any improvements upon the land which were made for the purpose of agriculture, upon the ground that the evidence showed that the land was unfit for agriculture because of the impossibility of draining it, which defendant knew; that drainage was a remote possibility, and that "complainant should not be charged, nor defendant credited, with the expense of improvements which must have been so obviously ill-advised;" third, the master found against the defendant's contention that the complainant had no interest in the cypress timber upon the lands, but found that the complainant had a one-third interest therein, and was therefore entitled to one-third of the proceeds derived from the sale of the cross-ties made therefrom and sold by defendant; that the complainant should pay to the defendant one-third of the price which defendant paid to Yelvington upon the repurchase of the S.  $\frac{1}{2}$  of section 8, with interest; that the complainant was entitled to a partition of the lands described in the amended bill; that the value of the lands was \$20,000; that the value of the cross-ties and cedar cut from the lands by the defendant was \$4,220.78, of which the complainant was entitled to one-third; that the complainant had paid taxes upon the lands, and was entitled to a refund of two-thirds of the amount from defendant, the amount of which the master found to be \$240.46. The master allowed an attorney's fee of \$2,400, two-thirds of which should be paid by the defendant, and the costs amount-

ing to \$72 should be paid in like proportion by them.

The defendant by his solicitor filed exceptions to this report, and in such exceptions pointed out particularly the finding of the master to which exception was taken. The exceptions questioned the correctness of the master's findings: First, as to the interest of complainant in the 120 acres of land in section 31; second, as to complainant's interest in the S.  $\frac{1}{2}$  of section 8, involved in the Yelvington transaction; third, as to the number and value of the cross-ties cut from the land and the complainant's interest therein; fourth, as to the finding that the defendant never repaid the \$400 to the Peninsular Naval Stores Company, which amount was used to make the first payment on the 120 acres purchased in section 31; fifth, as to the finding in which defendant was not allowed credit for expenses for improvements on the south half of section 8; sixth, as to the value of the lands; seventh, as to the finding that defendant had received \$4,220.78 from timber cut from the land "in which the complainant is entitled to one-third"; eighth, as to the amount of solicitors' fees; ninth, as to the finding that complainant was entitled to the relief prayed, subject to the modifications and conditions stated in the report; and, tenth, as to each and every of the findings and report of the master.

The final decree, which was rendered in June, 1915, confirmed the master's report and findings as to the facts and equities with some modifications. The decree adjudged that the defendant held an undivided third interest in the 120-acre tract in section 31 in trust for the complainant, and ordered a conveyance thereof to complainant upon the payment by it to the defendant of \$268.67, with legal interest from May 25, 1911, to the date of payment; that the defendant held an undivided one-third interest in the S.  $\frac{1}{2}$  of section 8, T. 9 S., R. 29 E., in trust for complainant and conveyance thereof should be made by defendant to complainant upon payment by the latter to the former of the sum of \$268.67, with legal interest from June 22, 1911; that the equities were with the complainant as to the matter of the accounting for the proceeds of the sale of the cypress and cedar sold by the defendant from the land, and approved the finding of the master as to the amount received by the defendant therefrom, namely, \$4,220.78, and ordered the defendant to pay to the complainant one-third of that amount, and in default of the payment for 30 days the complainant to have execution therefor, and a lien upon the lands of defendant set apart to him in the partition or in the event of a sale of the lands under the court's order upon the defendant's share of the proceeds of the sale; that the defendant owes to the complainant \$240.46 on account of the taxes paid by complainant on the lands, which amount defendant was re-

quired to pay within 30 days, and in default thereof the complainant should have execution therefor and a lien upon the defendant's lands set apart to him in the partition, or upon his part of the proceeds of the sale of the lands as before. The sum of \$2,000 was allowed as solicitors' fees, two-thirds of which was decreed to be paid by the defendant, for which the solicitors were decreed to have a lien upon the lands involved in the suit in the event of the failure of the parties to pay the same within 30 days; that the special master be allowed \$222 for his services to be paid in the same proportion, by complainant and defendant, and a lien, as aforesaid, upon the lands or proceeds of the sale thereof, and the costs to be paid in the proportion of one-third by complainant and two-thirds by the defendant; that upon the payments being made by complainant to defendant as decreed, and the deeds executed by defendant to complainant as decreed, the complainant will be entitled to and lawfully seised in fee simple of an undivided one-third interest, and the defendant of an undivided two-thirds interest in the 120 acres of land in and to the S. W.  $\frac{1}{4}$  and the N. W.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of section 31, T. 8 S., R. 29 E., and the S.  $\frac{1}{2}$  of section 8, T. 9 S., R. 29 E.; that the complainant is seised in fee simple of an undivided one-third interest, and the defendant of an undivided two-thirds interest, in the following described lands: all of sections 5, 6, 7, N.  $\frac{1}{2}$  of section 8, all of section 16, and all of section 17 except the N. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  thereof, and all of section 18 in township 9 S., Range 29 E. Partition of the lands was ordered to be made as soon as the payments were made by the complainant and conveyances executed by the defendant as directed. Commissioners were appointed to make partition and report their actions and doings to the court. From this decree an appeal was taken by the defendant.

W. W. Dewhurst, of St. Augustine, and H. L. Anderson, of Jacksonville, for appellant. MacWilliams & Bassett and David R. Dunham, all of St. Augustine, for appellee.

ELLIS, J. (after stating the facts as above). [1] The appellant insists that the bill shows upon its face that the court was without jurisdiction, and therefore upon the final hearing should have been dismissed, notwithstanding the answer. It is contended that the bill merely seeks an accounting between copartners, while praying for partition of lands, and that partition of partnership lands cannot be decreed until the equities between the partners have been settled; that the bill seeks to adjudicate the rights of the parties upon such a variety of subjects so different in character that they should not be litigated in one suit. It is pointed out that the bill seeks to establish a resulting trust in certain lands, an accounting between copartners, to surcharge a partnership account



and a partition of lands held by copartners. It is true that the answer contains no demurrer to the bill upon any specific ground; but, inasmuch as the answer sets up many matters of defense, counsel seek the benefit therefrom either by way of answer, plea, or demurrer. If the court was not wholly incompetent to grant the relief sought in the bill, the method pursued to question the form of the bill, or the court's jurisdiction, we think, would not avail. No question was raised until after the testimony was taken (if then) as to whether the court had jurisdiction to entertain a bill for partition, to establish a resulting trust, and for an accounting. There are subjects which a court of equity has no power to hear and determine, even by consent of parties, but if the subject-matter be of such character that jurisdiction may be conferred by consent, the defendant will not be heard to complain if he makes no objection to a hearing, but participates in it. In this case a master was appointed, much testimony was taken and a decree rendered upon the merits against the defendant, who then makes objection here to the court's jurisdiction. See *Central Elevator Co. v. People ex rel. Moloney*, 174 Ill. 203, 51 N. E. 254, 43 L. R. A. 658; *Brewster v. Colegrove*, 46 Conn. 105; *Page v. Young*, 106 Mass. 313; *Detroit Motor Co. v. Third Nat. Bank*, 111 Mich. 407, 69 N. W. 726; *Whiting v. Root*, 52 Iowa, 292, 3 N. W. 134; *Cutting v. Dana*, 25 N. J. Eq. 265; *Baron v. Korn*, 127 N. Y. 224, 27 N. E. 804; *Mayo v. Murchie*, 3 Munf. (Va.) 358; *United Shoe Machinery Co. v. Holt*, 185 Mass. 97, 69 N. E. 1056; *Richmond v. Bennett*, 205 Pa. 470, 55 Atl. 17. The rule has several times been recognized by this court. See *Griffin v. Orman*, 9 Fla. 22; *Williams v. Wetmore*, 51 Fla. 614, 41 South. 545; *De Cottes v. Clarkson*, 48 Fla. 1, 29 South. 442; *Rivas v. Summers*, 33 Fla. 539, 15 South. 319. See, also, 10 R. C. L. 368 and authorities cited.

[2] This bill had for its principal object a partition of the lands owned in common by appellant and appellee, which, exclusive of the lands in T. 8 S., R. 29 E., amounted to 4,447.41 acres, a one-third interest in which Farrell conveyed to the Forest Investment Company in 1908. The avreage in T. 8 S., R. 29 E., amounted to about 1800 acres according to the deed from Farrell to the Forest Investment Company, which lands were also described in the bill. So far as the acreage was concerned, a tenancy in common was alleged to exist between the complainant and defendant as to all of it. There were two tracts of land embraced in the lands above referred to, concerning which questions had arisen as to complainant's interest, which questions the court was asked to determine as incidental to the main relief sought by the bill. Those questions arose out of the relations existing between complainant and defendant at the time when the incidents occurred giving rise to the differences between

them. The Forest Investment Company and the defendant were interested together as copartners in a turpentine business; their joint account was carried by the Peninsular Naval Stores Company under the name of R. L. Farrell & Co. In this business the Forest Investment Company owned a one-third interest. It owned as purchaser from Farrell an undivided one-third interest in the lands described. As incident to the turpentine business of this partnership, by reason of considerations which arose affecting that interest and business, the two transactions, one involving the S.  $\frac{1}{2}$  of section 8, and the other the S.  $\frac{1}{2}$  and N. W.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of section 31, occurred. According to complainant these transactions were of such character and so affected by the trust relation which existed between the two parties that in equity and good conscience the act of the defendant was the act of the partners and the transactions were for their joint interest. This question was incidental to the main relief sought, and cannot, in the view we have of the evidence, be considered as the principal object of the suit; it certainly was not according to the bill. The partnership had terminated. The parties were merely tenants in common of the lands. One of them sought a partition which he had a right to ask for. It was discovered that his cotenant had, not as partner in the turpentine business, but as one of the owners of the land, denuded it of a large quantity of cypress and cedar which he sold and converted the proceeds thereof to his own use to the exclusion of his cotenant. The accounting prayed for in this transaction of the defendant was the other matter concerning which complainant asked relief. It was incident to the main purpose of the bill, and grew out of the relations of the parties as cotenants of the lands sought to be partitioned.

[3-6] The objection that the bill was multifarious, we think, is not well founded. A bill is not necessarily multifarious because there may be united in it several causes of action. If all the different causes of action united in the bill grew out of the same transaction, and all the defendants interested in the same rights, etc., the bill will be maintained. Where the subject-matter of the controversy is incumbered with many conflicting claims, equity will entertain a suit for determining and adjusting all these interests at once. The objection of multifariousness, when made for the first time at the hearing, will not be allowed where the real point in controversy can be determined as well in the one court as if there were many separate suits. The objection in this cause does not appear to be so grave as to interpose an obstacle to the proper administration of justice, and therefore should not be allowed. See 10 R. C. L. 429-435; *Nelson v. Hill*, 5 How. (U. S.) 127, 12 L. Ed. 81; *Briges v. Sperry*, 95 U. S. 401, 24 L. Ed. 390; *Hefner v. Northwestern Mut. Life Ins. Co.*, 123 U. S.

747, 8 Sup. Ct. 837, 81 L. Ed. 309; *Hamilton v. Whitridge*, 11 Md. 128, 69 Am. Dec. 184; *Henderson v. Farley Nat. Bank*, 123 Ala. 547, 26 South. 226, 82 Am. St. Rep. 140; *Fies v. Rosser*, 162 Ala. 504, 50 South. 287, 136 Am. St. Rep. 57; *Emerson v. Gaither*, 103 Md. 564, 64 Atl. 28, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114; *Johnson v. Black*, 103 Va. 477, 49 S. E. 633, 68 L. R. A. 264, 106 Am. St. Rep. 890. In dealing with the question of multifariousness the matter particularly to be considered is convenience in the administration of justice, and if this is accomplished by the mode of procedure adopted, the objection will not lie. This is the principle upon which the courts act in determining the validity of an objection of that character. It is no objection that there are several causes of action. They arose from the holding of this large tract of land in common between the complainant and defendant. Convenience was subserved and expenses and costs reduced by the procedure adopted. No one can be said to have been inconvenienced, and the court had power to settle all the questions presented. Having taken jurisdiction of the cause for one purpose, the court had power to proceed with the determination of all the matters presented. See *Taylor v. Florida East Coast R. Co.*, 54 Fla. 635, 45 South. 574, 16 L. R. A. (N. S.) 307, 127 Am. St. Rep. 155; *Miller v. Louisville & N. R. Co.*, 83 Ala. 274, 4 South. 842, 3 Am. St. Rep. 722; *Allen v. Elder*, 76 Ga. 674, 2 Am. St. Rep. 63; *Thomas v. Thomas*, 250 Ill. 354, 95 N. E. 345, 35 L. R. A. (N. S.) 1158, Ann. Cas. 1912B, 344; *Doggett v. Hart*, 5 Fla. 215, 58 Am. Dec. 464; *Griffin v. Fries*, 23 Fla. 173, 2 South. 266, 11 Am. St. Rep. 351; *Capital City Bank v. Hilson*, 64 Fla. 206, 60 South. 189, Ann. Cas. 1914B, 999; *Carlton v. Hilliard*, 64 Fla. 228, 60 South. 220. Under the statutes of this state courts of equity have jurisdiction to order the partition of lands. Section 1939, General Statutes of 1906, Florida Compiled Laws of 1914; *Christopher v. Mungen*, 61 Fla. 513, 55 South. 273.

[7] The question of the right of a corporation to enter into a copartnership with an individual is not involved in this proceeding. Whether there was any power in the corporation to do so or not, the copartnership was formed, transacted business, and dissolved. This complainant does not seek by the bill to open any partnership accounts, nor does it seek an accounting as of one partner from another; but after terminating a partnership arrangement in a certain business, it found itself tenant in common of certain lands with appellant, and filed a bill for partition, seeking an account from its cotenant of the profits derived by him from the sale of certain timber from the common property. The first assignment of error is not sustained.

The assignments of error numbered from 2 to 8, inclusive, attack the decree as being erroneous for not sustaining certain exceptions to the master's report; for confirming

the report as to its findings of fact and equities; for finding the equities to be with complainant; and for decreeing that complainant was entitled to an undivided third interest in the 120 acres of land in section 31, and the south half of section 8; and for adjudging that the complainant was entitled to an accounting from the defendant as to the proceeds of the sale of the timber from the lands, and as to the amount of such proceeds; and in ordering the defendant to pay to complainant a certain sum on account of taxes paid by the complainant on the land. These assignments of error, as well as the remaining ones, 12 in number, involve an examination of the evidence. The exceptions to the master's report are based upon the proposition that the evidence did not justify the different findings. Counsel in their brief and during the oral argument urged that the report of the master and the decree following it were unsupported by the evidence. We think it would be of no interest to the parties to discuss the evidence, which was quite voluminous and conflicting. The master carefully examined it, and made an exhaustive and clear analysis of it. His report, we think, was fully sustained by the evidence, and the decree which followed the master's findings contains no error that we have discovered. There was ample evidence to support the finding that the defendant and complainant as *Farrell & Co.* made the first payment on the purchase price of the 120 acres in section 31, and that the land was purchased at the time for the benefit and use of the partnership; and to support the theory of the bill that the defendant was in conscience bound to have repurchased the south half of section 8 for the benefit of himself and complainant. While the copartnership between complainant and defendant had terminated when the sale was made to *Yelvington*, yet it was made on defendant's representations some time before the dissolution of copartnership, which representations were afterwards discovered to be untrue. Not that there was any design on defendant's part to misrepresent to his cotenant any facts, but the fact remains that the statements he did make constituting the reasons for selling were discovered to be unfounded, whereupon he repurchased the lands in his own name. He should not be permitted to profit in that manner at the expense of his cotenant.

[8-12] The chancellor's conclusions on the facts will not be reversed, unless it clearly appears that he erred in such conclusions. *City of Jacksonville v. Huff*, 39 Fla. 8, 21 South. 774; *Waterman v. Higgins*, 28 Fla. 660, 10 South. 97; *Lucas v. Wade*, 43 Fla. 419, 31 South. 231; *Fuller v. Fuller*, 23 Fla. 236, 2 South. 426; *Sarasota Ice, Fish & Power Co. v. Lyle & Co.*, 58 Fla. 517, 50 South. 993. But appellant contends that, although the bill waived an answer under oath, the defendant made oath to his answer, and was therefore entitled to the benefit of an an-

swer under oath. Where an answer is made under oath, the allegations contained in it which are responsible to the bill, and which set up facts to which other testimony could be received, are to be taken as true, unless disproved by evidence of greater weight than the testimony of one witness. See *Carr v. Thomas*, 18 Fla. 736; *Carter v. Bennett*, 6 Fla. 214; *Day v. Jones*, 40 Fla. 443, 25 South. 275; *Pinney v. Pinney*, 46 Fla. 559, 35 South. 95. The above rule rests upon the equitable principle that if defendant is put upon his oath by his adversary, credit shall be given to his own declarations unless they are contradicted by at least two witnesses, or by written documents, or by evidence greater than the testimony of one witness. See *White v. Walker*, 5 Fla. 478. To have this weight, however, the answer must be direct and positive, must be under oath, and relate to such facts as other testimony could be received to establish. It should not, as an example, be permitted to show that the intent and meaning of the parties to a written agreement was contrary to what appears on the face of it, as said by the court in *Carter v. Bennett*, supra. The modern rule, according to the American decisions, is that the sworn answer is evidence in the defendant's favor in so far as its statements are responsive to the allegations of the bill. In other words, when the material allegations of a bill are met by a responsive answer under oath, the allegations of the bill must be supported by the testimony of two witnesses, or one witness and corroborating circumstances, otherwise the defendant's answer will prevail and the bill be dismissed. The practice of answering under oath is of ancient origin, and in this country is universally required except where the practice has been changed by statute or rule. *Union Bank of Georgetown v. Geary*, 5 Pet. (U. S.) 99, 8 L. Ed. 60; *Conley v. Nailor*, 118 U. S. 127, 6 Sup. Ct. 1001, 30 L. Ed. 112; *Dravo v. Fabel*, 132 U. S. 487, 10 Sup. Ct. 170, 33 L. Ed. 421. In order for the plaintiff to avoid the effect of an answer, that is, if he was unwilling that it should have the effect of evidence against him, he was required to expressly waive in the bill the oath of the defendant to the answer. *Conley v. Nailor*, supra. This was the effect of rule 41 of the Rules of Practice in the Courts of Equity of the United States as prescribed by the Supreme Court of the United States and amended in 1871.

Section 1877, of the General Statutes of Florida 1906, Florida Compiled Laws 1914, provides as follows:

"In the absence of provisions of the law or rules of practice of this state, the rules of practice in the courts of equity of the United States, as prescribed by the Supreme Court thereof, under the act of Congress of the 8th of May, one thousand seven hundred and ninety-two, shall be rules for the practice of the courts of this state when exercising equity jurisdiction; and when the rules of practice so directed by

the Supreme Court do not apply, the practice of the courts shall be regulated by the practice of the High Court of Chancery of England."

In the case of *Kahn v. Weinlander*, 39 Fla. 210, 22 South. 653, this court, speaking of the above act, which was passed in 1828 and has been continued as law in this state down to the adoption of the General Statutes of 1906, said:

"The purpose of the act referred to was to make the rules of practice adopted by the Supreme Court of the United States in the equity courts of the United States applicable in chancery causes in the courts of this state, where provision was not made on the subject by the act, and it makes no difference whether the rules provided for were adopted before or after the passage of the act, provided there is no statutory provision covering the subject. We are of the opinion that such was the purpose of the act, and it should be so construed."

Under the provisions of the act of 1873, chapter 1938, the Supreme Court of Florida adopted rules governing the practice and proceedings in the Circuit Courts of Florida in equity. The Supreme Court of the United States had, prior to that time, however, amended rule 41, providing that the complainant may in his bill waive an answer under oath, in which case the answer should not be evidence in his favor unless the cause was set down for hearing on bill and answer only. The result of all this, as said by this court in the case above cited, is that the amendment to rule 41 as adopted by the Supreme Court of the United States is in force in the courts of chancery of this state, because no rule of this court adopted under the act of 1873 was in irreconcilable conflict with it. Now counsel for appellant contends, and we think correctly, that as the new rules of practice for the courts of equity of the United States promulgated by the Supreme Court of the United States in November, 1912, make no provision for the complainant waiving in his bill an answer under oath; and as the new rules abrogated the old ones, and as there is no provision in the rules prescribed by the Supreme Court of Florida on the subject, a complainant cannot deprive the defendant of the benefit of his answer under oath by expressly waiving it in the bill.

In the case of *Clements v. Moore*, 6 Wall. (U. S.) 299, 18 L. Ed. 786, the court through Mr. Justice Swayne, said that it was the defendant's right to answer under oath, and the complainant could not deprive her of it; that such was the settled equity practice where there was no regulation to the contrary. This announcement of Judge Swayne, based upon an opinion by Judge Kinney in *Armstrong v. Scott*, 3 G. Greene (Iowa) 433, seems to be in accordance with the weight of authority on that point in the United States. See 10 R. C. L. 545-549. Why an answer not under oath should have any greater force than any other pleading in a cause is not apparent. If the oath was waived under the old rule, the complainant was still required

to prove the allegations of his bill. As the purpose of requiring an answer under oath was for the complainant's advantage, in that it required the defendant to purge his conscience upon the matters alleged, and as the price of that advantage was the benefit to the defendant of his responsive averments as evidence in his behalf, the reason of the old rule adopted in this and other jurisdictions, which permitted the waiving in the bill of the oath to the answer, is obvious, and was exceedingly salutary. But although the appellant's contention is correct upon this point, viz., that the complainant cannot, since the adoption of the new rules by the Supreme Court of the United States, deprive the defendant of the "right" of swearing to his answer, and thereby have more than the benefit of one witness in his behalf, the sworn answer does not have that effect as to new matter set up by way of affirmative defense; nor as to averments of facts which testimony would not be admissible to prove. The answer in this case contains many such averments, and certainly cannot, as to such averments, be given the same effect as a sworn answer which is responsive to the allegations of the bill. We think the evidence offered by the defendant to contradict the terms of the deed from Wilson to Farrell, and from Farrell to complainant, was properly rejected; that the master's conclusion, which was confirmed by the court as to the value of the timber cut from the lands, cannot be disturbed, in view of the answer of the defendant and the evidence in the case, and that the matter of requiring the defendant to refund to the complainant his proportion of the taxes paid by the complainant on the lands was proper under the prayer for general relief.

[13, 14] It was contended in the oral argument that the burden was upon the complainant to prove that it was authorized to do business as a corporation in this state; and, in the absence of any evidence on the subject, it must be held to be without such authority. The bill expressly alleges that the complainant is so authorized; the answer

does not deny the allegation. The statutes of this state (sections 2682 et seq., General Statutes of 1906) do not expressly prohibit a foreign corporation from bringing a suit in this state until it has complied with the requirements of the statute. The reason for the omission may have been to enable such corporation to have the aid of the courts in the protection of its property rights where the court does not have to give force or validity to an executory contract by such a corporation. The rule seems to be that when the defendant wishes to raise the question of the corporation's right to maintain a suit in this state, he should make the defense specially. See 12 R. C. L. 98-101. The point raised by appellant that a corporation cannot enter into a copartnership with an individual, and therefore is not entitled to an accounting from its so-called partner, we think, is not involved in this case. The partnership between the Forest Investment Company and the appellant, which existed from 1908 to some time in 1911, had been dissolved, its affairs settled, and all obligations discharged so far as the pleadings and evidence show. The contracts which the partnership made have been executed. The partners were left as tenants in common of certain lands. The relations which they bore to each other as tenants in common required the exercise of good faith toward each other in all transactions pertaining to the common property, and because of these relations and the reciprocal duties and obligations, the court undertook to settle the disputed question as to complainant's interest in the S.  $\frac{1}{2}$  of section 8 and the 120 acres in section 31, and require an accounting for the value of the timber cut from the common property, and in the exercise of the jurisdiction we think the court acted clearly within its power, and that the evidence does not show that the conclusions reached were erroneous. So the decree is affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and WHITFIELD, JJ., concur.

(199 Ala. 48)

RUSSELL et al. v. STOCKTON et al.  
(8 Div. 865.)(Supreme Court of Alabama. Jan. 12, 1917.  
Rehearing Denied Feb. 15, 1917.)**1. VENDOR AND PURCHASER**  $\S$  266(8)—**WAIVING VENDOR'S LIEN—ACCEPTING VOID SECOND MORTGAGE.**

A vendor's purchase-money lien was not waived where the vendees executed a void second mortgage to the vendor shortly before his death, but the instrument was not examined by him or by his family until a month after his decease.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig.  $\S\S$  735-747.]

**2. VENDOR AND PURCHASER**  $\S$  266(6)—**WAIVING VENDOR'S LIEN—ACCEPTING PURCHASER'S NOTES.**

A vendor's purchase-money lien was not waived by accepting the vendees' promissory note containing a waiver of exemptions.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig.  $\S\S$  733, 734, 748-750.]

**3. MORTGAGES**  $\S$  151(6) — **PRIORITY — VENDOR'S LIEN.**

One loaning vendees money to purchase land, with the vendor's knowledge and perhaps an agreement to have preferred security for such advances, and later accepting a mortgage from the vendees for a larger amount, has a claim prior to the vendor's lien for the amount advanced toward the purchase price.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig.  $\S\S$  318, 332-336.]

**4. APPEAL AND ERROR**  $\S$  890(1) — **PARTIES ENTITLED TO ALLEGE ERROR — ERROR AFFECTING COPARTY.**

A mortgagee cannot complain on appeal that the deed to his mortgagors should be reformed where the mortgagors, although coparties defendant with the mortgagee, did not appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig.  $\S\S$  3584, 3585, 3587, 3589, 3590.]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Bill by M. A. Stockton and others against T. J. Russell and others. Decree for complainants, and defendants appeal. Reversed and remanded.

Sample & Kilpatrick, of Cullman, for appellants. Wert & Lynne, of Decatur, for appellees.

SAYRE, J. This bill was filed by the widow and minor heirs of A. M. Stockton, deceased, to foreclose a vendor's lien for the unpaid balance of the agreed purchase price of a certain tract of land which deceased had sold to the defendants D. W. and C. L. Thomas, who were his son-in-law and daughter. The defendants aforementioned had mortgaged the land to T. J. Russell, and he is made a party defendant to the bill with a prayer that his mortgage be declared subordinate to the lien claimed. Relief, according to the prayer of the bill, was awarded against all the defendants in the law and equity court of Morgan.

[1, 2] The principal question is, whether deceased waived his vendor's lien for the

whole or any part of the unpaid balance of the purchase price. It appears that a mortgage was to be made to secure this balance; but it cannot be supposed that the grantor intended to waive his equitable lien in reliance upon a mortgage that afforded him no security at all. It is evident, rather, that if he intended, or if by force of circumstances he may be held at any time or in any case to have intended, to waive his lien by taking an independent security, that intention was conditioned upon the execution of a valid security. An instrument purporting to be a second mortgage was delivered to him; but it was prepared in collaboration by his grantees and their mortgagee some days after the execution and delivery of the deed, without the knowledge or participation of Stockton, who was then confined to his bed by his last illness. The instrument was not examined at the time by Stockton or any member of his household, nor was it discovered by them that it purported to be a second mortgage until after his death about a month later. This instrument was in fact no security; it was void because it was not executed as required by the statute. Its acceptance in the manner and under the circumstances indicated did not prove a waiver of the vendor's equitable lien. *Gravlee v. Lampkin*, 120 Ala. 210, 24 South. 756; *Campbell v. Goldthwaite*, 189 Ala. 1, 66 South. 483; *Chapman v. Chapman*, 55 Ark. 542, 18 S. W. 1037. Nor did the acceptance of the promissory note of the vendees amount to a waiver of the vendor's lien, though it contained a waiver of exemptions. *Thompson v. Sheppard*, 85 Ala. 611, 5 South. 334; *Woodall v. Kelly*, 85 Ala. 368, 5 South. 164, 7 Am. St. Rep. 57.

[3] The defendant Russell, who alone takes this appeal, insists that, to the extent of \$450 at least, the amount of the payment made at the time of the sale, he should have a lien decreed in his favor in precedence of the vendor's lien to be declared in favor of the complainants. Prior to the transaction in question Stockton was indebted to Dr. Turney in the sum of \$300, and this indebtedness was secured by a mortgage which covered the 80-acre tract here involved and as well another smaller tract about a mile away to which the witnesses refer as the old home place. It appears very certainly that one inducement leading Stockton to the transaction in question was his desire to leave to his wife and minor children the place where he then lived as an unincumbered homestead. He also preferred that the sale should be a cash transaction; but he knew that Thomas expected and would need to borrow the money from Russell. After Russell declined to advance the whole purchase price, to wit, \$1,100, Stockton accepted a cash payment of \$450, leaving the balance to be payable nominally one year

later, but with the understanding that the principal might be deferred for some years, provided interest was paid. This balance Russell advanced by paying the debt due to Dr. Turney and sending a check to Stockton for \$150.

At first we wrote that Russell was not entitled to priority for any part of the mortgage he held from Thomas and wife. He claimed priority for his entire debt; but it was, and is now, clear that Stockton did never intend that Russell should have a prior lien for the entire amount of the debt Thomas owed him and which Russell took occasion to swell by purchasing an outstanding claim against Thomas and including the same in the ostensible first mortgage which he took from the latter. However, now upon reconsideration we think that we, like the chancellor perhaps, were led too far by our reprobation of the fact that an effort appeared to have been made to impose upon Stockton by putting him off with a mortgage that would be subordinate to appellant's mortgage in its entirety and to bind him (Stockton) by the false appearance of a waiver of priority more extensive than he intended. Considering the case again, we are still clear in our opinion that appellant is not entitled to a priority to the full extent of the debt for which Thomas and wife executed their mortgage to him; but we have concluded that the competent evidence, an influential part of which comes from a source friendly to appellees, shows that appellant advanced the sum of \$450 with the just expectation (*Bell v. Bell*, 174 Ala. 446, 56 South. 926, 37 L. R. A. [N. S.] 1203)—perhaps even with an express agreement (*Wilder v. Wilder*, 89 Ala. 414, 7 South. 767, 9 L. R. A. 97, 18 Am. St. Rep. 130)—that he was to have a security for its repayment prior to the vendor's lien for the balance of the purchase price, and that it would be an unwarranted interference with his contract or quasi contract right to a priority to the extent of the sum so advanced, and acquired by appellant when he advanced the money, to hold that his priority to that extent was forfeited by his subsequent effort to swell his priority to the full extent of the larger mortgage which, as against Thomas and wife, he rightfully took.

[4] In regard to the prayer contained in the cross-bills of the respective defendants for a reformation of the deed from Stockton to Thomas and wife, it will suffice to say that the Thomases do not appeal, and that no relief in this respect can be granted to Russell for the reason that there is no proof of any mistake in the mortgage under which he claims.

The decree will be reversed, and the cause will be remanded for further proceedings in accordance with this opinion. If it shall appear to the court below by way of appro-

priate pleading and proof that the defendant Russell should in equity be charged with rents and profits as a mortgagee in possession before foreclosure, the court will order a reference to ascertain the proper amount of such charge, and allow the same in reduction of Russell's priority.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., concur.

(199 Ala. 80)

GARRETT, Sheriff, v. COBB. (1 Div. 943.)

(Supreme Court of Alabama. Dec. 21, 1916.  
Rehearing Denied Feb. 15, 1917.)

1. MANDAMUS  $\Leftrightarrow$  160(7)—ALTERNATIVE WRIT—AMENDMENT.

The alternative writ in mandamus is not merely process, but also pleading; hence Code 1907, § 4864, providing that "any of the pleadings in such proceedings" may be amended to attain justice, is applicable.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 332-334.]

2. MANDAMUS  $\Leftrightarrow$  160(7)—ALTERNATIVE WRIT—SUFFICIENCY—AMENDMENT.

By amendment to writ in mandamus, giving sheriff alternative right to return, as forfeited, a detinue bond, or to show cause why bond had not been forfeited, the ends of justice were attained as contemplated by Code 1907, § 4864, allowing amendments for that purpose.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 332-334.]

3. MANDAMUS  $\Leftrightarrow$  35 — TO COMPEL MINISTERIAL ACT BY SHERIFF.

A sheriff's duty under Code 1907, §§ 3783, 3790, to return detinue bond as forfeited, where plaintiff fails to deliver goods taken and defendant has paid judgment and costs within 30 days, is ministerial, and mandamus lies to compel such action, although petitioner had a remedy by suit on the bond; mandamus being necessary to render effectual his summary cumulative remedy by execution against sureties on bond returned by sheriff as forfeited.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 67.]

4. SHERIFFS AND CONSTABLES  $\Leftrightarrow$  73 — COMPENSATION FOR CARE OF PROPERTY—TAXATION AS COSTS.

The amount allowed sheriffs by Code 1907, § 3722, for care of property seized under writ of detinue, "as the court may fix," does not become part of the taxable costs until the court has determined its amount.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 90.]

5. SHERIFFS AND CONSTABLES  $\Leftrightarrow$  73 — COMPENSATION—DUTY TO HAVE TAXED.

Where a sheriff makes payment of compensation, allowed by section 3722 for care of property seized in detinue, a condition precedent to returning plaintiff's bond as forfeited, as required by sections 3783, 3790, where plaintiff has refused to return property after defendant's payment of judgment and costs, it is the sheriff's duty to move the court to fix amount of such compensation.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 90.]

Appeal from Circuit Court, Clarke County; Ben D. Turner, Judge.

Petition by Z. T. Cobb for mandamus

against S. C. Garrett, as sheriff, to require him to return a certain replevy bond as forfeited, or else show cause why he could not do so. From an order granting the writ respondent appeals. Affirmed.

The petition shows that petitioner was sued in the circuit court of Barbour county in detinue for certain personal property, which was described, and that a writ was issued, and under said writ the sheriff seized the property, and that plaintiff in detinue, Frank M. Ladd & Co., executed a plaintiff's replevy bond as provided by section 3780 of the Code of 1907; that the bond was taken and approved by the sheriff, and the property seized was taken and delivered to plaintiffs, their agents or attorneys; that said cause was duly tried, and a judgment rendered in favor of plaintiff for the property seized, and the mortgage indebtedness due by defendant to plaintiff was ascertained by the jury to be \$322.75, and the presiding judge entered the order that if the debt ascertained, together with the interest and costs, be paid by defendant within 30 days from this date, no execution or other process will issue on the judgment. The petition alleges the payment within 30 days to the clerk of the judgment, and the interest and the costs by petitioner, and that, notwithstanding this, the sheriff has failed and refused upon demand to deliver to petitioner the personal property seized, and has failed and refused to return as forfeited plaintiff's replevy bond. It is then prayed that the writ of mandamus issue to compel a return of plaintiff's replevy bond as forfeited, or else to show cause why he should not do so. The demurrers raise the question that the writ was not an alternative writ, but is specific, and fails to give respondent any alternative, and affords no alternative for respondent to perform the required act. Motion to quash the writ is based on the same ground. It is also urged that petitioner had other and adequate remedies.

T. J. Bedsole, of Grove Hill, for appellant.  
William D. Dunn, F. E. Poole, and Q. W. Tucker, all of Grove Hill, for appellee.

SAYRE, J. [1] The alternative writ in mandamus is not process merely, but both process and pleading. *Longshore v. State ex rel. Turner*, 137 Ala. 636, 34 South. 684. Section 4864 of the Code provides that "any of the pleadings in such proceedings may be amended as often as occasion may require to attain the ends of justice."

[2] Assuming that the writ in this case was amended so as to leave with respondent the alternative of returning the bond forfeited or showing cause why it should not be so, instead of commanding him to show cause why the bond had not been forfeited, as perhaps the original writ did—though from the record it is not at all clear that this was the

effect of the amendment allowed—the amendment left open the way to respondent either to return the bond forfeited, and thus put an end to the proceeding, or to show cause why it should not be done, and thus the ends of justice were attained, as the statute contemplates. *Longshore v. State ex rel. Turner*, supra.

[3] The duty required of respondent was ministerial, and his failure or refusal invited an apt use of the writ of mandamus. *Cooper v. Davis*, 88 Ala. 569, 7 South. 145. Petitioner had a remedy by suit on the bond, it is true, but he was by the statute vested with a right to the summary cumulative remedy by execution against the sureties on the bond upon the sheriff's return of the same as forfeited, and he was entitled to the writ of mandamus to make this summary remedy effectual.

The sheriff had seized some horses and mules under a statutory writ of detinue. Plaintiffs in the detinue suit had given bond and taken possession of the animals. After verdict and judgment for plaintiffs, which ascertained the amount of defendant's indebtedness under the mortgage through which plaintiffs in that suit claimed, as provided by section 3780 of the Code, defendant in that action, petitioner and appellee in this, paid the amount of his mortgage indebtedness and the officers' fees, and, plaintiffs having failed for 30 days after judgment to deliver the property, defendant demanded of the sheriff that he return the bond forfeited as provided by sections 3790 and 3783 of the Code; but the sheriff refused on the ground that his compensation for keeping the animals pending the execution of the replevy bond had not been paid, and the meritorious question in the case is whether, on the facts stated, the respondent sheriff was correctly required to return the bond forfeited.

[4, 5] Section 3722 of the Code allows to sheriffs for taking care of personal property seized under a writ of detinue "such compensation as the court may fix" to be taxed as costs. In this case the sheriff had rendered a statement of the amount claimed by him for taking care of the animals, and the clerk had placed this item among the other items of costs upon his cost bill; but the court had not been asked to fix this compensation, nor had it made any order. Defendant, refusing to pay this charge, demanded nevertheless that the bond be returned forfeited. It is clear that this compensation does not become a part of the taxable costs until its amount has been fixed by the court, and from the foregoing statement of the record it appears that the ultimate question to be decided is this: Upon whom rested the burden of moving the court to fix the sheriff's compensation for taking care of the property? Upon this question the court holds that if the sheriff in such cases would make

the payment of his compensation of this sort a condition precedent to a return of the bond forfeited, he must move the court to have the amount of it fixed by judicial order.

Affirmed.

ANDERSON, C. J., and MCCLELLAN and GARDNER, JJ., concur.

(199 Ala. 114)

LOUISVILLE & N. R. CO. v. GRAY.  
(8 Div. 862.)

(Supreme Court of Alabama. Dec. 21, 1916.  
Rehearing Denied Feb. 15, 1917.)

1. MASTER AND SERVANT ~~278(5)~~—INJURY TO SERVANT—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Evidence that defendant railroad's hostler, under a superior's direction, coupled a live engine to a tender of a dead engine on which plaintiff claimed to be working, and moved it a few inches, injuring plaintiff, *held* insufficient to establish negligence in moving the engine.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 274, 277, 278.]

2. MASTER AND SERVANT ~~278(6)~~—INJURY TO SERVANT—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Evidence *held* insufficient to sustain a jury finding that defendant railroad's hostler negligently failed to stop an engine after hearing plaintiff's outcries, where plaintiff's injuries were caused by a second engine being shoved only a few inches.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 962.]

McClellan and Gardner, JJ., dissenting.

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Action by John G. Gray against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Eyster & Eyster, of New Decatur, for appellant. Wert & Lynne, of Decatur, for appellee.

SAYRE, J. Appellee, to whom we shall hereafter refer as plaintiff, claimed damages for personal injuries alleged in the first count to have been caused "by the negligence of an engineer or hostler of defendant who then and there had charge or control of an engine of defendant." In the third count negligence is charged against "one of the defendant's employes \* \* \* who had charge or control of a locomotive engine that was being operated or run by said employe." We construe this count as stating substantially the same cause of action as that set forth in the first count with some elaboration that need not here be repeated. In counts A and B, added by amendment, plaintiff's injuries were charged to the negligence of one J. T. Weatherly, count A alleging that said Weatherly, who was then and there in the exercise of superintendence, "negligently caused the tank and an engine, about which

the plaintiff was engaged as aforesaid, to strike together with such force as to proximately hurt and injure this plaintiff," while count B alleged that plaintiff's injuries "were proximately caused by the act of a person in the service or employment of defendant, who had charge or control of a locomotive engine operated on and over the said track of the defendant, upon which this plaintiff was engaged in working on another locomotive engine standing on the track, in that said person so in charge of said locomotive engine ran against or struck a tank detached from the engine upon which this plaintiff was working, and caused the same to roll or run against the engine upon which this plaintiff was working and which was done by the person in charge of said engine in obedience to particular instructions given by one J. T. Weatherly, who was then and there employed by defendant and by it delegated with authority in behalf of having engines and tanks coupled, and defendant's said hostler in charge of said engine, as aforesaid, was making a coupling of said engine and tank under the instructions of said person so delegated with authority," who "was negligent in giving the order to make such coupling." The complaint was under the Employers' Liability Act (section 3910 of the Code), of course, and we have only undertaken to state enough of the several counts upon which the case was sent to a jury to show the gist of the action and designate the particular employes to whose negligence plaintiff's injuries are charged.

Plaintiff suffered injuries that must appeal so strongly to the sympathies of any court or jury that it is not inappropriate to say that under no rule of law or practice have we the power of arbitrators, and that the question of defendant's liability must be determined according to the settled principles that have heretofore obtained in cases of this general character.

[1] Plaintiff's case rested in the main upon his own testimony. He testified that he was at work making some minor repairs upon a locomotive engine. Prior to plaintiff's injury this locomotive had entered the defendant's roundhouse at Decatur, front forward, and at the time was standing dead upon the track. The time was shortly after 1 o'clock a. m. Between 12 and 1 defendant's employes rested and took their midnight meal. Plaintiff, according to his testimony, was engaged in inserting a Carter key in the end of the brake beam on the left side of the engine between the first and second driving wheels. The driving rod, or main side rod, was attached to the third, or main, driving wheel. A side rod connected all the drivers, and this of course operated inside of the main rod. This end of the brake beam was above the rail approximately, but whether a few inches inside or out is not clear. Plaintiff testified:



"At the time I was struck I had started to straighten. I was bent and started to straighten up from the engine just about the time I was struck. The beam where I was trying to put the key through was about  $2\frac{1}{2}$  or 3 inches off the floor, and I was stooping over. I was struck somewhere in the right side there and knocked sideways, like that, just as I started to straighten. The struck me [it is so written in the bill of exceptions] and something 'cotch' me here. It was done so quick I couldn't tell what it was, but I was struck right here. After being struck, I was in this position [indicating] laying out, and I was mashed from this hip up under my breast bone and up under my shoulder blades, and I was wedged that way [indicating]. I couldn't get out until they pinched me out, I mean by that, they got pinch bars, and as the rod had me caught, they had to pinch the engine back, and that let me out."

On cross-examination the plaintiff said:

"When I was hurt I couldn't tell what caught me. It knocked me down and I couldn't tell what it was."

Nobody saw plaintiff at the time of his injury. The engine upon which he says he was at work came to be moved in this wise: The tender needed some repair and had been detached from its engine. Weatherly, who was in charge of things, directed that a live engine be attached to the tender in order that it be drawn away to the place where it was to be repaired. This live engine was moved upon the turntable, and then an employé aligned the turntable with the track upon which the dead engine stood. Weatherly gave the signal for the movement of the live engine, and this signal was communicated to the hostler operating the engine through the turntable man. The hostler, from his place on the right side of the live engine, could not see the place where plaintiff was, and there is nothing to show that he knew, or that it was his business to know, anything of plaintiff's engagement with the dead engine. He moved in response to the signal. In making the coupling with the tender, the engine upon which plaintiff testified he was at work was moved some 5, 6, 7, or 8 inches. Plaintiff's cries, following immediately upon the impact of the live engine against the tender, brought several employés to the place where he was. The undisputed evidence of these employés was that they found plaintiff caught between the driving rod and the counterbalance of the main driving wheel of the engine. This counterbalance was a crescent-shaped body of iron or steel that from "nose" to "nose" reached, approximately, three sevenths of the way around the wheel and extended out from the general surface of the outer side of the driver about four inches; and as the driver was caused to make a partial revolution forward by the impact of the live engine against the tender, transmitted through the tender to the dead engine, the counterbalance descended while the driving rod ascended, between them catching and breaking bones in the region of plaintiff's hips. The general position of plaintiff, as the witnesses found him,

was facing away from the engine. It will be noticed that while the undisputed evidence showed that plaintiff was caught between the driving rod and the counterbalance of the third, or main, driving wheel, his testimony was that at the moment of his injury he was at work between the first and second driving wheels. That this was no inadvertence or mistake on the part of plaintiff is made clear by his testimony and by the testimony of witnesses for the defendant, upon which one of the pleas was predicated, to the effect that five or ten minutes before the accident they had seen plaintiff sitting and apparently asleep or drowsing on the driving rod with his back against the main driving wheel. Plaintiff did not deny that he was caught in the manner described by the witnesses for the defendant.

It has been our purpose to state the evidence as it may be supposed to bear upon the issue tendered by the first and third counts of the complaint charging negligence to the hostler, and not specially with reference to other issues in the cause, though they have been involved to some extent. On this evidence, though it be conceded that the tender was moved some small but unnecessary distance, it is very clear that the hostler, who had no knowledge or notice of the plaintiff's position, whatever that may have been, was not guilty of any breach of duty to plaintiff in making the coupling in obedience to Weatherly's signal. It was Weatherly's duty to plaintiff, if the latter was where he had a right to be in the performance of the work he was employed to do, to know the situation and govern the movements of the live engine accordingly; and however guilty he may have been, no culpable negligence with respect to plaintiff can be charged to the hostler who acted under his instructions as it was his duty to do.

It is not possible to conclude from any part of the evidence that any of the witnesses intended to say, or that in fact, the tender or the dead engine were moved any great distance by the impact of the live engine. The witnesses measure both these distances by inches. If plaintiff was engaged about the dead engine, as he said he was, and his body, while so engaged, was in a position that rendered any movement of the engine dangerous, and if Weatherly should have known the fact, it would have been a grave fault on his part to direct or allow any operation of the live engine that probably threatened plaintiff's safety by a movement of the dead engine, without giving plaintiff due warning. The brief for plaintiff argues that the evidence warranted a finding that the dead engine was moved from 12 to 20 feet. This, we presume, is based upon some rough estimates as to the position of the engine before and after the accident. Plaintiff, speaking of the position of the engine, testified:

"The front of the engine on which I was working was about 8 or 10 feet from the edge of wall of the roundhouse."

He said nothing about how far it was moved or its position afterwards. Witnesses for defendant, speaking of its position after the accident, testified that the nose of the engine was 10 or 15 feet from the wall of the roundhouse. Plainly, plaintiff and these witnesses were speaking of the same wall. This evidence does not sustain the contention that there was any change forward in the position of the engine. Nor have we been able, after a careful investigation of the record, to find any evidence that the dead engine was shoved forward anything like the distance it would have moved upon a complete revolution or any approximation of a complete revolution, of its driving wheels, as plaintiff seems to contend. The evidence on this subject came from defendant's witnesses who saw and took part in the operation, and their estimates of the movement of the dead engine varied from 4 to 8 inches. These witnesses also testified, and in this too they were uncontradicted, that from its position on the turntable, 75 feet from the inner or nearest wall of the roundhouse, the live engine moved up close to the tender, about 3 feet, the witnesses said, where it stopped, and then on Weatherly's signal moved again until it came into contact with the tender with force enough—some force was necessary—to cause the coupling apparatus to interlock automatically. The jury may have had reasons for discrediting these witnesses; but whether so or not, in the absence of other evidence affording a basis for some reasonable hypothesis of the hostler's negligence, there was no warrant for a finding that he was guilty of any initial negligence in moving his engine as he did in response to authoritative signal and without knowledge or notice of plaintiff's engagement in any manner with the dead engine.

[2] But plaintiff contends that there was room for a finding that the hostler was at fault in not stopping his engine more promptly upon hearing plaintiff's cries. In this connection it is noted that plaintiff's back was raked from shoulder blade down to sacrum; that is, down to the posterior bony wall of the pelvis, some bones in which were broken. The character of these injuries was entirely consistent with the fact that the dead engine moved only some inches. Without dispute, as we have already pointed out, plaintiff was caught between the forward descending nose of the counterbalance on the main driving wheel and the main driving rod, which, necessarily, was at the same moment ascending to meet the counterbalance. The statement of the witnesses, the photograph of the engine in question, shown in the record, our general acquaintance with the human anatomy, and our common knowledge of the construction and operation in a gener-

al way of locomotive engines, make it clear beyond cavil that plaintiff was injured by a very slight movement of the engine upon which he was at work. Not only so, but plaintiff's evidence and the nature of his wounds conduce to the same conclusion. Plaintiff had no warning from any movement of the engine that he was about to be hurt. He testified that he did not know what struck him. There is, therefore, no reason for supposing that he cried out before at least some part of his injuries had been inflicted. It is not possible that thereafter the engine moved more than a few inches. If it had moved as much as a foot, plaintiff's hips would have been utterly crushed and no doubt his life ended upon the spot. To allow a verdict of subsequent negligence to be built up on such conditions would be to hold that the jury were justified in spinning a theory of negligence without regard to the teachings of common sense and experience. The truth is, no doubt, that the dead engine, being detached from the tender, moved only so far as the original impact of the tender sufficed to send it. In the absence of notice to the hostler that some one would probably be affected by the movement of the dead engine—and upon Weatherly's authoritative signal he was justified in assuming that no one would be—so slight a movement of the engine cannot in reason or justice be charged to him as negligence, initial or subsequent.

Convinced that the verdict in this case cannot be sustained by reference to the first and third counts of the complaint, we have attempted to discuss, in too much detail and at too great length perhaps, the elemental facts upon which the argument for that aspect of the case has been placed by counsel in their brief. Without further remark we leave the questions, whether plaintiff was at work upon the engine, and, if so, whether Weatherly was guilty of any negligence, to the finding of an impartial jury.

Reversed and remanded.

ANDERSON, C. J., and MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur. McCLELLAN and GARDNER, JJ., dissent.

(199 Ala. 132)

SLOSS-SHEFFIELD STEEL & IRON CO.  
v. BEARDEN. (8 Div. 901.)

(Supreme Court of Alabama. Dec. 21, 1916.  
Rehearing Denied Feb. 15, 1917.)

MASTER AND SERVANT—§95—INFANT'S EMPLOYMENT IN "MINE"—STATUTORY PROHIBITION.

Code 1907, § 1035, prohibiting the employment of boys under 14 in any mine, applies only to underground, and not to open or surface, mines.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 141, 180.

For other definitions, see Words and Phrases, First and Second Series, Mine.]

Gardner, Somerville, and Thomas, JJ., dissenting.

Appeal from Circuit Court, Franklin County; C. P. Almon, Judge.

Action by Willie Bearden, pro ami, against the Sloss-Sheffield Steel & Iron Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Suit by appellee against appellant for recovery of damages sustained while in the employ of appellant at its iron ore mine in Franklin county. The counts upon which the trial was had, numbered 2, 3, and 4, rest for recovery upon the wrongful employment of the plaintiff by the defendant as in violation of section 1035 of the Code, the plaintiff being under the age of 14. The trial resulted in a judgment for the plaintiff; hence this appeal.

Tillman, Bradley & Morrow, of Birmingham, and E. B. Almon, of Tusculumbia, for appellant. W. L. Chenault, of Russellville, for appellee.

**PER CURIAM.** While this court held in *Cole v. Sloss-Sheffield S. & I. Co.*, 186 Ala. 192, 65 South. 177, Ann. Cas. 1916E, 99, that section 1035 of the Code of 1907 applied to ore as well as coal mines, we think that, regardless of the technical definition of the word "mine," it was the legislative purpose to protect employes in underground mines, whether coal or ore, and not in open or surface mines such as the one here involved. The trial court erroneously applied said statute to the mine in question, and therein committed reversible error. The judgment will be reversed, and the cause remanded.

**ANDERSON, C. J., and McCLELLAN, MAYFIELD, and SAYRE, JJ., concur.**

**GARDNER, J. (dissenting).** In construing section 1035 the court held in the *Cole Case*, supra, that the expression "any mine" meant all mines. The rule was there reiterated that statutes of this character should be liberally construed, so as to effectuate the humane intent of the Legislature.

The defendant was engaged in operating an iron ore mine. The evidence discloses that in this work "a dinky, steam shovel and railroad track," etc., were used. The superintendent testified in part as follows:

"The defendant company is engaged in digging the earth and mineral with the shovel and washing it for use at the furnace. He [plaintiff] got hurt at washer No. 3. The company was digging up the earth and mineral and loading it on the little dump cars \* \* \* and dumping it in the washer. They were washing brown hematite ore from the dirt. We did not have to dig any tunnels or underground passages. All this work was on the surface of the ground. It was what we call open work, and there is no drift or shaft work there. We took out the surface about 12 feet deep at the point where the shovel was working, but it varies of course."

Mr. Webster gives as one of his definitions of a mine the following:

"Any place where ore, metals, or precious stones are got by digging or washing the soil, as, a placer mine."

In *Bouvier's Law Dictionary*, vol. 2, is the following definition:

"A mine is an excavation in the earth for the purpose of obtaining minerals."

Webster also says that in its widest sense the term "mines" includes quarries. See the word "quarry" in Webster's Dictionary. The following cases are of more or less interest in this connection: *Marvel v. Merritt*, 116 U. S. 11, 6 Sup. Ct. 207, 29 L. Ed. 550; *Murray v. Allred*, 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 249, 66 Am. St. Rep. 740; *Callahan v. James* (Cal.) 71 Pac. 104; *Dunham v. Kirkpatrick*, 101 Pa. 36, 47 Am. Rep. 696.

The definition of a mine as disclosed by the above authorities is not confined only to those having underground passageways. From the distinction drawn by the majority it is difficult to ascertain at what point in the operation the works would be a mine within the meaning of said definition. As to what depth or what extent would be required of the underground work to bring the mine within the definition of an "underground mine" would remain a matter of much uncertainty. The definition of a mine does not take into account that distinction. The evidence above quoted shows that this ore is gotten from the earth by digging, and that the depth varies at the point where the shovel was at that time working in this particular mine, which was only 12 feet in depth, and must vary more or less according to the quantity of ore found. Under the decisions of this court section 1035 of the Code is to be given a liberal construction, and that here accorded it is in my opinion entirely liberal. I therefore respectfully dissent from the majority opinion.

**SOMERVILLE and THOMAS, JJ., concur in dissenting opinion.**

(199 Ala. 4)

**GATTIS TURPENTINE CO. v. RUSSELL**  
et al. (1 Div. 958.)

(Supreme Court of Alabama. Feb. 8, 1917.)

**1. APPEAL AND ERROR 877(1) — ADVERSE RULING—INTEREST OF PARTY.**

An appeal from adverse rulings by one not a party to the suit will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560, 3561.]

**2. APPEAL AND ERROR 1011(1) — CONCLUSIONS OF COURT—CONFLICTING EVIDENCE.**

Conclusions of fact of the trial court, based on conflicting evidence, will not be disturbed on appeal, although seemingly against the preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3985.]

Appeal from Circuit Court, Baldwin County; A. E. Gamble, Judge.

Ejectment by the Deerland Turpentine

Company against Chaney Russell and others, in which the Gattis Turpentine Company was substituted as plaintiff. Judgment for defendants, and the Gattis Turpentine Company appeals. Affirmed.

Ervin & McAleer, of Mobile, and Charles Hall, of Bay Minette, for appellants. William F. Anderson, of Mobile, for appellees.

**McCLELLAN, J.** Common-law ejectment. As originally instituted, the Deerland Turpentine Company was the actual plaintiff. Warvelle on Ejectments, §§ 90, 91; Etowah Mining Company v. Carlisle, 127 Ala. 663, 667, 29 South. 7. From the summons, and from the judgment entry of May 23, 1916, it so appears. The defendants were Charles and Chaney Russell. The three devises were, respectively, originally laid in the Gattis Turpentine Company, in A. M. Thompson, and in the members of a firm, Burns & Son. A deed to the land in controversy from the Gattis Turpentine Company to the Deerland Turpentine Company, of date February 7, 1914, was offered by the plaintiff. On objection that this conveyance disclosed, on its face, that it was executed by a nonresident corporation, not shown to have been authorized to do business in this state, the court declined to admit it in evidence. In respect of this ruling the bill of exceptions recites that:

"The plaintiff then and there excepted. Plaintiff's attorney then asked leave of the court to amend his complaint by striking out the name of the Deerland Turpentine Company and substituting that of the Gattis Turpentine Company, which was granted by the court, and the amendment was allowed over the objection of defendants."

According to the recital of the mentioned judgment the amendment was of the "first count" (demise), the only place in the complaint where the substitution permitted could be effected.

[1] It appears with certainty that the appeal from the judgment in favor of the defendants was sought and undertaken to be effected by the Gattis Turpentine Company. If the legal effect of the amendment, after the stated adverse ruling on the admission of the deed, was to substitute the Gattis Company for the Deerland Company as the actual party plaintiff (whether erroneous or not, it is not necessary to now inquire), then the appellant (Gattis Company) was not the party against whom the adverse ruling in refusing to admit the deed from the Gattis Company to the Deerland Company was made—a conveyance that, if admitted, would have shown the absence of title in the Gattis Company, in which the first count laid it. If, on the other hand, the effect of the amendment was only to change the entity in which the demise was laid in the first count to another, then the Deerland Company remained (we assume for the occasion only) the actual party plaintiff; and, if so, the

party plaintiff against which the judgment was rendered has not appealed, the appeal being by the Gattis Company. Hence, without attempting, for it is unnecessary, to at this time define the legal result as between the dilemmas indicated, it must be held that the first assignment of error presents nothing this court can review.

[2] On the issue of fact litigated, viz. whether the mortgage or mortgages executed by the Russells on Chaney Russell's land were alone given to secure the indebtedness of the husband, no part of which was for the security of the indebtedness of the wife, Chaney, the oft-repeated rule established in Cobb v. Malone, 92 Ala. 630, 9 South. 738, for the review on appeal of conclusions of fact attained by a trial court, without the intervention of the jury, testimony delivered ore tenus would, on this record, preclude a reversal of the judgment rendered.

The judgment is affirmed.  
Affirmed.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

(199 Ala. 57)

**ATLANTIC COAST LINE RY. v. ENTERPRISE COTTON OIL CO.**  
(4 Div. 608.)

(Supreme Court of Alabama. Jan. 18, 1917.  
Rehearing Denied Feb. 15, 1917.)

**1. CARRIERS — 108 — LOSS OF GOODS — NATURE OF LIABILITY.**

Where there was no special contract regarding carrier's liability for shipment of crude oil, the common-law rule of liability will govern.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 471-495.]

**2. CARRIERS — 108 — LOSS OF GOODS — COMMON-LAW LIABILITY.**

By common law a carrier is an insurer, and is responsible for all losses except those resulting from the act of God, or the public enemy, or the fault of the shipper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 471-495.]

**3. CARRIERS — 132 — ACTION FOR LOSS OF GOODS — BURDEN OF PROOF.**

The burden rests upon a carrier to plead and establish that the loss to goods came within the exceptions to the common-law rule of liability.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 578-582, 605.]

**4. CARRIERS — 131 — LOSS OF GOODS — PLEADING.**

A plea that loss of crude oil shipped by plaintiff was due to plaintiff's negligence in not closing a valve held demurrable because not negating carrier's negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 569-577, 593.]

**5. CARRIERS — 137 — LOSS OF GOODS — INSTRUCTIONS.**

In action for loss of crude oil, where court instructed jury that the carrier was not liable if loss occurred through shipper's fault as alleged in special pleas, the charge as a whole held not erroneous.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 594, 595.]

**6. CARRIERS §137—LOSS OF GOODS—INSTRUCTIONS.**

Refusal of instructions for failure to negative contributory fault of the carrier and to set out carrier's liability as insurer, *held* proper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 594, 595.]

**7. EVIDENCE §474(7)—OPINION EVIDENCE—LOADING OF TANK CAR.**

Where a witness stated his experience of 12 years in loading oil tank cars, sufficient predicate was laid to permit his testimony that a car was properly loaded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2201.]

Sayre, J., dissenting.

Appeal from Circuit Court, Coffee County; A. B. Foster, Judge.

Suit by the Enterprise Cotton Oil Company against the Atlantic Coast Line Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

Suit by appellee to recover damages for failure to deliver a tank of crude oil received by the defendant as a common carrier for shipment from Enterprise, Ala., to Portsmouth, Va. The oil was loaded on the cars by the plaintiff.

The defendant filed several special pleas. Those numbered 5, 6, 7, and 8, demurrers to which were overruled, set up as defense that the valve on the inside of the oil tank which prevented the oil from passing into the pipe through which it was to be emptied out of the car was not properly adjusted by plaintiff when the tank was loaded; that the cap on the end of the discharge pipe was not securely fastened when the tank was loaded; that both the valve and the cap on the discharge pipe were improperly adjusted by the plaintiff—all of which was impossible of discovery by external examination of the car; and that on account of such default on the part of plaintiff in loading the car, the oil emptied out while in transportation and was lost. The cause went to the jury on the plea of the general issue, and the above-noted special pleas.

Pleas 3 and 4, to which demurrer was sustained, are as follows:

"3. That the tank containing the crude oil was on a car which was loaded with said oil by the plaintiff, and that the tank containing this oil had an adjustable valve in the bottom of it by which the opening of the pipe through which the oil was to be emptied out of said tank closed the said opening of the pipe. And defendant avers that the said oil was lost out of the tank by reason of the failure of the plaintiff to properly adjust said valve over the opening of said pipe, and that thereby the oil contained in said tank ran out of the same and was lost.

"4. That the oil alleged to have been lost to the plaintiff was put by the plaintiff into a tank which was on a car, for transportation by this defendant, and that this tank was constructed so as to provide for the emptying of said oil out of the tank by means of a pipe at the bottom of said tank, and that the opening to said pipe was closed by an adjustable valve which prevented the oil from getting into the pipe through which it was to be emptied. And

defendant avers that the plaintiff failed to properly close the said valve, and as a result thereof the oil emptied through the pipe onto the ground and was lost in transportation. And defendant avers that the loss of the oil was due to the failure of the said plaintiff to properly close the said valve, as it was his duty to do."

The following charges were given at appellant's request:

"A. The court charges the jury that the defendant is not an insurer of the act of the plaintiff's servants or agents in the loading of their car.

"B. The court charges the jury that if they are reasonably satisfied that the oil was lost without fault of the defendant, then their verdict must be for defendant.

"1. The court charges the jury that if the car of oil was properly handled in transportation, and if they believe that the car was not properly loaded, and that the improper loading could not have been discovered by the external examination of the car, then the verdict must be for defendant.

"2. The court charges the jury that defendant is not an insurer of the delivery of the oil against the acts of the plaintiff's agents or servants in loading the car.

"3. The court charges the jury that the defendant only insured the delivery of the oil provided it was properly loaded.

"4. The court charges the jury that the burden is upon plaintiff to show that the car was properly loaded."

The refused charges read as follows:

"A. The court charges the jury that if the valve was properly adjusted and the cap on the end of the discharge pipe properly put on at the time of loading the car, but either of them became unadjusted in transportation so as to cause the loss of the oil, without fault of defendant, then their verdict must be for defendant.

"1. The court charges the jury that if they believe that the valve was not properly set, and that by reason of its being open, the oil was lost, their verdict must be for defendant.

"2. The court charges the jury that if they believe the oil was lost on account of the failure of the plaintiff's agents or servants to properly adjust the valve in the tank car and the cap on the discharge pipe, their verdict must be for defendant."

"6. The court charges the jury that the only duty that defendant owed the plaintiff was to properly handle the car in transportation, and if properly handled, and the car was not properly loaded—which could not have been discovered by an external examination of the car—their verdict must be for defendant."

"11. The court charges the jury that the defendant discharged its duty to plaintiff when it properly inspected the car and properly handled it."

On submission of the cause to the jury on the issues above indicated, there was verdict and judgment for the plaintiff, and the defendant prosecutes this appeal.

John R. Tyson, of Montgomery, for appellant. W. W. Sanders, of Elba, for appellee.

GARDNER, J. [1] There is in the record no indication of any special contract which sought to exempt the shipment of the tank of crude oil from the common-law rule of a common carrier's liability. This rule therefore prevailed in the consideration of this cause, and it was given application by the court below.

[2] Speaking of this rule our court in *Steele & Burgess v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49, said:

"By the common law, the carrier is responsible for all losses, except such as result from the act of God, or the public enemy. Hence his liability is not confined to such losses as are the consequences of his own negligence, or want of skill. He is liable for losses by accident, mistake, and numerous unavoidable occurrences, not falling under the head of acts of God or the public enemy, and against which it is not within the reach of human vigilance or foresight to provide. For losses occasioned by the wrongful acts of third persons, by accidental fires, by robbery, or by the violence of mobs, which neither the carrier nor his agents can resist, or by any vigilance avoid, he is responsible. 1 Smith's L. C. 315; 2 Ohio St. R. 137. The liabilities of a common carrier are thus distinguished into two classes: The one, a liability for losses by neglect, which is the liability of a bailee; the other, a liability for losses by accident, or other unavoidable occurrence, which is the liability of an insurer."

And in the more recent case of *A. G. S. R. R. v. Quarles*, 145 Ala. 436, 40 South. 120, 5 L. R. A. (N. S.) 867, 117 Am. St. Rep. 54, 8 Ann. Cas. 308, is the following:

"As a general rule the undertaking of a common carrier to transport goods to a particular destination includes the obligation of a safe delivery of them, within a reasonable time, to the consignee. And the contract of carriage is one of insurance against every loss or damage, except such as may be occasioned by the act of God or the public enemy or the fault of the owner of the goods or his agent. And in this state the shipper makes a prima facie case against the carrier when he shows the goods were not delivered, and, in order for the carrier to relieve itself of the absolute liability for their loss as an insurer, it must bring itself within the exception relied upon as an excuse for its failure to deliver."

See, also, *Boon & Co. v. Steamboat Belfast*, 40 Ala. 184, 88 Am. Dec. 761, and *Walter v. A. G. S. R. R. Co.*, 142 Ala. 474, 39 South. 87; 4 R. C. L. 696-704.

While the language of the decisions frequently confine the defenses of a common carrier against its common-law liability to that of loss occasioned by the act of God and the public enemy, yet in fact, as pointed out by this court, there is a third defense—that of loss occasioned by the fault of the owner of the goods or his agent. This is emphasized in the case of *McCarthy & Baldwin v. L. & N. R. R. Co.*, 102 Ala. 193, 14 South. 370, 48 Am. St. Rep. 29, where it was said:

"It is manifest that the case made by the averment of these facts tendered no issue of negligence vel non on the part of the defendant. The contract averred is an unconditional common-law contract of carriage without reservations or exceptions. By its terms the defendant insured the safe delivery of the goods to the consignee, and assumed liability for any loss or injury resulting from any cause except such as afforded the carrier a defense at common law. The strictest proof of all possible care on the part of the carrier in the transportation and delivery of the goods would have been no defense, and, of course, proof of the carrier's negligence was in no wise essential to a recovery. The defenses, which a carrier under such a contract may interpose to an action for failure

to deliver in good condition, are commonly mentioned as two only, namely, that the loss or injury was due either to the act of God, or to the act of a public enemy. But there is in reality a third resting on the fault of the owner of the goods or his agent. This latter defense, while the fault involved in it may consist merely of negligence imputable to the plaintiffs, is in no sense, and bears little analogy to, the defense of contributory negligence, available in actions against common carriers of passengers, sometimes in actions against carriers of live stock, and even, it may be, in actions against carriers of goods—inanimate things—under contracts of affreightment, which limit liability to loss or injury occasioned by the carrier's negligence."

[3, 4] It was this latter defense—loss occasioned by the fault of the shipper who loaded the car—which was interposed by the defendant in this case. It was ruled in the above-mentioned case of *McCarthy, etc., v. L. & N. R. R. Co.*, that as the burden rested on the common carrier to plead and establish that the loss or injury came within the exceptions to the common-law rule of liability because a result of the act of God or the public enemy, the burden likewise rested upon the carrier to aver and establish the other exception to that rule of liability, the fault of the shipper; and to do so "he must bring himself entirely and perfectly within it by negating all contributing fault of his own." Measured by this rule, pleas 3 and 4 were subject to the demurrer interposed thereto.

Under the common-law rule of liability recovery for failure to deliver the goods is not dependent upon proof of negligence or fault on the part of the carrier, for the liability, aside from any question of exceptions to the rule which are not embraced in this statement, is that of insurer and would include a liability on the part of the carrier for loss occasioned by third persons, intermeddlers, brawlers, or thieves.

The evidence for plaintiff went to show that the tank was properly loaded with oil, that the valve was securely adjusted and the cap properly screwed on the discharge pipe. The car of oil was several days in transit, and the evidence for the defendant tended to show that it was handled in a careful manner, being externally inspected, and that the oil leaked out after the car had left Savannah, Ga., on its way to Portsmouth. There was also evidence that the valve was "unseated," and that the cap had fallen off the discharge pipe.

[5] The trial court was careful to instruct the jury that no liability attached to the carrier if the loss was occasioned by the fault or neglect of the shipper in any particular, as set out in the special pleas.

[6] Some of the refused charges were faulty for failure to negative any contributing fault on the part of the carrier, and others ignored the rule of liability controlling in the cause, that of insurer; but there was no reversible error in their refusal.

Careful consideration has been given the

cases cited by counsel for appellant: *Hutchinson v. C. & St. P. R. R.*, 37 Minn. 524, 35 N. W. 433; *Lee v. Raleigh & G. R. R.*, 72 N. C. 236; *Newby v. Chicago, etc., Ry.*, 19 Mo. App. 391; *Gulf, etc., R. R. v. Wittnebert*, 101 Tex. 368, 108 S. W. 150, 14 L. R. A. (N. S.) 1227, 130 Am. St. Rep. 858, 16 Ann. Cas. 1153. The latter case was not of the same kind of suit as here involved, and while some of the language used may be pertinent to the question under consideration, the case itself is not in point. We do not mean to indicate, however, that there is any conflict between it and the conclusion we have here reached. The other cases involve questions arising from the shipment of live stock, and under special contract, it appears. They seem to hold that in the shipment of live stock another exception has been added to the common-law rule in favor of the carrier against injuries arising from the nature and propensities of the stock, which could not be prevented by foresight or vigilant care. 4 R. C. L. 703. Such is also the holding of this court in *A. C. L. Ry. v. Rice*, 169 Ala. 265, 52 South. 918, 29 L. R. A. (N. S.) 1214, Ann. Cas. 1912B, 389. That question, however, is not before us now for consideration.

[7] One of plaintiff's witnesses, who it appears was either engaged in the work or was superintending the loading of the car, after stating his experience of 12 years in loading oil tank cars, was permitted to testify that this car was properly loaded.

Defendant's objection to the question on the ground that it was a question for the determination of the jury and was not the subject of expert testimony was overruled, and the ruling of the court is assigned as error. A similar question was treated in *McCarthy & B. v. L. & N. R. R. Co.*, supra, wherein the court said:

"The only \* \* \* error we find in the record lies in the exclusion of the testimony of the witness Slater, to the effect that these cars were 'well and carefully loaded.' This was the mere opinion of the witness, it is quite true, but we think a sufficient predicate had been laid to render his opinion on that subject competent evidence."

The following authorities are also cited as supporting that view: *So. Ry. Co. v. Stollenwerck*, 166 Ala. 556, 62 South. 204; *Stoutz Mt. Coal Co. v. Tedder*, 189 Ala. 637, 66 South. 619; *Cohn & Goldberg Co. v. Robbins*, 159 Ala. 289, 48 South. 853; *Hood v. Disston & Sons*, 90 Ala. 377, 7 South. 732; *St. L. & S. F. R. R. Co. v. Brantley*, 168 Ala. 579, 53 South. 305; *Shook v. Pate*, 50 Ala. 91; *Spiva v. Stapleton*, 38 Ala. 171.

We find no reversible error in the record, and the judgment of the court below will be affirmed.

**Affirmed.** All the Justices concur, except **SAYRE, J.**, who dissents.

(199 Ala. 41)

**BEISER v. SOVEREIGN CAMP OF WOODMEN OF THE WORLD.** (1 Div. 946.)

(Supreme Court of Alabama. Dec. 21, 1916.

Rehearing Denied Feb. 15, 1917.)

**INSURANCE—§755(2)—MUTUAL BENEFIT INSURANCE—ESTOPPEL AFFECTING FORFEITURE—STATUTE.**

Gen. Acts 1911, p. 713, § 20, allowing fraternal benefit societies to provide that no subordinate body, officers, or members shall have authority to waive provisions of laws or constitution, and that same shall be binding on the society, members, and beneficiaries, held to preclude any waiver, express, or implied, or estoppel predicated on acts or conduct of officers, or members.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1908.]

McClellan and Thomas, JJ., dissenting.

Appeal from Circuit Court, Baldwin County; A. E. Gamble, Judge.

Action by Felix W. Beiser against Sovereign Camp of the Woodmen of the World. Judgment for defendant, and plaintiff appealed to Court of Appeals, which transferred the cause under Acts 1911, p. 450, § 6. Affirmed.

John E. Mitchell, of Mobile, for appellant. Ervin & McAleer, of Mobile, for appellee.

**MCCELLELLAN, J.** This is an action to recover \$1,000 alleged to be due the plaintiff (appellant) under a "beneficiary certificate or policy of life insurance," issued on August 30, 1913, by the defendant (appellee), a fraternal beneficiary association, on the life of William Beiser, a member of the association, the plaintiff being named as the beneficiary in such certificate, the alleged member of the association having died on June 8, 1914.

The defenses set up in pleas 2 and 3, respectively, were these: (a) That under provisions of the constitution of the association Beiser, previous to his death, ceased to be a member and an insured in the association because of his conviction of a felony; (b) and that under provisions of the by-laws of the association the beneficiary certificate became void because the assessment for May, 1914, was not paid within the time required by the by-laws of the association. Special replications 6 and 7 to plea 2 asserted a waiver, by defendant's agent Ebinger as clerk of the local camp, by his receipt of Beiser's membership assessments after full knowledge or notice of the conviction of Beiser. Special replications 4, 5, and 6, to the third plea as amended, relied upon estoppels wrought, it is averred, by the act of defendant's agent Ebinger, who, as clerk of the camp, and in discharge of his duty, habitually or customarily collected Beiser's assessments at dates subsequent to the time they should have been paid, as late as the fourth day of the succeeding month; that

Belser was led to believe that assessments paid as late as the fourth day of the month succeeding that in which the assessments were due would be accepted; and that, acting under such belief and custom, the assessment, upon which the forfeiture alleged in the amended third plea is averred, was paid on June 4, 1914, and such payment was accepted by the clerk as agent for the defendant. The court sustained demurrers to special replications 4 to 6, inclusive, as also to replications 7, 8, and 9, but error in the rulings striking these last-noted replications is, with commendable candor, not urged; is waived, in effect, in brief for appellant. Without questioning the binding qualities of the provisions of the constitution set up in the second plea and of the by-laws averred in the third plea as amended, the plaintiff's reliance to avoid their invalidating effect, working when offended as alleged forfeitures of rights under the contract, is waiver and estoppel resulting from the indicated acts of defendant's agent Ebinger, acting within the scope of his authority.

In the General Act, approved April 24, 1911 (Gen. Acts 1911, pp. 700-722), entitled "An act for the regulation and control of fraternal benefit societies," the following provisions appear:

"Sec. 4. Except as herein provided, such societies shall be governed by this act and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein."

"Sec. 8. Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation, or if a voluntary association, the articles of association, the constitution and laws of the society, and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member and copies of the same certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and conditions thereof and any changes, additions or amendments to said charter or articles of incorporation, or articles of the association, if a voluntary association, constitution or laws duly made or enacted subsequent to the issuance of the benefit certificate shall bind the member and his beneficiary, and shall govern and control the agreement in all respects the same as though such changes, additions or amendments had been made prior to and were enforced at the time of the application for membership."

"Sec. 20. The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members."

ANDERSON, C. J., and MAYFIELD, SAYRE, SOMERVILLE, and GARDNER, JJ., entertain the opinion, and so hold, that the provisions of section 20, ante, preclude any waiver, express or implied, or any es-

toppel predicated of the acts or conduct of any subordinate officer or member, thus confirming the correctness of the rulings of the court below on the pleadings, and thereupon affirming the judgment. The writer, with whom Justice THOMAS concurs, is of a different opinion; and so upon the considerations to follow:

The public policy of a state is generally expressed by statute or Constitution. 4 Words and Phrases (2d Series) pp. 27-29; *Harding v. Amer. Co.*, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189, 213; *U. S. v. Trans-Mo. Assn.*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007. In so far as the cited enactment affirmatively affects or governs insurance contracts made by mutual associations within its purview, or restricts or governs the acts of subordinate officers or agents, it is a visitation upon the subject-matter of paramount restraint created by the thus expressed public policy of the state; and to the extent such public policy applies and controls the association, its subordinate officers and agents, members, and beneficiaries of members, they cannot be subjected to, or have the favor or advantage of, legal principles that, but for the expression of such public policy, would have application to and effect upon the rights of the parties to insurance contracts made by such associations. Section 20, quoted above, is to be attributed for justification to the police power of the state. Since its intent and provisions are in derogation of the common law, the section (20) is to be strictly construed. *Lock v. Miller*, 3 Stew. & P. 13; *Ivey v. Pierce*, 5 Ala. 374; *Cook v. Meyer*, 73 Ala. 580. When construed according to its letter, as must be done, the section (20) restrains such associations, its members, beneficiaries of its members, from making any promise or effecting any engagement to waive provisions of the laws and constitution of such associations providing against the waiver of such provisions. Manifestly, the waiver therein referred to is a waiver of the provision itself; not the waiver of the invalidating effect the forfeiture wrought by the breach of the provision. A restraint upon the power of agents or members to waive a provision of the constitution or by-laws of an association of this character and a restraint upon the power of an agent or a member to waive the forfeiture resulting from a breach of the provision which the agent or member is forbidden to waive as a part of the contract of insurance are distinct concepts. The distinction is illustrated in this expression which is reproduced from *Security Mutual Life Ins. Co. v. Riley*, 157 Ala. 563, 564, 47 South. 738:

"The first insistence of the appellant touching the question of waiver is that inasmuch as it is provided that forfeiture cannot be waived save in writing by certain officers of the company, together with the fact that no such waiver was made, the doctrine of waiver has here no foundation upon which to rest. A provision in an in-



insurance policy, to the effect that a forfeiture cannot be waived except by agreement in writing, signed by certain officials, is for the benefit of the company, has reference only to express agreements, and does not preclude an implied waiver or one by parol."

My opinion is that the provisions of section 20 do not preclude an implied or parol waiver of a breach of the constitution or by-laws of such association, effecting, if not waived, a forfeiture of rights thereunder by the insured; nor preclude the interposition of an estoppel on the part of the insurer to assert a forfeiture, legally resulting from the acts or conduct of its subordinate agents. Hence the provisions of sections 4, 8, and 20 of the General Act of 1911 are not, in my opinion, material to the matters of avoidance set forth in special replications 6 and 7 to plea 2 and in special replications 4, 5 and 6 to plea 3 as amended. With the provisions of the cited General Act of 1911 eliminated from governing effect upon the matters of avoidance set up in the five special replications noted above, there is not, as indeed under the established doctrine of our decisions there could not well be, any serious insistence that the effect of the forfeitures asserted in plea 2 and plea 3 as amended were waived or the right to claim forbidden by estoppel, as the case may be, by the averred acts or conduct of the agent of the association whilst acting within the scope of his authority. *United Order of the Golden Cross v. Hooser*, 160 Ala. 334, 337, 49 South. 354; *Security Mutual Life Ins. Co. v. Riley*, 157 Ala. 553, 563, 564, 47 South. 735; *U. S. Life Ins. Co. v. Lesser*, 128 Ala. 568, 23 South. 646; *Travelers' Ins. Co. v. Brown*, 138 Ala. 526, 35 South. 463. On like doctrine rests the cases of *Pringle v. Modern Woodmen, etc.*, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231; *Modern Woodmen, etc., v. Colman*, 64 Neb. 162, 89 N. W. 641. See, also, *Bacon on Benefit Soc.*, § 433; *Supreme Lodge, etc., v. Withers*, 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762.

Whether the averments of fact set forth in these special replications are, strictly speaking, matters operating a waiver only, and not constituting an estoppel against the association, is a question not raised by the demurrers and not argued here. Should that inquiry later arise or become important, the following authorities may contribute to its solution: 40 Cyc. pp. 254-258; *Cassimus Bro. v. Scottish Ins. Co.*, 135 Ala. 256, 270, 271, 33 South. 163; *Queen Ins. Co. v. Young*, 86 Ala. 424, 430, 431, 5 South. 116, 11 Am. St. Rep. 51.

It is hardly necessary to add that under the circumstances set forth in these special replications knowledge or notice to the agent of the facts averred was the equivalent of notice thereof to the agent's principal. *Security Ins. Co. v. Riley*, supra; *Cassimus Bro. v. Scottish Ins. Co.*, supra. The rulings of the court below on the special replications were laid in error.

The plaintiff having been driven to a nonsuit by the adverse rulings of the court in sustaining demurrers to his special replications, the rule in *Wilson v. Owens Horse Co.* (App.) 70 South. 956, where no nonsuit was taken, is without application or effect. *Henderson v. T. C. I. & R. R. Co.*, 190 Ala. 126, 129-131, 67 South. 414.

In accordance with the conclusion of the majority of the court, the judgment is affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD, SAYRE, SOMERVILLE, and GARDNER, JJ., concur. McCLELLAN and THOMAS, JJ., dissent.

(199 Ala. 121)

STATE ex rel. DERRICK v. HAWKINS.  
(8 Div. 2.)

(Supreme Court of Alabama. Feb. 15, 1917.)

1. CRIMINAL LAW § 84(1)—COURTS—CONSOLIDATION BY STATUTE—LEGISLATIVE INTENT.

The creation of the inferior criminal court of Madison county by Loc. Acts 1915, p. 381, approved September 16, 1915, shows legislative intent to modify to that extent the consolidation of courts of record into the circuit court by Acts 1915, p. 279, approved August 16, 1915.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 115, 120, 121.]

2. CRIMINAL LAW § 84(6)—COURTS — CONSOLIDATION BY STATUTE—LEGISLATIVE INTENT.

Since the inferior criminal court of Madison county, created by Loc. Acts 1915, p. 381, does not occupy the same field as the county court, re-established by County Court Act (Acts 1915, p. 862), and the only similarity is that each have general jurisdiction of misdemeanors concurrent with the circuit court, and there is the fundamental difference that the Inferior Criminal Court has final jurisdiction, and the partial concurrence of jurisdiction suggests no conflict between the legislative acts, the provision of County Court Act, § 8, repealing all laws in conflict therewith, does not repeal the Inferior Criminal Court Act.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 122-124.]

Appeal from Circuit Court, Madison County; R. C. Brickell, Judge.

Action by the State, on the relation of Charles Derrick, against J. W. B. Hawkins. Judgment dismissing petition, and petitioner appeals. Affirmed.

R. E. Smith, of Huntsville, for appellant. Betts & Betts, of Huntsville, for appellee.

SOMERVILLE, J. The only question presented by the record is whether the general "County Court Act," approved September 25, 1915 (Gen. Acts 1915, p. 862), and re-establishing the old system of county courts in all counties having less than 50,000 population, has repealed the act approved September 16, 1915 (Local Sess. Acts 1915, p. 381), which established the "inferior criminal court of Madison county," so as to abolish that court.

By the general "Court Consolidation Act,"

approved August 16, 1915 (Gen. Sess. Acts 1915, p. 279), it was provided that:

"Every court of record by whatever name called, having the jurisdiction to try civil and criminal cases, or either with juries is hereby consolidated into the circuit court."

[1] The creation of the inferior criminal court of Madison county—a jury court of record—by the later enactment, evinced a clear and deliberate legislative purpose to thereby modify the general sentence of dissolution pronounced upon similar courts, to the extent at least of perpetuating one memorial of the prescribed and abandoned system. Hence, so far as the theory of a unified system of jury courts is concerned, general legislative policy can lend no force to the implication of repeal by other general enactments.

[2] The inferior criminal court in question has concurrent jurisdiction with the circuit court of all misdemeanors in the county, whether the prosecution is begun by information or indictment; and all such cases remaining undisposed of in the circuit court at the end of each term are to be transferred to the docket of the inferior court for trial therein. Quarterly jury terms are to be held, and all appeals are to be taken directly to the Supreme Court. On the other hand, the re-established county court, though given jurisdiction of all misdemeanors concurrent with the circuit court, may try only those whose prosecution is begun by information. All cases must be tried by the judge without a jury, and appeals must be taken to the circuit court. Obviously, the only point of contact between the county court and the inferior criminal court is that each has a general jurisdiction of misdemeanors concurrent with the circuit court. The fundamental difference is that the inferior criminal court has final jurisdiction of all prosecutions, however begun, and is, as to its practice, procedure, and records, a duplication of the circuit court, which it is manifestly intended to supplement and aid.

It is therefore entirely clear that the county court is not intended to occupy, and does not occupy, the same field occupied by the inferior criminal court; and equally clear that the partial concurrence of their jurisdictions suggests no conflict between the legislative acts by which they have been severally created. It necessarily follows that the precautionary provision found in section 6 of the "County Court Act," that "all laws, whether local, general or special, in conflict with the provisions of this act be and the same are hereby repealed," has no repealing nor restraining influence upon the "Inferior Criminal Court Act," and the court thereby created and established is continued in existence for all of its intents and purposes. For this conclusion judicial precedents are not needed, but the following cases are germane: *State ex rel. Scholl v. Duncan*,

162 Ala. 196, 50 South. 265; *State ex rel. Tyson v. Houghton*, 142 Ala. 90, 38 South. 761; *State v. White*, 160 Ala. 168, 49 South. 78; *Birmingham v. Sou. Exp. Co.*, 164 Ala. 529, 51 South. 159.

The demurrer to the petition was properly sustained; and the petitioner, declining to plead further, the petition was properly dismissed.

Let the judgment be affirmed.

Affirmed.

ANDERSON, C. J., and GARDNER and THOMAS, JJ., concur.

(199 Ala. 74)

PENNINGTON v. MIXON. (4 Div. 619.)

(Supreme Court of Alabama. Feb. 8, 1917.)

1. APPEAL AND ERROR ⇐959(3)—DISCRETION OF COURT—AMENDMENT—REOPENING CASE.

An amendment allowed in ejectment after closing testimony and making arguments, permitting a different description to be added to complaint, and allowing further testimony thereon, was within court's discretion, which, not shown to have been abused, will be conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3830.]

2. EJECTMENT ⇐79—DISCLAIMER.

Defendant's disclaimer in ejectment suit, filed as permitted by Code 1907, § 3843, was an admission of plaintiff's title, with denial of defendant's possession; and, where issue is not joined on this plea, plaintiff is entitled to judgment.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 218.]

3. EJECTMENT ⇐111(9)—VERDICT—RESPONSIVENESS TO ISSUE.

Verdict in ejectment, allowing recovery of certain lands, held not to define the boundary line, which was the sole issue involved, defendant having disclaimed possession and suggested a boundary dispute as permitted by Code 1907, § 3843.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 342, 343.]

4. EJECTMENT ⇐111(3)—VERDICT—DESIGNATION OF BOUNDARY.

Verdict in ejectment, describing boundary as commencing at stake set by a certain man, although somewhat uncertain, cannot be said to be so unserviceable as to affect an otherwise sufficient verdict.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 332-334.]

5. EJECTMENT ⇐82—TRIAL—SCOPE OF ISSUE—STATUTE.

No issue of title or adverse possession is triable in an ejectment suit, where defendant files disclaimer and suggests a boundary dispute as permitted by Code 1907, § 3843.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 222-228.]

6. BOUNDARIES ⇐35(3)—EVIDENCE—SURVEYOR'S OPINION.

A duly qualified competent surveyor may give his opinion as to the true location of the line between properties or as to divisions of land according to government calls.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 157-159.]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Statutory ejectment by Travis Mixon against Thad B. Pennington. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

F. M. Gaines and E. S. Thigpen, both of Dothan, for appellant. Farmer & Farmer and T. M. Espy, all of Dothan, for appellee.

MCCLELLAN, J. [1] Mixon sued Pennington in statutory ejectment to recover a plat of land lying between their respective larger, uncontested holdings. Over the objection of the defendant (appellant), and after evidence taken and after arguments made, the court suspended the trial and permitted the plaintiff to add count 2 to the complaint, wherein a different description (from that appearing in the original count) of the land sued for was introduced into the pleading, and thereupon allowed further testimony to be taken. There can be no question of the right of the court to exercise and to give effect to a discretion in such circumstances; and nothing is made here to appear that would warrant this court in concluding that the discretion reposed in the court was abused. The judgment entry recites:

"The defendant disclaims possession of the land sued for, and suggests that the suit arises over a disputed boundary line. The court then made up the issue as to where the true boundary lines between the lands of the plaintiff and defendant, it appearing that the plaintiff owns the N. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  of section 31, township 1, and range 27, and that the defendant owns the S. W.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of section 30, township 1, range 27. Thereupon came a jury of good and lawful men, to wit, M. M. Wade, foreman, and 11 others, who upon their oaths do say: 'We, the jury, find the true line between the N. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  of section 31, township 1, range 27, and the S. W.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of section 30, township 1, range 27, to be the line beginning on the range line between ranges 26 and 27 on the west side of N. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  of section 31, township 1, range 27, where Travis Mixon, on November 5, 1915, drove or put down a light wood stob, or stake thence running south 1 degree 22 $\frac{1}{2}$  minutes east.' It is therefore considered and adjudged by the court that the plaintiff, Travis Mixon, have and recover of the defendant, Thad Pennington, the lands sued for, to wit: Beginning at a point on the range line between ranges 26 and 27 on the west side of N. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  of section 31, township 1, range 27, where the said Travis Mixon, on November 5, 1915, drove or put down a light wood stob or stake thence running south 1 degree and 22 $\frac{1}{2}$  minutes east, as found and described by the jury, together with the costs in this behalf expended, for which let writ of possession and execution issue."

[2] The disclaimer filed by the defendant (Code, § 3843) was "an admission of plaintiff's title, with denial of defendant's possession." Wade v. Gilmer, 186 Ala. 524, 526, 64 South. 611, 612, and authorities there cited. No joinder in issue on the plea of disclaimer is shown by the record to have been taken. At the outset, after the disclaimer was filed, the plaintiff might have taken judgment upon it for the lands sued for. Torrey v. Forbes, 94 Ala. 185, 10 South. 320; Wade v. Gilmer.

[3] It is manifest that the line described in the jury's verdict as being the true dividing line between the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 31 and the S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 30, both in township 1, range 27, in Houston county, Ala., does not define any such line as the single issue triable required to be defined.

[4] A fault in the verdict appears to probably result from the jury's error in using south for east and east for south in the phrase, "thence running south [i. e., east] 1 degree 22 $\frac{1}{2}$  minutes east [i. e., south]." The reference in the verdict to a "stob or stake," put down on a certain date by a certain man, is a somewhat uncertain means of defining the beginning point of a line, though we are not prepared to say it is so unserviceable as to affect a verdict or judgment otherwise sufficient.

[5] On the retrial likely to occur the evidence may be very much reduced and simplified if it is borne constantly in mind that no issue of title or adverse possession is triable when the defendant invokes the rule of Code, § 3843.

[6] A duly qualified, competent surveyor may give his opinion as to the true location of a line between properties or dividing certain divisions and subdivisions of land according to government calls.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

(190 Ala. 101)

LAMPKIN v. STOUT et al. (8 Div. 867.)

(Supreme Court of Alabama. Dec. 21, 1916. Rehearing Denied Feb. 15, 1917.)

# 1. MORTGAGES $\Leftrightarrow$ 300—TENDER OF PAYMENT—ATTORNEY'S FEES.

A tender of the amount due on a mortgage, except a reasonable attorney's fee therein provided for, is insufficient, where the mortgagor failed to establish that the mortgagee agreed to postpone the time of payment.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 876-888.]

# 2. MORTGAGES $\Leftrightarrow$ 319(3)—PAYMENT OF INTEREST—SUFFICIENCY OF EVIDENCE.

That only one-quarter's interest on a mortgage remained unpaid held established by direct testimony and a letter from the mortgagee's attorney demanding that amount of interest.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 863, 875, 913, 1366.]

# 3. MORTGAGES $\Leftrightarrow$ 338 — FORECLOSURE UNDER POWER OF SALE—TEMPORARY INJUNCTION.

Where a mortgagor's bill offered to pay any amount found due, she was entitled to the continuance of a temporary injunction, restraining exercise of a power of sale under the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1026-1035.]

McClellan and Mayfield, JJ., dissenting in part.

Appeal from Chancery Court, Morgan County; James E. Horton, Jr., Chancellor.

Suit by Tennie S. Lampkin, as administratrix, against L. O. Stout and others. From a decree dismissing the bill, the complainant appeals. Reversed and remanded, with directions.

E. W. Godbey, of Decatur, for appellant. Wert & Lynne, of Decatur, for appellees.

MCCLELLAN, J. On May 22, 1911, R. B. White and wife executed to S. W. Irwin and L. O. Stout a note and mortgage for a \$800 loan, payable on May 22, 1912. On October 26, 1911, A. B. Lampkin, since deceased, bought from White the land described in the mortgage, assuming the mortgage debt, upon the principal of which White had made no payment, and gave his note for a like principal sum, payable 90 days after February 22, 1913, on which, with Lampkin, White became a joint obligor. All the parties regarded the debt as bearing interest at 8 per cent., payable quarterly from the date of the first note. Lampkin paid quarterly (\$16) during his life, and after his death the appellant, his widow, made one payment in that sum. On February 28, 1914, Stout, who in September, 1911, had acquired all of Irwin's interest in the mortgage debt, delivered the note and mortgage to attorneys Wert & Lynne for collection. Through a letter dated February 28, 1914, they notified Mrs. Lampkin of this fact, and requested payment to avoid foreclosure. The total amount due was stated in the letter to be \$900, which included an attorney's fee, claimed under provisions of the mortgage, amounting to \$81.17. The day the letter was written was Saturday; and it is a matter of dispute when Mrs. Lampkin received this letter. On March 3, 1914, these attorneys posted notices of the foreclosure sale under the power contained in the mortgage. The foreclosure contemplated was restrained by temporary injunction issued on bill filed by Mrs. Lampkin on March 3, 1914.

The complainant's contention is that after receipt of the letter dated February 28, 1914, and before the notices of foreclosure were posted, she effected a legal tender to Stout's attorneys of \$818 in full of all that was demandable under the mortgage at that time, a sum that did not include the attorney's fee. She insists that no attorney's fee was demandable under the mortgage for the reason that she had, before the papers were turned over to the attorneys, expressly advised the mortgagee of her unconditional willingness and readiness to pay the whole indebtedness, and that he lulled her into inaction to this end by telling her he was in no hurry for the money. She also contends that her tender was adequate, covering the entire principal and interest demandable on that date. The chancellor concluded that the burden of proof resting upon her was not discharged, and dismissed her bill.

Whether the tender was sufficient in amount depended upon these subjects of controversy between these parties, viz.: (a) Whether the interest had been paid up to November 22, 1913; and (b) whether an attorney's fee was demandable under the provision of the mortgage to that end, the collection of the indebtedness having been committed to the attorneys before the date of the tender, unless the complainant sustained her contention on the facts that her failure to pay was invited by the mortgagee's remark that he was in no hurry for his money.

[1] As to the attorney's fee: After a careful consideration of the whole evidence, our opinion is that the complainant has not discharged the burden of proof assumed by her in this connection. There is the greatest doubt, to say the least of it, whether she did not couple her expression of willingness and readiness to pay the debt and accrued interest with conditions foreign to any obligations resting on the mortgagee. That she had not paid the past-due obligation is plain. That she had some idea of duties on the part of the mortgagee that did not exist cannot be doubted when the whole evidence is viewed. That the mortgagee did not intend to lull her into inaction in the premises is strongly supported by the fact that he would derive no benefit from such a process—he would receive none of the attorney's fee; and he is shown not to have had any desire to own the land covered by the mortgage. The provision in the note and mortgage for the payment of a reasonable attorney's fee was in the nature of an indemnity; and when the indebtedness was not paid, under the circumstances shown by this record, the mortgagee was within his rights in committing its collection to his attorney; and the indemnity borne by the mortgagee was and is available to protect him. *Faulk v. Hobble Co.*, 178 Ala. 254, 265, 59 South. 450. There was no tender of any sum on account of the provision for an attorney's fee. Hence the tender was deficient in that respect.

[2] The other point of controversy revolves about this inquiry: Was the interest paid up to November 22, 1913? The total interest, from the beginning to the date stated, was \$160, making, when divided, ten installments of \$16 each. On his examination as a witness, the mortgagee admitted the receipt of \$144 from White, A. B. Lampkin, and Mrs. Lampkin. In his answer to interrogatory 5, he says A. B. Lampkin only made five interest payments of \$16 each. Seven checks, for \$16 each, given by A. B. Lampkin to the mortgagee and canceled by him, are reproduced in this record. That they were given as quarterly payments of interest on this indebtedness cannot be reasonably doubted, even if, as we do, the check stub (Exhibit G) and the book memoranda (Exhibit H) are eliminated from consideration. Mrs. Lampkin paid \$16

after her husband's death. So the Lampkin payments amounted to \$128. This reduces the issue to this: Whether White paid the interest from May 22, 1911 (the beginning), up to November 22, 1911; Lampkin buying the land and presumably assuming the debt on the last days of October, 1911. White testified that he gave two checks for interest. If so he did, the interest was paid by him from May 22 to November 22, 1911; and, if this is true, the payments made by the Lampkins satisfied the interest up to November 22, 1913. Undoubtedly the agreement was that the annual interest was payable quarterly. Such seems to have been the practice. Six of the seven checks given by A. B. Lampkin were dated on days corresponding to these quarterly periods. The conclusion that the interest was paid up to November 22, 1913, is further supported by the letter written by the mortgagee's attorney to Mrs. Lampkin on February 28, 1914. All the information the attorney then possessed as to the amount due must have been derived from the mortgagee and the papers delivered to him by the mortgagee. The letter fixed the amount of the indebtedness then due at "nine hundred dollars, including interest and attorney's fees." The testimony of the attorney shows that this sum included the sum of \$817, principal and interest, and \$81.77, attorney's fee. If the amount of the attorney's fee (\$81.77) is deducted from the \$900 stated in the letter, as the whole sum of the claim at that time, it will be seen that the attorney's calculation was based upon the assumption, at least, that there was only approximately three months' interest in arrears. We think it is proper to conclude that the mortgagee so advised his attorney when he turned the matter over to him for attention. So, on the date of the effort to make the tender the indebtedness was \$800, principal, and interest from November 22, 1913, together with a reasonable attorney's fee for the services rendered by the mortgagee's attorneys. As stated, the tender was insufficient. If our calculation is correct, it would have been sufficient had Mrs. Lampkin tendered a reasonable attorney's fee for services rendered up to that time. It results that the complainant was not entitled to the temporary injunction restraining the execution of the power of sale under the mortgage. But it was error in the chancellor to dismiss her bill out of court, since in her amended bill she had offered "to pay any amount that may be found due, and to do equity as the court may direct."

There is nothing in the case of *Security Loan Association v. Lake*, 69 Ala. 456, 460, which required the complete dismissal of this bill to redeem from an unforcedclosed mortgage.

The complainant was entitled to redeem, and the court was in error in dismissing the bill.

The entire costs accruing from or about this appeal will be equally apportioned between and paid by the appellant and the appellee.

Reversed and remanded, with directions.

[3] All the Judges concur in the foregoing opinion. ANDERSON, C. J., and SAYRE, SOMERVILLE, GARDNER, and THOMAS, JJ., are of opinion that the court erred in dissolving the temporary injunction, basing their view upon *Whitley v. Dunham Lumber Co.*, 89 Ala. 493, 497, 7 South. 810. McCLELLAN and MAYFIELD, JJ., are of opinion that the court did not err in dissolving the temporary injunction, because special ground alleged for its issuance was not sustained in the proof. 1 High on Injunctions (4th Ed.) § 461. McCLELLAN, J., entertains the view that *Whitley v. Dunham Lumber Co.*, supra, is not authority for a contrary conclusion.

(199 Ala. 134)

MARTIN v. BROWN et al. (6 Div. 397.)

(Supreme Court of Alabama. Feb. 8, 1917.)

1. EXCHANGE OF PROPERTY ~~§ 4~~—CONTRACTS—CONSTRUCTION—PRESUMPTIONS.

Where an agreement for the exchange of lands is silent as to the nature and character of the estate or interest to be sold or conveyed, the presumption is that an indefeasible legal title to the unsevered estate in the soil is what is intended to pass and to be acquired.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. § 4.]

2. EXCHANGE OF PROPERTY ~~§ 4~~—CONTRACTS—CONSTRUCTION—PROVINCE OF COURT AND JURY.

Where an agreement for exchange of land does not specify the kind of estate to be conveyed, the determination of the same is for the court.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. § 4.]

3. ESTOPPEL ~~§ 56~~—SALES—FAILURE TO ASSERT TITLE.

Although the owner of an automobile stands by and makes no objection while another makes assertions of ownership to a prospective buyer, he is not estopped from later asserting title against buyer, unless buyer has, because of owner's failure to assert title, suffered substantial loss, or altered his position for the worse.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 142.]

Appeal from Circuit Court, Jefferson County; E. C. Crow, Judge.

Detinue by P. D. Martin against J. D. Brown and another. Judgment for defendants and plaintiff appeals. Transferred from the Court of Appeals under section 6, Acts 1911, p. 449. Reversed and remanded.

The facts sufficiently appear. The following is charge 4, refused to plaintiff:

Gentlemen of the jury, the court charges you that where a person agrees to convey an equity in a certain lot of real estate subject to a certain mortgage, the law presumes such interest in such real estate to be an equity in fee simple, and the court charges you that a conveyance of

equity in surface right is not a compliance with such agreement.

The following are the charges given for defendant:

(3) If you find from the evidence that the car in question was traded to Brown by J. N. Martin, and that negotiations in trade were made in the presence and hearing of plaintiff, and he did not object to the same or set up his claim to the car, then he cannot recover in this action.

(4) If you find from the evidence that the car was owned by P. D. Martin prior to being traded to Brown, and that J. N. Martin, the father of P. D., in the presence of P. D., informed Brown that the car was owned by himself, then it was the duty of plaintiff, P. D. Martin, to inform Brown that the car was his, and, if he failed to do this, he cannot now, for the first time, set up title to the car.

(5) If you find from the evidence that this car was purchased or traded for by Brown from the father of plaintiff, and that, during negotiations between father of plaintiff and Brown, plaintiff was present and knew that Brown was on a trade, or about to trade with plaintiff's father for a car, and plaintiff failed to notify Brown of his claim of title to the car, then he would be estopped to now set up such title as against defendant Brown.

The record shows no charge 7, but shows the following, which is doubtless referred to:

(8) If you find from the evidence that plaintiff, P. D. Martin, was prior to the time of the trade with Brown the owner of the automobile in question, and that at the time of the negotiation with his father by Brown for the trade for the car, P. D. Martin knew that his father was trading his car, and he had an opportunity to inform Mr. Brown that the car was his, and did not do so, then he is estopped to set up title to the automobile.

(9) If you find from the evidence that plaintiff was present while Mr. Brown was trading for his car, it was his duty to inform Brown that he owned the car, and if he did not do so, plaintiff cannot recover in this case.

A. H. Darden and Turner & Murphy, all of Birmingham, for appellant. Sanders & Roe, of Ensley, for appellees.

**McCLELLAN, J.** This is an action of detinue to recover an automobile, instituted by the appellant against the appellees. The cause was tried on the theory and defense asserted by Brown; the other party defendant, the company, being accorded a judgment on its plea of disclaimer. The plaintiff is the son of J. N. Martin, with whom he was associated in business in Birmingham. J. N. Martin and J. D. Brown, the defendant, on September 14, 1913, entered into a contract to exchange the automobile in question for Brown's equity in a house and lot in Ensley. Brown's lot was incumbered with a mortgage for \$3,000. The parties agreed the value of the lot to be \$3,750, thus fixing the monetary equivalent of the automobile at \$750. On September 17, 1913, J. N. Martin gave a written order to the representative of the Great Southern Automobile Company to deliver the car to J. D. Brown. This order recited an agreement by J. N. Martin to refund to Brown the charges for repairs made by it on the car, and further recited this:

"Said car traded to Mr. Brown for house and lot in Ensley Highlands \* \* \* having received paper on house. Title of this car passes into the hands of Mr. J. D. Brown."

Brown received the car from the company, giving his promissory note to the company for the amount of the charges. It appears without dispute that J. N. Martin afterwards paid this note in full. Subsequently, on view of an abstract furnished by Brown, Martin's attorney discovered that Brown's interest in the Ensley lot was confined to the surface; the mineral interest having been severed in ownership from the surface.

[1] Where an agreement for the sale or exchange of lands is silent as to the nature and character of the estate or interest to be sold or conveyed, the presumption arises that an indefeasible legal title to the unsevered estate in the soil is what is intended to pass and to be acquired. *Goodlett v. Hansell*, 66 Ala. 151; *Taylor v. Newton*, 152 Ala. 459, 44 South. 583. While the contract entered into between J. N. Martin and J. D. Brown expressly recognized the existence of an incumbrance present in the outstanding mortgage referred to, yet there was nothing in the agreement that operated to qualify or negative the just expectation on the part of Martin that the fee-simple title, unaffected by a separate ownership of the mineral interest therein, would be conveyed to him by Brown, thus requiring the application of the presumption to which allusion has been made. In charge 4, given to the jury by the court at the request of the plaintiff, this applicable rule of law was appropriately stated. However, in response to subsequent inquiry from the jury the court withdrew this charge from the jury's consideration, and indorsed it as being refused. Immediately following this action by the court the jury was advised that it was their function "to say what the contract meant."

[2] In withdrawing charge 4 from the jury's consideration and in refusing to give it to the jury, as well as in its act of referring the construction of the contract to the jury, the court erred to the prejudice of the plaintiff. It was the duty of the court, itself, to construe the contract shown by the evidence with the view to the application of the rule of law to which charge 4 had particular reference. If the contract made between Brown and J. N. Martin was not performed in any degree by Brown, it is very clear that Brown was not entitled to retain the automobile of which he had acquired the possession as upon an exchange of his equity in the fee of the Ensley lot. If Brown delivered a conveyance to J. N. Martin, transmitting his equity in the surface only of the Ensley lot, and Martin accepted a conveyance of that character, then the plaintiff could not recover the automobile given in exchange therefor.

[3] The trial court gave, at defendant's instance, special charges numbered 3, 4, 5, 7,

and 8, upon the theory that the plaintiff was estopped to assert his title to the automobile by his acquiescence in J. N. Martin's assertion to Brown of his, J. N. Martin's, ownership of the car. As abstract propositions of law, these instructions were well framed; but, unless Brown suffered a loss of substantial character, or was induced to alter his position for the worse in some material respect, the estoppel referred to in these instructions was not available to prevent the plaintiff from asserting his ownership in the automobile. *Brooks v. Romano*, 149 Ala. 301, 306, 42 South. 819.

For the error indicated, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

(199 Ala. 145)

TOWN OF CLIO v. LEE. (4 Div. 650.)

(Supreme Court of Alabama. Feb. 8, 1917.)

1. INJUNCTION  $\S$  26(9)—ENJOINING EJECTMENT—ESTOPPEL AS GROUND.

Where it was sought to condemn two tracts belonging to the same person, but the judgment, containing no description, but merely awarding damages in solido, was void as to one tract, because of the attempted description thereof in the condemnation pleadings being insufficient to describe any land, ejectment on his legal title by the owner thereof will be enjoined, on the ground of estoppel, because of his acceptance and retention of the damages awarded for the two tracts; and this though the condemnor has made no expenditure in improvements.

[Ed. Note.—For other cases, see Injunction, Cent. Dig.  $\S$  54-61.]

2. EQUITY  $\S$  362 — DISMISSAL OF BILL — WANT OF EQUITY.

Motion to dismiss for want of equity will be sustained only when admitting all the facts apparent on the face of the bill, though illy pleaded, complainant can have no relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig.  $\S$  758-761.]

3. INJUNCTION  $\S$  171—DISSOLUTION.

Dissolution of injunction will be allowed only on want of equity in the bill, or the denials of a verified complaint; technical errors or inaccuracies not availing.

[Ed. Note.—For other cases, see Injunction, Cent. Dig.  $\S$  373.]

Appeal from Chancery Court, Barbour County; O. S. Lewis, Chancellor.

Injunction by Town of Clio against Mrs. A. T. Lee. From an adverse decree, complainant appeals. Reversed, rendered, and remanded.

Steiner, Crum & Well, of Montgomery, for appellant. A. A. Evans, of Montgomery, and A. H. Merrill & Sons, of Eufaula, for appellee.

SAYRE, J. This is an appeal from the decree of the chancery court dissolving a temporary injunction by which had been re-

strained an action of ejectment brought by appellee against appellant. The municipal authorities of the town of Clio, appellant, having resolved to widen South Elba street, made application to the clerk of the circuit court, as provided by article 29 of the Code, for a writ ad quod damnum to assess the value of certain land owned by appellee therein described and referred to in the manner following: The application set forth the resolution of the town council to the effect that "South Elba street between Brundidge street crossing and McIlwain street crossing should be widened on the east side as follows: Beginning at a point opposite and in line with the front of the sidewalk of Teal & Teal storehouse, thence southward on a line parallel with the brick storehouse on the west side of said South Elba street and to McIlwain crossing." The application further, among other things, showed that appellee owned land adjoining said street as follows: "At the corner of South Elba street and Brundidge street 70 feet more or less, fronting said South Elba street." On the facts averred in the bill, as they will presently appear, the foregoing description of one parcel of the property sought to be condemned is an impossibility. The application sought to condemn also another parcel, a narrow strip, situated on the west side of South Elba street further to the south and beyond McIlwain street. No mistake was made as to this other parcel; it is not involved in the present suit, and it is necessary to refer to it for the reason only that appellee's contention, which appears to have had currency in the court below, comes to this in substance, that because this narrow strip on the west side of the street was correctly described in the proceeding for condemnation, and no other land was correctly described, the whole of the money which appellant, as we shall see, paid into court as the assessed compensation for all the land taken should be treated by the court as compensation for the narrow west side strip only, and not at all as for the land now in controversy. The proceeding for condemnation, thus evidently involving two different and separated parcels of land, the one to the north and the other to the south of McIlwain street, the one on the west and the other on the east side of South Elba street, progressed through intermediate stages to a trial by jury in the circuit court where the damages sustained by this appellee were assessed in solido and paid into court whence they were received by appellee. Afterwards, appellant having gone into possession of both pieces of the property which it supposed had been condemned, that is, as the bill explains, having gone upon the property and prepared it for the public use as a part of the street, appellee sued in ejectment for a lot described as being on the south side of

Blue Springs street and fronting 70 feet on the east side of South Elba street; in other words, on the southeastern corner of South Elba and Blue Springs streets, after which the bill in this cause was filed.

By the bill it is made to appear that the town of Clio was built about the crossing of what is known as the Elba road and the road between Brundidge and Blue Springs. The Elba road to the south of the crossing is now South Elba street. The Brundidge-Blue Springs road west of the crossing is now known as Brundidge street, while that part of it to the east is known as Blue Springs street. For all practical purposes the two are one continuous road or street, different parts of which are now differently named. It further appears that appellee owned the property at the southeastern corner of the intersection and none other that touched upon either street at the intersection or north of McIlwain, which is a cross street next south of the street to which we may now conveniently refer as the Brundidge-Blue Springs street. The Teal & Teal storehouse, referred to in the description of the property in the application for condemnation, fronts on South Elba street at the northeast corner of that street and the street to which we have referred as the Brundidge-Blue Springs street. Appellee contested the *ad quod damnum* proceeding at all stages; but, as we have pointed out, she finally accepted and still retains the damages assessed. It also appears on the bill that testimony was submitted to the freeholders summoned for the preliminary assessment on the subject of the proper amount that should be paid to appellee as damages, she being present by counsel, and that at said hearing no property was mentioned other than the property described in the application as the property of appellee; that in the circuit court no reference was made to any other land; that "the said land and the value of the buildings and fence"—the bill shows the buildings were at the southeast corner of the intersection—"was the issue before the jury, and their verdict was with reference to the value of the buildings and fences and land along with the rental value of the same; that through inadvertence the land at the corner of Blue Springs and South Elba streets was incorrectly described in the condemnation proceedings, it being described as being at the corner of Brundidge and South Elba streets, instead of at the corner of Blue Springs and Elba streets."

The manifest theory of the ejectment suit is that the property for which appellee there sued was not condemned for the reason that the application for the writ *ad quod damnum* described the property to be condemned as lying to the south of Brundidge street, or on the corner of Brundidge and Blue Springs streets, whereas the property in question lies directly south of Blue Springs street, or on

the corner of Blue Springs and South Elba streets.

Defendant has not answered the bill. There is no denial of the facts averred. The injunction was dissolved on the ground that there was no equity in the bill. The natural justice of complainant's case is plain. Defendant has accepted the price, and the prompt judgment of the unsophisticated conscience is that the enjoyment by the public of the easement or the land for which it has paid the price should not be disturbed. Nor do any of the more or less artificial rules which of necessity affect the system of equity administered by the courts change the nature of the judgment. Defendant (appellee) objects to the bill for the alleged reason that to allow an interference by injunction with its action of ejectment would be equivalent to allowing a collateral impeachment of the judgment in the condemnation proceeding.

[1] We cannot accept appellee's view of the case. If only the parcel of property on the west side of South Elba street and south of McIlwain had been described in the condemnation proceeding, it may be conceded that appellant could not be permitted to show that the damages assessed included also the value of a different piece of property, for that is what appellee's cited cases hold. But here it is perfectly plain on the face of the record of the proceeding for condemnation, which constitutes appellant's muniment of title, that the effort was to condemn two different and separated parcels of land, and that the damages for both parcels were assessed in *solido*. It is conceded that one parcel was adequately described, and that to it appellant acquired a good title. If the terms in which the other parcel is described were shown by the averment of extrinsic facts to be merely ambiguous, that is, applicable alike to more than one parcel of land, then, in that case, appellant would be allowed to explain and clear up its meaning by parol evidence in defense of the pending action of ejectment (*Chambers v. Ringstaff*, 69 Ala. 140), and, as against that action, its remedy at law would be adequate and complete, foreclosing any resort to equity. But the terms in which the other parcel, the one in controversy, is described, as defined by the veritable facts and not contradicted by the record, are impossible. The judgment is thus shown to be affected, not indeed by mere errors or irregularities, on account of which no collateral attack could be maintained, but by irreconcilable repugnancy the effect of which is to render the description void for uncertainty and the judgment of condemnation, as to any land other than the narrow strip on the west side of the street, a nullity. The application for the writ *ad quod damnum*, which, we take it, became a part of the record in the circuit court, describes the narrow strip on the west side of South Elba street, and discloses, very plainly indeed, an effort to describe a wholly



different parcel; but the judgment itself contains not a word of description. It merely awards damages in solido. "The rule of law is, that every judgment of a court of justice must either be perfect in itself, or capable of being made perfect by reference to the pleadings, or to the papers on file in the cause, or else to other pertinent entries on the court docket." *Alexander v. Wheeler*, 69 Ala. 332, 342. Now the facts averred in the bill show what property other than the narrow strip the parties in common considered and treated as involved in the condemnation, appellee's acceptance of the damages assessed in solido, appellant's entrance upon the property in controversy as a part of the property so condemned, and its continued possession, of which facts appellant's continued possession is also asserted by appellee's declaration in her action of ejectment. These facts make a perfectly good case for the application of the equitable doctrine that where a corporation having the power of eminent domain in the effort to exercise that power goes into possession under a deed or by a proceeding which turns out to be void, compensation having been made, the court will enjoin an ejectment by the owner of the legal title so by miscarriage left in him, and thus give effect to the estoppel in pais which has no effect upon the legal title. We have a number of cases which look to this effect. *Jones v. New Orleans R. R. Co.*, 70 Ala. 227; *South & North Alabama R. Co. v. Alabama Great Southern*, 102 Ala. 236, 14 South. 747; *Cowan v. Southern Ry.*, 118 Ala. 554, 23 South. 754; *Hobbs v. N., C. & St. L. R. R. Co.*, 122 Ala. 602, 26 South. 139, 82 Am. St. Rep. 103; *Hendrix v. Southern Ry.*, 130 Ala. 205, 30 South. 596, 89 Am. St. Rep. 27; *Alabama Central v. Long*, 158 Ala. 301, 48 South. 363; *Jones v. Southern Ry.*, 162 Ala. 540, 50 South. 380. This principle is sustained by the authorities generally. 2 *Lewis Em. Dom.* (2d Ed.) § 606; 3 *Dillon Mun. Corp.* (5th Ed.) § 1039. Considerations of public policy as well as recognized principles of justice between the parties, require the court to hold that the property in cases of this kind may not be reclaimed by virtue of the bare legal title remaining in the owner, and that the owner's equity is to have compensation awarded him where he has not been already compensated. 102 Ala. ubi supra. And "there is no principle of law better settled, or resting on wiser considerations of public policy, or higher considerations of justice, than that no person, whether sui juris or under disability, and the character of the disability is not of importance, who has received and retains the fruits of a judicial proceeding, can be heard to assail it, either for irregularity or illegality, to the prejudice of others who have in good faith relied on and acted upon it as valid." *Robertson v. Bradford*, 73 Ala. 116; *Creamer*

*v. Holbrook*, 99 Ala. 52, 11 South. 830. This doctrine is modified to some extent in the case of infants who are allowed a right of election until their disability is removed or an election is made for them by the court. *Hobbs v. N., C. & St. L. R. R. Co.*, supra. We need not consider the situation that might have arisen had the appellee, a married woman, executed, and appellant accepted, a deed without the assent of the husband evidenced as prescribed by statute—an hypothetical case upon the implications of which appellee bases some argument, and to which, or a like case, the court gave some consideration in *Hendrix v. Southern Ry.*, 130 Ala. 205, 30 South. 596, 89 Am. St. Rep. 27, and *Clark v. Bird*, 158 Ala. 278, 48 South. 359, 132 Am. St. Rep. 25—for that is not what happened. If the husband and wife had joined in a deed which proved to be ineffectual at law for some reason not arising out of the statute which requires the husband's assent in a certain form, they would scarcely be allowed to retain the consideration without making the conveyance good. *Knox v. Childersburg Land Co.*, 86 Ala. 180, 5 South. 578. But appellant followed the provisions of another statute (Code, § 1441) which competently provides for the cases of all sorts and conditions of owners, married women included. Nor does it matter that appellant's expenditures upon the improvement of the property, in order to prepare it for the use for which it was condemned, have not amounted to much—that no money appears to have been spent. The estoppel in pais necessary to the equity of complainant's bill is abundantly supplied by appellant's payment and appellee's acceptance of a sum of money a part of which, equal to the assessed value of the property, was paid as compensation for the land in suit.

[2, 3] A motion to dismiss for want of equity will be sustained only when, after admitting all the facts apparent upon the face of the bill, whether well or ill pleaded, the complainant can have no relief. *Coleman v. Butt*, 130 Ala. 266, 30 South. 364. And the dissolution of an injunction will be allowed only upon the want of equity in the bill, or the denials of a verified answer. Appellee has not answered. Upon her motion to dissolve, technical errors or inaccuracies are not available. All amendable defects are regarded as amended. *L. & N. R. R. Co. v. Bessemer*, 108 Ala. 238, 18 South. 880.

From the foregoing it results that the decree must be reversed. A decree will be here rendered reinstating the injunction, and remanding the cause for further proceedings.

Reversed, rendered, and remanded.

ANDERSON, O. J., and McCLELLAN and GARDNER, JJ., concur.

(199 Ala. 177)

**ALABAMA GREAT SOUTHERN R. CO. v. FLINN.** (6 Div. 322.)

(Supreme Court of Alabama. Feb. 15, 1917.)

**1. MASTER AND SERVANT** ¶259(3) — **ACTION FOR SERVANT'S INJURY—COMPLAINT—NEGLIGENCE.**

In action under Employers' Liability Act (Code 1907, § 3910), a count, charging that defendant's superintendent "negligently" ordered plaintiff to do the act causing injury, *held* a sufficient allegation of negligence, and it was not necessary to set out particular facts showing that it was negligence to give the order.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 839.]

**2. MASTER AND SERVANT** ¶262(4) — **ACTION FOR SERVANT'S INJURY—PLEA—CONTRIBUTORY NEGLIGENCE.**

Plea, alleging that employé was negligent in that, "he knew or \* \* \* ought to have known that it was dangerous to do the kind of work, \* \* \* and that same was a danger obvious to him," yet did the work ordered and was injured thereby, *held* bad for not alleging that danger was obvious; the mere fact that plaintiff ought to have known it not constituting contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 859.]

**3. PLEADING** ¶34(4) — **ALTERNATIVE AVERMENTS—CONSTRUCTION.**

Alternative averments in pleading are no stronger than the weakest allegation.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 66.]

**4. PLEADING** ¶34(4) — **AMBIGUITY — CONSTRUCTION.**

Allegations susceptible of more than one construction must be construed most strongly against the pleader.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 66.]

**5. MASTER AND SERVANT** ¶149(1)—**LIABILITY FOR SERVANT'S INJURY — DANGEROUS WORK.**

To make an employer liable for employé's injuries resulting from ordering him to do dangerous work, it must be reasonably apparent to employer or his vice principal that the work would expose employé to some peril beyond ordinary risk and against which ordinary care would not protect him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 291-294.]

**6. MASTER AND SERVANT** ¶149(1)—**LIABILITY FOR SERVANT'S INJURY — DANGEROUS WORK—OBVIOUS DANGER.**

If the peril is obvious to the employé and he could readily avoid it in conforming to his orders, the employer has the right to assume that the employé will see and avoid the danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 291-294.]

**7. MASTER AND SERVANT** ¶150(1)—**LIABILITY FOR SERVANT'S INJURY — DANGEROUS WORK—INHERENT DANGER.**

If the peril is not obvious, but inherent in the conditions under which the employé works, the employer's order to do the dangerous work is negligence, unless he warns employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297, 300.]

**8. MASTER AND SERVANT** ¶245(4), 289(20) — **LIABILITY FOR SERVANT'S INJURY — "DANGEROUS WORK"—QUESTION FOR JURY.**

There is no legal definition of how dangerous work ordered by employer need be before employé must disobey it or be chargeable with negligence, but where the danger is as apparent to employé as to employer and facts are not disputed, it is not a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 781, 1111.]

**9. MASTER AND SERVANT** ¶245(1)—**LIABILITY FOR SERVANT'S INJURY — RELATION OF PARTIES.**

A servant does not stand on the same footing with his master, his primary duty being obedience; and, if in discharging his duties he is injured through the master's negligence, he should be recompensed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 778, 784, 787, 788.]

**10. MASTER AND SERVANT** ¶205(4) — **SERVANT'S RIGHT TO RELY ON VICE PRINCIPAL'S ABILITY.**

A prudent employé may, within reasonable limits, rely upon the ability of his master's vice principal.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 549.]

**11. EVIDENCE** ¶472(4)—**OPINION EVIDENCE.**

It was proper for the court to decline to compel employé, on cross-examination to express opinion as to whether, under existing conditions, his work was dangerous, or whether danger was obvious, or to state whether he was discharged on account of a fight.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2189.]

**12. EVIDENCE** ¶471(1)—**OPINION EVIDENCE.**

As a general rule, a witness should not be allowed to state his conclusions or opinions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149, 2160, 2163.]

**13. EVIDENCE** ¶472(4)—**OPINION EVIDENCE — NEGLIGENCE.**

It was not erroneous to refuse to allow a witness to give his opinion as to whether certain acts would constitute negligence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2189.]

**14. EVIDENCE** ¶471(17)—**OPINION—DUTY OF FOREMAN.**

Testimony as to whether it was a foreman's duty to warn employé as to the probability of their being injured was proper.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2149; Witnesses, Cent. Dig. § 833.]

**15. MASTER AND SERVANT** ¶262(4), 284(1) — **SERVANT'S INJURY — PLEA — CONTRIBUTORY NEGLIGENCE.**

The defendant employer in an employé's personal injury suit may not plead contributory negligence in a general form, but must plead it specially, and can prove none except as pleaded.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 859, 862.]

**16. PLEADING** ¶12 — **MATTER WITHIN KNOWLEDGE OF ONE PARTY.**

Where particular facts constituting a cause of action or defense lie peculiarly within the knowledge of one party, that party is primarily required to allege and prove such facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 38.]

**17. EVIDENCE ¶151(4) — UNCOMMUNICATED MOTIVE.**

It was not erroneous to decline to allow a witness to state what he would have done had he been in the employe's position at the time of injury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 440.]

**18. DAMAGES ¶216(1)—INSTRUCTIONS—PERSONAL INJURY.**

In an employe's action for personal injury, an oral charge that the law furnished no measure of damages in such cases, and leaving the amount to the jury's discretion, was not erroneous as to damages for mental or physical pain.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548, 549.]

**19. TRIAL ¶296(11) — INSTRUCTION AS A WHOLE.**

Where any misleading tendencies of an oral charge regarding damages in a personal injury case were cured by other parts of the charge, there was no reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 715.]

**20. DAMAGES ¶216(1) — ACTION FOR SERVANT'S INJURY — INSTRUCTIONS — PERMANENT INJURIES.**

Oral charge in an employe's personal injury suit, leaving the jury to award such damages as would reasonably compensate for permanent personal injuries, where all elements were not susceptible of exact measurement, held not erroneous.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548, 549.]

**21. DAMAGES ¶30 — MEASURE OF — PERMANENT PERSONAL INJURY.**

Where personal injury is shown to be permanent, pain and suffering, past and future, impaired health, diminished earning capacity, disfigurement, expenses of nursing and care, and other elements of damages proximately resulting may be considered, not all of which are capable of exact measurement.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 222.]

**22. DAMAGES ¶12 — MEASURE OF — PERMANENT PERSONAL INJURY — SUSCEPTIBLE OF EXACT MEASUREMENT.**

Where damages for permanent personal injuries are susceptible of exact measurement, the plaintiff must furnish data from which the amount may be fixed by the jury; and, if he does not only nominal damages can be recovered.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 31.]

**23. DAMAGES ¶208(1) — MEASURE OF — PERMANENT PERSONAL INJURIES — NOT SUSCEPTIBLE OF EXACT MEASUREMENT.**

Pain and suffering, past and future, mutilation, disfigurement, or loss of an organ as elements of damages for permanent personal injuries are not capable of exact measurement, and consequently are left to the jury's discretion.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 54, 64, 68.]

**24. DAMAGES ¶12 — SUBJECT OF — LOSS OF EYE.**

The loss of an eye entitles the injured party to recover some damages if the defendant is liable at all, although not capable of exact ascertainment.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 81.]

**25. TRIAL ¶242 — REFUSAL OF MISLEADING INSTRUCTIONS.**

Requested charges were properly refused, where they possessed misleading tendencies.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 569-576.]

**26. DAMAGES ¶216(7) — ACTION FOR SERVANT'S INJURY—INSTRUCTIONS—FUTURE LOSS.**

Instructions held erroneous in an employe's personal injury case, which sought to prevent recovery of damages for loss of any kind in the future, where the evidence showed pain and suffering and loss of an eye; such damages not being susceptible of exact measurement.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 552.]

Appeal from Circuit Court, Jefferson County; C. B. Smith, Judge.

Action by J. M. Flinn against the Alabama Great Southern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

A. G. & E. D. Smith, of Birmingham, for appellant. Smith & Wilkinson and Harsh & Fitts, all of Birmingham, for appellee.

MAYFIELD, J. [1] Appellee, a mechanic employed by appellant in its machine shops, sues appellant to recover damages for personal injuries, the loss of an eye, and other damages. The trial was had on two counts, one drawn under the second subdivision, and the other under the third subdivision, of the Employers' Liability Act (Code 1907, § 3910). The two allegations of negligence are, respectively, as follows:

"Cliff Adams, who on behalf of defendant had superintendence intrusted to him by defendant, negligently whilst in the exercise of such superintendence negligently caused or allowed said object to be thrown or propelled upon or against plaintiff on the occasion aforesaid, and as a proximate consequence of said negligence plaintiff suffered said injuries and damage."

"Cliff Adams, who was in the service or employment of defendant and to whose orders or directions plaintiff was bound to conform, negligently ordered or directed plaintiff to plane or cut metal, to wit, said truck bolster on or by means of said planer, and plaintiff did conform to said order and direction of said Adams, and as a proximate consequence of so conforming to said negligent order plaintiff suffered said injuries and damage."

The sufficiency of the last count was challenged by demurrer, but the count was held sufficient, and that ruling is here insisted upon as error to reverse. In the opinion of the writer this count is wholly insufficient; but the later rulings of this court have established a rule as to sufficiency of counts like the one in question, which authorizes the ruling of the trial court. The views of the writer on this subject were set out at some length in the case of Louisville & Nashville Railroad Co. v. Borganier, 168 Ala. 567, 53 South. 138. In that case the whole and sole allegation as to negligence on the part of the servant giving the order was that one Kirby, who gave the order, "negligently" ordered plaintiff to come where he, the said

Kirby, was upon an engine. The majority held the allegation sufficient as to negligence. In the case of *Republic Iron & Steel Co. v. Williams*, 168 Ala. 617, 53 South. 76, the allegation as to negligence in the giving of the order was:

"Negligently ordered or directed plaintiff to go into said furnace without properly and sufficiently warning or informing plaintiff as to said gas or liquid."

The majority of the court held the allegation sufficient to show negligence in the giving of the order. The majority held the allegation sufficient, without the averment of failure to warn of the existence of the dangerous gas or liquid in the furnace; that is, that the allegation that the superior servant ordered the inferior "to go into a furnace" was sufficient to charge actionable negligence against the master. The majority had, before those two cases, held, and have since held, similar allegations sufficient. While the writer is yet of the opinion that these rulings are wrong, and that they destroy all the efficacy of pleadings in such cases, yet it is a matter or question of practice, and no good can come of the writers' further dissenting, and hence he yields to the inevitable.

[2] Plea 8 was interposed as a defense to each count, and a demurrer thereto was sustained, and of this ruling the defendant next complains. The plea was as follows:

"That plaintiff was guilty of negligence which proximately contributed to his own injury in this: That he knew, or in the exercise of due care ought to have known, that it was dangerous to do the kind of work in which he was engaged when injured on the planer, and that the same was a danger obvious to him, yet nevertheless plaintiff did said work on said planer, and in consequence thereof was injured."

[3] This plea will be seen to contain alternative averments. It must therefore be tested by its weakest averment, viz., that plaintiff "ought to have known that it was dangerous" to do the work ordered to be done by him, and that he ought to have known it was an obvious danger.

[4] It may be true that the plea is susceptible of the construction that the phrase, "ought to have known," refers only to the dangerous character of the work ordered to be done, and not to the allegation that it was obviously dangerous to do the work ordered to be done; but it is also susceptible of the construction that the quoted phrase applies to both, and it must be construed against the pleader. So construing it, the plea was bad, and subject to the demurrer.

[5-7] The law as to the question sought to be raised by the plea, in the different phases in which it is usually presented, was well stated in the case of *Woodward Iron Co. v. Wade*, 192 Ala. 651, 68 South. 1008. It is there said:

"It must have been reasonably apparent to the master, or his vice principal who gave the order, under the conditions as he knew or ought to have known them, that the servant's execution of his command would expose the servant to some peril, beyond the ordinary risks of his

service, and against which ordinary and reasonable care on his part would probably not suffice to protect him. See 1 Labatt on M. & S., § 347.

"(2) If this peril was obvious to the servant, and might readily be avoided by him while fully discharging his duty of service in conformity with the order given him, the master had the right to assume that the servant would both observe the peril and avoid it; and the order was not negligently given. *Davis v. Western Ry. of Ala.*, 107 Ala. 626, 633, 18 South. 173.

"(3) If, on the other hand, the peril was not obvious, but was inherent in the conditions necessarily surrounding the servant while executing the master's order (conditions which the master could and should have known, and of which, if not remedied, the servant could expect the master to seasonably inform him), the master's order, without such warning, was negligent and actionable. 1 Labatt on M. & S. 437."

[8-10] Here it was not clearly and certainly alleged by the plea that the peril or danger involved in obeying the order was obvious to the plaintiff; it was only alleged (construing the plea against the defendant), that the plaintiff, by the exercise of reasonable care, ought to have known that the danger or peril of so obeying the order was obvious. Moreover, the danger or peril, if any existed, which made it actionable negligence to give the order in this case as alleged, and to which allegation the plea was intended to be an answer, must have been "inherent in the conditions necessarily surrounding the servant while executing the master's order." The mere fact that a servant knows, much less that he ought to know, that the work he is doing or is ordered to do is dangerous, or is attended with danger, standing alone, does not make the servant guilty of contributory negligence such as to bar his recovery on account of actionable negligence of the master or of one of his servants, even in giving the order to do the particular work. The danger and peril of doing the work or thing must be obvious, and one which an ordinarily prudent servant would not undertake to risk, even if ordered so to do by the master or by a servant for whose orders the statute makes the master liable. Mr. Labatt thus states the rule:

"Upon general principles it is manifest that, although the servant may have been directly commanded or urged to undertake the work from which the injury resulted, he cannot claim an indemnity where the danger to be encountered was at once so obvious and so serious that no prudent man would have incurred it. That is to say, the order must, if it is to serve as a justification, be a matter with regard to which the servant has a right to rely on the superior judgment of the master.

"The courts decline to lay down a rule of law purporting to define accurately how dangerous a proposed action would have to be before a servant receiving an order from his master to perform it would be required to disobey under pain of being chargeable with negligence. But where there is no dispute as to the facts, and the dangers of obedience to an order are as apparent to the servant as to the employer's representative, there is no occasion to go to the jury to determine whether the servant should have obeyed the order." *Master & Servant*, vol. 1 (1st Ed.) § 442, p. 1254.

"The servant does not stand on the same footing with his master. His primary duty is obedience, and if, when in the discharge of that duty, he is damaged through the neglect of the master, it is but meet that he should be recompensed." This essential inequality in the positions of the parties is deemed to warrant the deduction that "a prudent man has a right, within reasonable limits, to rely upon the ability and skill of the agent in whose charge the common master has placed him, and is not bound, at his peril, to set his own judgment above that of his superior." *Id.*, § 440, p. 1242.

This plea, of course, involves the doctrine of *volenti non fit injuria*, as applied to the Employers' Liability Act.

The decisions of this court have not been uniform on the subject, but have oscillated considerably, sometimes going to the extent of overruling themselves repeatedly. The subject was first raised and decided in the case of *Eureka Co. v. Bass*, 81 Ala. 200, 8 South. 216, 60 Am. Rep. 152; that decision was overruled by *Holborn's Case*, 84 Ala. 133, 4 South. 146; and the later decision was modified, if not qualified, in *Walters' Case*, 91 Ala. 435, 8 South. 357; and the last two cases overruled and the doctrine announced in *Eureka v. Bass*, 81 Ala. 200, 8 South. 216, 60 Am. Rep. 152, in effect if not in toto, re-established.

The three last cases were reviewed and explained, and the doctrine of the Massachusetts and the English cases was adopted and followed, in *Osborne's Case*, 135 Ala. 571, 33 South. 687, where it was said:

"The employer cannot treat as a breach of duty, but is held to sanction, that which by contract of employment he has required the employé to do. *Snow v. Housatonic, etc., R. Co.*, 8 Allen (Mass.) 441 [85 Am. Dec. 720]. In *Bailey's Per. Inj.*, § 1116, it is said: 'The mere fact that the employé knew that the work was manifestly dangerous of itself does not constitute contributory negligence. If it is shown that he used that which was dangerous in a negligent manner, this would be contributory negligence.' The same principle is announced in *Mobile & B. R. Co. v. Holborn*, 84 Ala. 133 [4 South. 146], and in *Highland Ave., etc., R. Co. v. Walters*, 91 Ala. 435 [8 South. 357]. 'A person who continues in an employment with full knowledge of the risk run, and who voluntarily goes to do that which he knows will expose him to danger, cannot recover for injuries so received.' Such is the law as stated in the leading case of *Thomas v. Quartermain*, 17 Q. B. D. 414, and as recognized by this court. *Birmingham R., etc., Co. v. Allen*, 99 Ala. 359 [13 South. 8, 20 L. R. A. 457]; *Bridges v. Tenn., etc., Co.*, 109 Ala. 287 [19 South. 495]; *Southern Ry. Co. v. Guyton*, 122 Ala. 238 [25 South. 34]. The decisions in *Mobile, etc., R. Co. v. Holborn* and *Highland Ave., etc., Co. v. Walters*, *supra*, though correct on the point to which we have cited them, have been in effect overruled so far as they held that the Employers' Liability Act operated as between employer and employé to abrogate the doctrine of *volenti non fit injuria*. That doctrine is founded on the consent express or implied of the employé to take the chances of injury or escape from a threatening situation, but such consent is not implied unless the danger is obvious or is known to the employé."

There has been no intentional departure from the doctrine announced in this last case by this court, and we now reaffirm it.

Therefore, testing the plea by these rules, and the other rules, that alternative averments are no stronger than the weakest alternative, and that all averments or allegations which are susceptible of two or more constructions must be construed against the party or pleader so averring or alleging, the plea was subject to the demurrer interposed.

[11] There was no error in the court's declining to compel the plaintiff to give his opinion or conclusion as to whether or not it was dangerous to work under the conditions existing when the injury occurred; nor in declining to compel plaintiff to answer the question, propounded on cross-examination, whether or not the danger was obvious to plaintiff; nor in declining to compel him to state whether or not he was discharged by the defendant on account of a fight he had had with a Mr. Griffin.

[12] A witness, as a rule, should not be allowed to state his conclusions. Held, that a witness could not state that a street was in a dangerous or impassable condition. *Aniston v. Iney*, 151 Ala. 392, 44 South. 48; 6 Mayf. Dig. 346.

A witness should not be allowed to testify that the plaintiff had knowledge of the defective condition of a trestle by which he was injured. *West Pratt Coal Co. v. Andrews*, 150 Ala. 368, 43 South. 348; 6 Mayf. Dig. 348.

A witness should not be allowed to reason to the jury; he must speak to and of facts; intentions, motives, or beliefs are to be inferred from facts, and the jury must deduce the conclusions unaided by the opinion, reasoning, or inference of witnesses; witnesses must testify, not argue; and expert witnesses are not an exception to this rule. *Richardson v. State*, 145 Ala. 46, 41 South. 82, 8 Ann. Cas. 106; *Mobile Co. v. Little*, 108 Ala. 399, 19 South. 443; 6 Mayf. Dig. 348.

Evidence consisting of conclusions and inferences of witnesses is usually inadmissible; e. g., opinion as to whom defendant's agent thought he was dealing with. *Manchester Fire Ins. Co. v. Feibelman*, 118 Ala. 308, 23 South. 759. As to why a party did or did not do an act. *Lytle & Co. v. Bank of Dothan*, 121 Ala. 215, 26 South. 6. As to why a party knew a fact. *Alabama G. S. R. Co. v. Burgess*, 114 Ala. 587, 22 South. 169. Whether a party would have acted differently. *Reeder v. Huffman*, 148 Ala. 472, 41 South. 177. Nor can a witness give his reason or motive for doing an act. *Southern Ry. Co. v. Shelton*, 136 Ala. 191, 34 South. 194; 6 Mayf. Dig. 349.

[13] There was no error in sustaining objections to the defendant's questions propounded to the witness Franks, which called for his opinion or conclusion as to whether given acts or words would constitute negligence. The facts and circumstances should have been stated to the jury, letting them draw the conclusion as to negligence. The whole right of action depended upon the

fact of negligence as to the particular subject inquired of by the questions. The questions, therefore, sought to have the witness discharge a part of the functions of the jury.

[14] These questions called for answers entirely different from those sought by the questions propounded by plaintiff to this witness, as to whether or not it was the duty of foremen to warn employes as to the probability of their being injured. These were facts to which the witness could testify, as a witness, without invading the province of the jury.

It is insisted by appellant that the duty to warn was not made an issuable fact, and that it was therefore immaterial and irrelevant. In the opinion of the writer, this contention is well founded and is correct; but the repeated ruling of the majority is to the contrary. That is, that the allegation that plaintiff was negligently ordered to do the work is sufficient without alleging any facts that show a duty, or the breach of a duty, not to order the plaintiff to do the work, and that it opens up the whole field and allows plaintiff to show any facts which tend to establish a duty owed to the plaintiff, and a breach thereof by ordering him to do the work or act commanded to be done. If the servant who gave the order to plaintiff to plane the iron knew, or by the exercise of proper diligence ought to have known, that it was dangerous or perilous for plaintiff to obey the order, it would be a breach of his duty owing the plaintiff to so order him; but, unless he knew, or ought to have known, of the danger or peril, then of course there was no breach of a duty in giving the order, and the servant giving the order would not be guilty of negligence in this respect.

[15] It has been ruled in the cases heretofore cited that it is not necessary to aver any particular facts or circumstances to show that it was actionable negligence to give the order complained of, that it is sufficient to show what the order was, and to allege generally that it was "negligently" given, of course following the language of the statute to the effect that the plaintiff was bound to conform to the order, and that he did conform thereto, and was injured as the proximate result of so conforming, and that under this general allegation any actionable negligence may be shown on the part of the servant who gave the order. This, of course, places the defendant at a great disadvantage, but the law and the rules of pleading are so written. The defendant is not allowed to plead contributory negligence in such general form, but he is required to plead it specially, and can prove none except what he so pleads, and if he does prove it he can get no advantage from so proving it. He cannot, of course, plead specially to any particular act of negligence charged, because no such negligence is alleged; he is not informed of any particular facts or circumstances which

show, or tend to show, that the servant who gave the order was negligent. The defendant is left to surmise and doubt; he may guess at the facts which the plaintiff will seek to prove in order to show actionable negligence in giving the order, and may thus anticipate and file a special plea; but the plaintiff may surprise him, and prove altogether different facts, as to which his special plea is no answer, or is not apt; but as to which matter a different plea might have been a perfect answer, and could have been easily proven, if it had been pleaded.

However difficult it may be to understand the reason or justice of a rule of pleading and evidence which allows one party to allege generally, and prove anything which he could prove if alleged specially, and yet denies this right to the other party, requiring him to allege both specifically and specially and allowing him to prove only such matter as he has specifically and specially alleged, nevertheless such is the law, and such are the well-settled rules in this court, in negligence cases.

[16] Where the particular facts constituting the cause of action, or the defense, lie peculiarly within the knowledge of one party and not within that of the other, the justice of the rule requiring the party having the knowledge to primarily allege and prove such facts is readily recognized; but when such facts are equally within the knowledge or the reach of both parties, or are peculiarly within the knowledge of the party not required to allege, the reason or justice of the rule is not so perceptible; but, nevertheless, the rule exists in this state, and in the opinion of the writer cries loudly for a change.

[17] There was no error in declining to allow the defendant to prove by the witness Stotzky what the witness would have done or would not have done had he been in the position plaintiff was in when the injury occurred. Two of the questions disallowed to the defendant were as follows:

(a) "I will ask you, in view of the fact that you have been a machinist for a long time, whether or not if you had been told to take that lug off the bolster you would have used, or would have been as apt to use, the planer as the slotter?"

(b) "I will put it in this shape: Suppose a foreman had told you to take off those lugs from the bolster, I will ask you whether or not you would have put it on the planer to have taken them off."

The uncommunicated motive or purpose of a witness with respect to certain acts of his about which he has testified are not admissible in evidence. He should not be asked, nor should he be allowed to state, what he would have done or said under certain conditions. *Reeder v. Huffman*, 148 Ala. 472, 41 South. 177; 6 Mayf. Dig. 350.

[18, 19] There was no error in that part of the oral charge to which exception was reserved, in which the court charged the jury that the law furnished no measure or standard to determine the exact amount of dam-

ages recoverable in actions like this, but that the measure thereof was left to the sound discretion of the jury to determine from all the evidence. This was certainly true, so far as damages for mental and physical pain were concerned; and, if it had any misleading tendencies as to other elements of damages, it was corrected or cured thereof by other parts of the oral charge of which this was but a part, or it should have been corrected by requested charges. We do not think this part of the charge was error to reverse.

[20] That part of the oral charge as to damages for permanent injury, to which exception was taken, is also insisted upon as error to reverse. After having instructed touching damages as for physical pain, loss of time, doctors' bills, and other expenses, that part of the charge concludes as follows:

"In addition, gentlemen, if you are reasonably satisfied from the evidence in this case that the plaintiff was permanently injured, this is the end of this lawsuit, and you may award him such sum as would reasonably compensate him for his permanent injuries."

It is insisted by counsel for appellant that that part of the oral charge was error to reverse, for the reason and upon the authorities relied upon to show error in the part of the oral charge to which an exception was reserved, and to which we have responded. The argument of appellant's counsel is based on *Seaboard Manufacturing Co. v. Woodson*, 98 Ala. 378, 11 South. 733, and the cases thereafter following it. In that case a charge was held bad which left to the discretion of the jury the amount of damages which the plaintiff might recover, as for the impairment of his ability to earn money. In that case it was said:

"Whether an employe's wages will be increased or diminished, in the future, or whether he will certainly die sooner or later, is not a fact of positive proof, but no sound rule of right and justice will permit a jury, in assessing damages to be paid by one person to another as compensation for a pecuniary loss, to reach a conclusion of the amount to be paid from mere conjectures, or without regard to proper data furnished as evidence. The law fixes the burden upon him who claims damages from another as a compensation for a pecuniary loss to furnish the facts necessary to ascertain the extent of his loss with reasonable certainty, and, failing in this, he is entitled to no more than nominal damages. It is upon this principle that it is permissible and proper to introduce evidence of the age of the person, mortuary tables to show the probable duration of life, the business habits, industry, and sobriety, earnings, skill, and whatever facts may conduce with reasonable satisfaction to aid the jury in arriving at what would amount to a just and fair compensation for the damage or loss sustained. *L. & N. R. Co. v. Orr*, 91 Ala. 548 [8 South. 360]."

The above case was cited with approval by the Court of Appeals in *Alabama Northern Railroad Co. v. Methvin*, 9 Ala. App. 519, 64 South. 175, and it was there said:

"While the law can fix no standards for measuring physical and mental pain, which, of necessity, must be left to the sound judgment of

the jury after taking into consideration and weighing the evidence as to the extent of it, yet damages for loss of time from work and for decreased earning capacity resulting from permanent injury are to be measured by certain data which the plaintiff should furnish the jury to that end. We are therefore of opinion that the court erred in the charge quoted, which gave the jury too wide a latitude in the assessment of the damages. *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378, 11 South. 733."

In *Manistee Mill Co. v. Hobdy*, 165 Ala. 411, 51 South. 871, 138 Am. St. Rep. 73, it is said:

"The court, in its oral charge, after instructing the jury that, if they found for the plaintiff, they should give him, as part of his damages, his reasonable expenses, compensation for loss of time, reasonable compensation for mental and physical suffering, and also for the permanent injury, and, after speaking of his probable expectancy, said: 'You may give the plaintiff the amount of his earnings during such expectancy, as a part of his damages.' In the present case the plaintiff testified that he was incapacitated to do sawmill work—that is, 'the physical part of it'—but, as it is evident that he is still capable of doing something for a livelihood, the burden was on the plaintiff to show the difference between his earning capacity before, and that since, the injury."

In *Sloss-Sheffield Steel & Iron Co. v. Stewart*, 172 Ala. 516, 525, 55 South. 785, 788, it is said:

"It may be that, when a party claims damages for the loss of earning capacity, he must furnish some data as to his earning capacity before and after the injury, and not leave it a pure matter of speculation for the jury. *Manistee Mill Co. v. Hobdy*, 165 Ala. 417, 51 South. 871 [138 Am. St. Rep. 73]; *Birmingham R. R. v. Harden*, 156 Ala. 250, 47 South. 327; *Seaboard Co. v. Woodson*, 98 Ala. 382, 11 South. 733; *Helton v. Ala. Midland R. R.*, 97 Ala. 275, 12 South. 276. Failing to do this, he is entitled to no more than nominal damages."

In *Binion's Case*, 107 Ala. 645, 18 South. 75, it was held that charges as follows were properly refused to defendant:

"(8) The plaintiff must show that his capacity for making a living has been diminished, and must furnish the evidence on which the jury are to calculate the amount of compensation to be allowed him.

"(9) If the evidence shows that the capacity of plaintiff for earning a support has not been diminished by the injuries sustained, then the jury can only award nominal damages."

The court, in dealing with these charges said:

"The eighth and ninth were properly refused. The loss of plaintiff's arm in the accident, his loss of time and his pain and suffering, were data upon which the jury might base their verdict, and the giving of these charges would have tended to impress the jury that such was not the fact. *Mobile & Ohio R. Co. v. George*, 94 Ala. 222 [10 South. 145]."

In *George's Case*, 94 Ala. 199, 10 South. 145, discussing charges as to damages when the injury is permanent, the court said:

"Where the injury is permanent, the plaintiff, in actions of this character, may recover compensation for the disabling effects of the injury past and prospective. In estimating the damages, the loss of time, and the incapacity to do as profitable labor as before the injury, as well as the mental and physical suffering caused by it, are pertinent and legitimate factors. *S. & N. R. Co. v. McLendon*, 63 Ala.

206; Ala. Gt. So. R. R. Co. v. Yarbrough, 83 Ala. 241 [3 South. 447, 3 Am. St. Rep. 715]."

[21] It appears from the decisions cited that when the injury is shown to be permanent, and to have been proximately caused by the negligence alleged, there may be several factors entering into the verdict determining or fixing the amount of damages. Some of these factors are: Pain and suffering, past and future, impaired health, diminished earning or working capacity, mutilation or disfigurement, and expenses of nursing and care; and there may be incurred many other detrimental effects, and expenses, as the natural and proximate result of the injury.

It was said by this court in Hill's Case, 93 Ala. 514, 9 South. 722, 30 Am. St. Rep. 65 (and quoted by Mr. Sutherland in his work on Damages), that:

"It is to be assumed that every physical endowment, function, and capacity is of importance in the life of every man and woman, and that occasion will arise for the exercise of each and all of them. And to the extent to which any function is destroyed, or its discharge rendered painful or perilous by the wrongful infliction of personal injury, is the party complaining entitled to damages. We can, in other words, conceive of no physical injury, wrongfully inflicted, whether entailing pain only, or disfigurement, or incapacity, relative or absolute, to perform any of the functions of life, which may not be made the predicate for compensation in damages."

[22] It thus appears that some of these factors or elements of damages, where permanent injuries are shown, are susceptible of exact admeasurement and proof, while others are not. As to those which are susceptible, of course the plaintiff must furnish data in the way of evidence or proof from which the jury may ascertain and fix the amount which is recoverable as for such elements; and, if no data or proof is furnished, then only nominal damages as for such elements are recoverable.

[23] As to those factors and elements of damages, from permanent injury, not susceptible of exact measurement or proof—such as pain and suffering past and future, mutilation, disfigurement of body or person, loss of an organ (in this case, an eye), their ascertainment and assessment are matters in a large degree, and of necessity, left to the discretion and enlightenment of the jury. But the finding of the jury is, of course, subject to the control of the court after rendition, as by setting the verdict aside because either so excessive or so inadequate as to show that the jury were influenced by bias, favor, prejudice, or other improper motive or inducement.

This part of the oral charge was dealing with damages as for permanent injuries, which may or may not include loss of earning capacity in the future, aside from loss of time. The injury might be permanent, and yet not involve any loss of future earning capacity. Hence damages for permanent in-

juries might not include such, because there might be none. The charge might tend to mislead the jury, as authorizing them to find damages as for loss of earning capacity, when there was no evidence to support such damages; but if such tendency the charge had, it could and should have been cured by requested charges.

[24] Certainly a permanent injury such as the loss of an eye well entitles the injured party to recover some damages of the defendant if the defendant be liable therefor, although there be no data which will authorize any given or fixed damages, some of the elements of which, as we have shown, are incapable of exact admeasurement.

[25] Defendant requested some written charges which were refused, but probably none of these were intended to correct the misleading tendencies of the oral charge in the respect above pointed out. If there were any such, they were properly refused because erroneous, or because they themselves possessed misleading tendencies.

[26] Charges 13 and 14 may have been intended to cure the misleading tendencies of the given charges; but they were erroneous in that they each sought to prevent a recovery of damages as for any loss of any kind in the future, because there was no evidence to support such damages. This might be true as to earning capacity in the future, but not as to pain or suffering, nor as for the loss of an eye. As is shown by the authorities before cited, such damages are not susceptible of certain or exact admeasurement, as are those for loss of time, for expenses, and for the amount that would probably be earned in the future but for the injury.

We are not prepared to say that there was any error in denying defendant's motion for a new trial.

We have considered all the errors assigned and argued, though they are not separately treated in the opinion.

Finding no reversible error, we conclude, that the judgment appealed from must be affirmed.

Affirmed. All the Justices concur.

(199 Ala. 87)

J. S. CARROLL MERCANTILE CO. v. HARRELL (4 Div. 689.)

(Supreme Court of Alabama. Feb. 8, 1917.)

MORTGAGES—§171(6)—REAL ESTATE MORTGAGES—RECORDING—CONSTRUCTIVE NOTICE—FAULTY DESCRIPTION.

The recording of a mortgage, describing land as, "My share of the estate of heirs of W., which is one-fourth of said estate," although followed by a more particular description of land not owned by W., is sufficient to prevent a subsequent judgment attaching in priority to mortgage, under rule that whatever is sufficient to put a party on inquiry is enough to charge him with notice.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 405, 407-409.]



Appeal from Circuit Court, Pike County; A. B. Foster, Judge.

Bill by T. J. W. Harrell against H. Watson and the J. S. Carroll Mercantile Company. From a decree overruling demurrer of defendant Mercantile Company, it appeals. Affirmed.

Bill by T. J. W. Harrell against H. Watson and J. S. Carroll Mercantile Company, a corporation, its purpose being to correct the description in a mortgage given by H. Watson to complainant, Harrell, and to enforce a foreclosure of the mortgage as against a judgment lien acquired by the respondent mercantile company. The bill shows that respondent H. Watson, son of N. C. Watson, deceased, to secure a loan of money intended to execute to complainant a mortgage on his undivided one-fourth interest in the estate of his father; that the mistake in description of the land was made by the draftsman in preparation of the mortgage; that the land misdescribed was never owned by N. C. Watson or his estate, nor by H. Watson, the mortgagor, but the land, correctly described in the mortgage was a part of the Watson estate; that said mortgage was executed December 10, 1912, and duly recorded in the probate office of Pike county on December 16, 1912. The judgment of the Carroll Mercantile Company was recovered January 25, 1916, and recorded February 3, 1916. The mortgage describes the land as follows:

"My share of the estate of heirs of N. C. Watson, which is one-fourth \* \* \* of said estate, and is described as follows: S.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$  of section 26, township 10, range 22, in all one hundred acres, more or less. Also ten \* \* \* acres west of the public road, which bounds this body of land on west. This land lies in Pike county, Alabama."

The complainant insists the true description should have been as follows:

"A one-fourth \* \* \* undivided interest in the S.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$ , section 26, township 10, range 22; and ten \* \* \* acres west of the public road, which bounds this body of land on the west, in section 27, township 10, range 22, consisting of one hundred and ten \* \* \* acres, situated in Pike county, Alabama."

Respondent, J. S. Carroll Mercantile Company, alone filed demurrers to the bill, taking the point that the record of the mortgage was insufficient as constructive notice to said respondent as a judgment creditor with a lien. From a decree overruling the demurrer said respondent prosecutes this appeal.

C. C. Brannen and John H. Wilkerson, both of Troy, for appellant. T. L. Borom, of Troy, for appellee.

GARDNER, J. One question only is presented by this appeal, and that is as to whether the recording of the mortgage executed by respondent H. Watson to complainant, with description therein contained as shown by the foregoing statement of the case, was sufficient constructive notice to J. S. Car-

roll Mercantile Company to prevent its judgment lien attaching in priority to the mortgage. A natural and reasonable construction should be given the following language of the description:

"My share of the estate of heirs of N. C. Watson, which is one-fourth \* \* \* of said estate."

A natural construction of this language clearly indicates a direct reference to the one-fourth interest of the mortgagor in the estate of N. C. Watson. It was so construed by the court below, and in that interpretation we concur. This general description is followed by a more particular description by government numbers by which a portion of the land is erroneously described. The following quotation from *Gamble v. Black Warrior Coal Co.*, 172 Ala. 669, 55 South. 190, is applicable here:

"It is \* \* \* well settled law in this state that whatever is sufficient to put a party on inquiry is enough to charge him with notice. Means of knowledge may be equivalent to knowledge. Whatever is sufficient to put one on his guard, and call for inquiry, is notice of everything to which the inquiry would lead. *Cole v. B. A. Ry. Co.*, 143 Ala. 427 [39 South. 403]."

We are clear to the view that the notice acquired by the respondent before recovery of the judgment, by virtue of the record of the mortgage to complainant, was to the effect that the mortgage embraced the one-fourth interest of the mortgagor in the estate of N. C. Watson, and was sufficient to put it upon inquiry as to what constituted said estate; and such inquiry would have led to a knowledge of the fact that a portion of the land was incorrectly described.

The decree overruling the demurrer is correct, and will be accordingly affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and SAYRE, JJ., concur.

No. 22098.

STATE TAX COLLECTOR v. BROWN.

In re BROWN.

(Supreme Court of Louisiana. Feb. 12, 1917.)

(Syllabus by the Court.)

1. LICENSES  $\Leftrightarrow$  19(4) - EXEMPTIONS - CONSTITUTIONAL PROVISIONS.

Article 229 of the Constitution exempts from license taxation all manufacturers, save those (few in number) who are excepted by specific enumeration; whereas, article 230, imposes the burden of property taxation upon all persons, save those (few in number) who are excepted by specific enumeration. It is evident therefore that the exemption, in the one case, was intended to be, and is, much broader in its application than in the other.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 53.]

## 2. LICENSES ~~§~~19(4) — CONSTITUTIONAL EXEMPTIONS—"MANUFACTURE."

The term "manufacture" (noun) is defined to be "the operation of making goods or wares of any kind; the production of articles for use from raw or prepared materials by giving those materials new forms, qualities, properties, or combinations, whether by hand labor or by machinery." And that definition is applicable to, and brings within the exemption from license taxation, declared by article 229 of the Constitution, the operations of one who, by the use of a plant, consisting of real estate and machinery, costing over \$40,000, and the regular employment of 20 operatives, subjects cream to a process of pasteurization, combines and blends it with sugar and fruits or flavoring extracts, confers a new quality and new properties on the combination by processes of freezing, molds it in different forms and colors, and sells the annual product, in four states, for over \$100,000.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 53.

For other definitions, see Words and Phrases, First and Second Series, Manufacture.]

Proceeding by the State Tax Collector against Benjamin C. Brown. Judgment in Court of Appeal affirming judgment for the collector, and defendant brings writ of review. Judgment annulled, collector's demands rejected, and suit dismissed.

Henry W. Robinson, of New Orleans, for applicant. James R. Parkerson and C. O. Friedrichs, both of New Orleans, for respondent.

### Statement of the Case.

MONROE, C. J. The state tax collector ruled defendant to show cause why he should not be condemned to pay state licenses for the years 1914 and 1915, as required by Act 171 of 1898, § 6, with costs, penalties, and attorneys' fees, for having conducted the business of wholesale ice cream dealer.

Defendant made a return to the effect that he was, and is, a manufacturer, exempted from such taxation by article 229 of the Constitution. The rule was made absolute by the district court, its judgment was affirmed by the Court of Appeal, and the matter has been brought here by writ of review.

It appears from the evidence and admissions in the record that defendant has been engaged in his present business for 11 years; that the cost price of the real estate and buildings upon and in which his business is conducted was \$18,500, in addition to which he requires the use of a garage and stable; that the cost value of his machinery and appliances was \$24,000; that, during each of the years 1914 and 1915, the approximate cost of the material used by him was \$89,387.66; that he carried on his pay roll 20 employes, at an annual expense of \$3,250.84; that his bill for fuel amounted to \$3,568.34, his gross sales to \$119,326.86, his sales outside of New Orleans, but in this state, to \$30,750; and that he has sold his product to the value of \$5,000 per annum in Mississippi, Alabama, and Florida, employing

two traveling salesmen in that business. Referring to the machinery and methods used by him, defendant testifies as follows (and there is no other testimony on the subject), to wit:

"This consists mainly of two refrigerating-ice cream making machines, one of them of 10 tons capacity and one of them of 20 tons capacity. These are equipped with 15 and 40 horse power motors, and with all the requisites, such as brine coolers, cold storage, etc. In addition, there are three mixing machines, which are power driven by large separate motors. These machines blend the cream, sugar, and extracts together. We operate four ice cream freezers of the circulating brine type, costing \$750 each. These freezers are German silver lined and have a daily capacity of 1,800 gallons of frozen product. These, of course, have to be equipped with individual 3 horse power motors. Three electrically equipped pumps are used for the circulation of the zero brine about the freezers. Ice crushers of which we have two and which will crush 25 tons of ice per hour, are used and operated also with motors of the proper size. Steam is necessary. We use a ten horse power boiler, and cans are washed by machinery. The large ice cream manufacturing plant of to-day could not be possible without a very large investment of capital in both buildings, machinery, and other equipment; in fact, none of our product to speak of is handled by hand, but, almost exclusively, by this automatic machinery. The first step in the process of ice cream manufacture according to the method which we employ, is the pasteurization of the raw cream. This is handled in a large tank of 300 gallons capacity; the product being heated to 160 degrees, Fahrenheit, and held there for 30 minutes. It is then cooled to approximately 32 degrees by being run over specially made apparatus. It is then conducted to the mixing machine of 200 gallons capacity; the sugar and extracts are added during this process, which is being 'agitated' (consists of agitations), so as to blend the component parts together. The 'mix,' or raw material, as it is called, is then ready to be frozen, when it is run through a short line of sanitary pipe to the brine freezers below. If strawberry ice cream is desired or any other particular flavor, this fruit is added as the raw material flows to the freezer. In from 10 to 12 minutes, each of these machines turns out about 13 gallons of ice cream. It is then drawn from the freezers into cans of different dimensions for shipment. These cans are transferred to what are called hardening rooms. These rooms are kept at a zero temperature, and as a result, in 24 hours, this cream is sufficiently hard to be ready for shipment. In case we wish to mold ice cream in brick form, this is done by running the same hard cream right from the freezers into the brick slabs or molds. It is then cut and wrapped into the desired sizes."

### Opinion.

[1] Article 229 of the Constitution declares that:

"The General Assembly may levy a license tax. \* \* \* All persons \* \* \* pursuing any trade, profession, business or calling may be rendered liable to such tax, except clerks, laborers, clergymen, school teachers, those engaged in mechanical, agricultural and horticultural pursuits, and manufacturers other than those of distilled alcoholic or malt liquors, tobacco, cigars and cotton seed oil."

It will be observed that the article thus quoted exempts, from the tax here in question, all persons engaged in mechanical pur-

suits and all manufacturers, save those who are expressly excepted.

[2] The terms "manufacturer" and "manufacture" (the latter when used as a noun and verb, respectively) are defined as follows:

**"Manufacturer."** \* \* \* One who manufactures; who is engaged in the business of manufacturing. In writings of the early eighteenth century, the term manufacturer was applied almost exclusively to the workmen; the employer was the master manufacturer. In modern usage, by 'manufacturer' is almost always meant the employer. \* \* \*

**"Manufacture."** \* \* \* (1) The operation of making goods or wares of any kind; the production of articles for use from raw or prepared materials by giving those materials new forms, qualities, properties, or combinations, whether by hand labor or by machinery; used more especially of production in a large way by machinery or by many hands working co-operatively. \* \* \*

**"Manufacture."** \* \* \* (1) To make or fabricate, as anything for use, especially in considerable quantities or numbers, or by the aid of many hands or machinery; work materials into the form of; as to manufacture cloth, pottery, or hardware; to manufacture clothing." Century Dictionary.

See, also, Web. New Int. Dic., to about the same effect.

The definitions as above quoted were practically adopted by this court in the case of *City of New Orleans v. Ernst & Co.*, 35 La. Ann. 747, where it was said:

"A manufacturer is defined to be: One who is engaged in the business of working raw materials into wares suitable for use, [or] who gives new shapes, new qualities, new combinations to matter which has already gone through some artificial process. A manufacturer prepares the original substance for use in different forms. He makes to sell, and stands between the original producer and the dealer, or first consumers, depending for his profit on the labor which he bestows on the raw material. [Citing] *City of New Orleans v. Le Blanc*, 34 La. Ann. 597."

And further the court said in that case:

"The Constitution clearly exempts all manufacturers not excepted. The excepted ones are: Those who manufacture alcoholic or malt liquors, tobacco and cigars, and cotton seed oil. As the defendants do not come within the exclusion [being rice millers], it is manifest that the license claimed cannot be recovered."

In *State v. American Sugar Refining Co.*, 108 La. 603, 32 South. 965, we had occasion to reconsider a ruling made in a case between the same litigants, reported in 51 La. Ann. 562, 25 South. 447 (in which it was held that defendant, as a sugar refiner, was not a manufacturer within the meaning of the constitutional provision here in question), and to hold that the refining of sugar, as there described, was a manufacturing business.

Among the citations of authority upon which that conclusion was based was the following:

"Nearly all artificial products of human industry, nearly all such materials as have acquired changed conditions or new and specific combinations, whether from the direct action of the human hand, from chemical processes devised and directed by human skill, or by the employment of machinery, \* \* \* are now commonly design-

nated as manufactured." *Carlin v. Western Assur. Co.*, 57 Md. 515, 40 Am. Rep. 440.

In *State v. Amer. Biscuit Mfg. Co.*, 47 La. Ann. 160, 16 South. 750, it was held that a corporation engaged in the manufacture, from flour, of crackers and Italian paste, was entitled to the exemption here claimed. The court said:

"The process of manufacture is that the flour leaves the barrels and passes through a powder sifter; thence into a powder mixer; from this into a dough box, on tracks, and is worked into the different kinds of dough; goes into a cutting machine; and finally into the oven, from which the complete articles (referring to the crackers) are taken, boxed, and shipped. The material is handled exclusively by machinery. From this statement it will readily be perceived that the establishment is a manufactory in which raw materials are made into ware suitable for use. There are new shapes, new combinations, new qualities given to the raw material by the process of manufacturing the article from the original material."

In so holding the court cited the case of *State v. Dupré & Hearsay*, 42 La. Ann. 561, 7 South. 727, in which it was held that the publishers of a newspaper were manufacturers, entitled to the exemption from license taxation as provided by the Constitution, although it was conceded that such application of the term was novel.

Thus, it said:

"This raises the novel questions whether or not a newspaper is an article of manufacture, and whether those who pursue the business of making or publishing newspapers are manufacturers within the meaning of the Constitution."

The court then quotes the definition of "manufacturer," as given in *City of New Orleans v. Ernst & Co.*, supra, and the opinion proceeds:

"Keeping this definition in view, the statement of facts embodied in this record shows that defendants use in their business valuable machinery and implements; that, in addition to the clerical and editorial departments, they employ a large number of mechanical laborers, such as typesetters, engineers, pressmen, and their assistants; that they purchase and use great quantities of raw materials, such as paper, ink, glue, etc.; that, by means of this machinery and mechanical labor, they convert this raw material into a new and distinct article, fit for use and in commercial demand, called a newspaper, which they sell directly to dealers and consumers."

"Certainly, from a mechanical point of view, this presents all the essentials of manufacture under every definition of the word. It \* \* \* comes clearly within the reason and motive of the constitutional exemption, which was to encourage enterprises that furnished employment to home labor in the making of things which the people use and require, and which, if not made here, would be bought abroad."

"But because the value of the newspaper is not derived from the raw material, or from the mechanical labor expended upon it, but rather as a mere medium for conveying the ideas and information impressed upon it by the purely intellectual labor of its editors, reporters, correspondents, and advertisers, the judge a quo concluded that the newspaper is a product of mind labor rather than of hand labor, and therefore is not an article of manufacture. The suggestion is plausible but, we think, not sound."

In *State ex rel., etc., v. Wilbert*, 51 La. Ann. 1223, 26 South. 106, it was held that:

"The proprietor of an establishment employed in the conversion of saw logs into lumber of different kinds and qualities in its rough state, is engaged in changing, by machinery raw materials into new and useful forms, and is, therefore, a manufacturer not within the exception."

Plaintiff relies upon the decision in *City of New Orleans v. Mannessier*, 32 La. Ann. 1075, in which defendant claimed exemption from the payment of a license tax upon the business of peddling ice cream (manufactured by himself) on the streets of New Orleans, and the exemption was denied. It appears to us, however, that the case thus cited may be distinguished from, and that its decision should not control, the case now under consideration, for this, to wit:

Though the opinion in the cited case contains the statement that defendant had appealed from a judgment condemning him to pay a license "on his business" of peddling ice cream on the streets, it contains also the statement, that:

"The attempt to magnify a confectionary, which is defendant's business, into a manufacture, must fail."

From which it is fairly inferable that the court found that the business of the defendant was that of a confectioner, and that the peddling of ice cream was merely an incident thereto.

Again, though the court said, in that particular case:

"We cannot assent to the proposition that a person making and selling ice cream is a manufacturer in the sense of the law, or in any other sense of the word"

—it does not follow that, 86 years later, the same court may not say, in another case, that a person making and selling ice cream is a manufacturer, within the meaning of a Constitution that has since been adopted and of the recognized definitions of that word.

It will hardly do to say, because pork, beef, soups, vegetables, and fruits may be prepared, in any of the forms in which they are used, in the kitchens of private houses, restaurants, and hotels, that there can be no such things as packing and canning establishments, or that Menier and Huyler any the less manufacture chocolate into various forms and combinations because the same thing may be done as an incident to the business of an ordinary confectioner. A few children may make as good candy as the world can produce, in a single tin cup, but, if they grow up, engage in the making of candy as a business, place their product on the market, and, perhaps, ship it to all parts of the world, no one will deny that they become manufacturers in every known and accepted sense in which that word is used. And, so, it may be that in 1880 Mannessier made ice cream under conditions which, in the opinion of this court, prevented his work from being entitled to recognition as that of a manufacturer, and

fixed the status of his business as that of a confectioner. But that finding by the court has no more bearing upon the case here presented than it would have upon the case of a new generation of Mannessiers, shown at this time to be leading the world in the making and sale of candy and chocolate in their various forms and combinations; for the defendant now before the court has shown, without attempt at contradiction, that, by the use of a plant, consisting of real estate and machinery, costing over \$40,000, and the regular employment of 20 operatives, he subjects cream to a process of pasteurization, combines and blends it with sugar and fruits or flavoring extracts, confers a new quality and new properties on the combination by processes of freezing, molds it into different forms and colors, and sells the annual product, in four states, for over \$119,000, thereby, as we think, as surely distinguishing himself from the ordinary confectioner as a Chicago packing house distinguishes itself from the ordinary butcher and cook, and as surely acquiring the status of a manufacturer as any one else who produces "articles for use from raw or prepared materials by giving to those materials new forms, qualities, properties, or combinations."

We note, in conclusion, that article 229 of the Constitution extends the exemption from license taxation to all manufacturers, save those excepted by specific enumeration, to wit, manufacturers of liquors (of different kinds), tobacco, cigars, and cotton seed oil; whereas, article 230 imposes the burden of property taxation upon all persons, save those (few in number) who are excepted by specific enumeration. It is therefore quite evident that the exception in the one case was intended to be, and is, much broader in its application than in the other, and, as we find, includes the defendant.

It is therefore ordered and decreed that the judgments of the Court of Appeal and of the district court, here complained of, be annulled, that plaintiff's demands be rejected, and that this suit be dismissed, at his cost in all courts.

(140 La. 837)

No. 22127.

MYERS v. LOUISIANA RY. & NAV. CO.

(Supreme Court of Louisiana. Feb. 12, 1917.)

(Syllabus by Editorial Staff.)

1. MASTER AND SERVANT §373—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—"INJURIES ARISING OUT OF EMPLOYMENT."

Where a carpenter employed as a railroad car repairer, while returning along the most practicable route to his work shed after taking measurements on the car for which he was preparing a piece of timber, was knocked down and injured by a swinging door of a car on the adjoining track blowing against him as he was passing, his injuries arose out of his employment within Employers' Liability Act (Act No. 20 of 1914), since the taking of the measurements was

as much working on the car as the nailing of a plank on it would have been.

**2. MASTER AND SERVANT  $\S$  371—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—CAUSE OF INJURY.**

The test to determine whether injuries to a workman arise out of his employment is not whether the cause of the injury, that is, the agency producing it, was something peculiar to the line of employment, but whether the nature of the employment was such that the risk from which the injury resulted was greater for the workman than for a person not engaged in the employment.

**3. MASTER AND SERVANT  $\S$  361—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—HAZARDOUS EMPLOYMENT.**

The employment of a carpenter engaged in repairing railroad cars is hazardous, since it is in and about railroad cars and tracks.

**4. MASTER AND SERVANT  $\S$  385(5)—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—"TOTAL DISABILITY."**

Under Act No. 20 of 1914,  $\S$  8 (d), allowing compensation to an injured workman for injuries producing permanent total disability to do work of any character, the permanent disability of a workman who had lost the use of one leg through breaking the hip bone, from following his regular trade, is not a total disability, since there are many lines of work open to a man in that condition.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Total Disability.]

**5. MASTER AND SERVANT  $\S$  412—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—TOTAL DISABILITY—BROKEN HIP.**

Where an illiterate carpenter 60 years of age had his hip bone broken, as a result of which he had been unable to perform any work up to the time of the trial one year later, and had never been able to follow his trade, since he could do no climbing, and could not even walk without a crutch or at least a cane, and it is possible that he would never be able to secure employment in any other line of work because of his inability to do any but manual work and of his advanced age, the finding of the trial court that his disability was total under Act No. 20 of 1914,  $\S$  8 (d), allowing compensation for injury producing permanent total disability to do work of any character, rather than partial under section 8 (c), allowing compensation for permanent partial disability amounting to one-half the difference between the wages before the injury and those he was able to earn thereafter, will not be disturbed, especially since there is no basis to determine the measure of compensation under the latter section, where the employé has been unable to do any work up to the time of the trial.

Appeal from Thirteenth Judicial District Court, Parish of Rapides; W. F. Blackman, Judge.

Suit by George G. Myers against the Louisiana Railway & Navigation Company for compensation under the Employers' Liability Act. Judgment for plaintiff, and defendant appeals. Affirmed.

Thornton & Thornton, of Alexandria, and Wise, Randolph, Rendall & Freyer, of Shreveport, for appellant. Blackman, Overton & Dawkins, of Alexandria, for appellee.

PROVOSTY, J. Plaintiff has brought this suit under Act No. 20, p. 44, of 1914, known as the Employers' Liability Act, for injuries

received while in the employ of the defendant company as a carpenter. The work he had in hand was the repairing of a camp car, which stood upon one of the repair tracks in the railroad yard of the defendant company in the city of Alexandria. He had been working under a shed about 300 feet away from this car upon a piece of timber to be fitted to that end of the car farthest from this shed, and for taking some necessary measurements had gone to this far end of the car, and, in doing so, had passed between the car and a coal car which stood upon another repair track; the space between the two cars being about 6 feet. After he had taken the measurements, he had gone to the other side of the coal car to a shed within a few feet of the coal car to restore to its owner a saw which on his way he had picked up where its owner had left, and probably forgotten, it. And as he was retracing his steps, passing again between the two cars, the door of the camp car, which swung like an ordinary door, instead of sliding as car doors generally do, blew to in a gust of wind, and struck him, and threw him against the coal car, inflicting the injury for which he brings this suit. The route followed by him in thus going to take and returning from taking these measurements was not only the most direct and convenient, but was, in fact, the only available, unless by making a circuit which no one would have thought of making.

[1] The injuries for which recovery may be had under the said Employers' Liability Act must have arisen "out of and in the course of" the employment; and the first contention of defendant is that while the injury in this case arose "in the course of" the employment, it did not arise "out of" it.

This phrase, "out of and in the course of the employment," which in itself appears to be clear enough has given occasion in its interpretation to a great many decisions, both in this country and in England; for it occurs in the workmen's compensation statute of England, which is the prototype of our American statutes upon the same subject, including our said Act No. 20 of 1914. The courts have had no difficulty in agreeing that "out of" does not mean the same thing as "in the course of," but means something more; that an injury may have been received "in the course of" the employment, and yet not "out of" it. Nor has any difficulty been experienced in ascertaining when an injury is to be considered as having arisen "in the course of" the employment; the difficulty has come in applying to concrete cases the phrase "out of." Before proceeding to the task of applying this phrase to the facts of the present case, it may be well to reproduce some of the expressions to be found in the books as to its meaning.

From an elaborate and apparently exhaus-

tive note in L. R. A. 1916A, p. 41, we take the following:

"It may be stated generally that the phrase 'out of and in the course of the employment' embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty which he is authorized to undertake, and which is calculated to further, directly or indirectly, the master's business. \* \* \*

"The risk must be one peculiarly incident to the employment, and not one incurred by every one, whether in the employment or not. Where an injury occurs upon a street from causes to which all persons upon the street are exposed, it cannot be said to arise out of the employment of the injured workman. But it has been said that the criterion is not that other persons are exposed to the same danger; but, rather, that the employment renders the workman peculiarly subject to the danger. \* \* \*

"In order that the injury may be one arising out of the employment, the workman must be acting within the scope of his employment at the time of his injury. \* \* \*

From Labatt on Master and Servant, p. 5419, we take the following:

"This phrase (out of and in the course of the employment) embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the master's business."

One of the cases cited in support of this text is where a collier was injured by the slamming of an iron gate, through which he was obliged to pass, on the premises of the employer, in the course of his employment.

In *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458, the Supreme Court of New Jersey said that the accident arises out of the employment when there is a connection between the conditions under which the work is required to be performed and the resulting injury. In *McNicol et al. v. Employers' Liability Ass'n Corp.*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, the Supreme Court of Massachusetts said:

"It is sufficient to say that an injury is received 'in the course of the employment' when it comes while the workman is doing the duty which he is employed to perform. It arises 'out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment. \* \* \* But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

In *Fitzgerald v. Clarke*, 99 L. T. N. S. 101, 1 B. W. C. C. 197, Buckley, L. J., said:

"The words 'out of' point to the origin or cause of the accident; the words 'in the course of' to the time, place and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words 'out of' involves the idea that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incident to the employment."

However, after vain attempts at formulating some verbal test for determining when the injury has or not arisen out of the employment, the courts have come to the conclusion that each case must be determined from its own facts; that the question cannot be solved by phrases. Illustrative cases, therefore, will best serve as a guide to what has been considered to be the intention of the statute. An abundance of such is to be found in the L. R. A. 1916A, page 41 et seq., note mentioned above. Thus—

A cabman was shot by a sentry, whose challenge he did not hear, as he was driving an officer into a fort. The court thought the accident arose out of the employment "since he was exposed to a special risk."

A sailor fell down a hatchway while washing his clothes. The work of washing his own clothes was said to be "incidental to the employment of a sailor."

And the same view was taken where a stable boy while eating his dinner was bitten by the stable cat.

And so where a ship carpenter was burnt as the result of a match, thrown away by a shoreman, having accidentally fallen among some shavings. The reason given was that the carpenter was required by his employment to work among shavings, and that he had gotten oil upon his trousers in the course of his work.

I likewise where an insurance collector slipped on a stair while on his rounds. The accident was said to have been brought on by the employment.

But not so where a workman while at his work was stung by a wasp.

Nor where an employé, in her fright at a cockchafer flying into the room, ran her thumb into her eye. *Cozens-Hardy, M. R.*, said:

"It is not enough for the plaintiff to say: The accident would not have happened if I had not been engaged in that employment. He must go further and say: The accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some peculiar danger."

At page 42: Nor where a tuberculous workhouse keeper fell from giddiness brought on by a fit of coughing while he sat on the steps leading to his room. It was thought that "there was nothing peculiar to the employment which rendered the risk greater than that to which other persons were subjected."

Nor where a janitor was overcome by heat

while in the street taking a message from one headmaster to another.

Nor where a painter's laborer was knocked down by a tram car while crossing a street to get some paint needed in his work. It was said to have been "merely a street accident to which all persons were subjected."

And so a charwoman sent by her employer to post a letter, who stumbled and fell while on her way to the post office.

But in two cases of collectors injured while riding on a bicycle in the course of duty, one kicked by a horse and the other colliding with a tram car, a different view was taken. It was said that a collector "is peculiarly exposed because of the fact that he is obliged to go out upon the street almost continually." And the same was said in the case of a drayman. But these cases were distinguished in a case where the workman was obliged to go but once or twice a day over a quiet country road; and in another case where the manager of a branch store had to go once a week two miles on his bicycle to submit his books for inspection, and slipped off his bicycle.

A stone mason struck by a slate blown off a neighboring building was allowed to recover, because the stooping position he was forced to occupy in doing his work rendered him less able to see the slate coming.

On the other hand, a carter struck by a piece of iron blown off an adjoining building was denied recovery.

At page 234: An employé going around delivering meat for a butcher stumbled against a bucket on the street. He was denied recovery.

On the other hand, a wagon driver who was injured in jumping off his wagon in order to drive away some boys hanging on the rear was allowed to recover.

"An injury to a city employé, who, after reporting according to custom for instructions as to where he is to work during the day, falls on the sidewalk while on his way towards such place, grows out of and is incidental to his employment."

At page 236:

"An employé sent to repair water mains between the tracks of a railroad is not outside of his employment in going to a hand car ten steps away to put on rubber boots, where that was the only place except the ground that he could sit on in order to put on boots and he had been told to bring the boots with him, and he could perform his work better when wearing them."

"That an injury should arise out of and in the course of the employment, it is not necessary that the employé be actively employed at the time of the injury. Thus a workman exposed to severe weather, and injured while warming himself, may be found to have been injured by accident arising out of and in the course of his employment. So an injury may be found to arise out of and in the course of the employment of a workman, where it is received while he is seeking shelter from a storm and at a place away from the immediate place of his work. And injuries received while necessarily crossing a street to seek toilet facilities arise out of and in the course of the employment. So an employé in a factory is still in the employ of the master while accepting the convenience of a toilet maintained by the employer. \* \* \*

At page 314:

"Some of the cases, however, make a distinction in the case of workmen whose duties are such that they are obliged to be continuously upon the street, or at least to spend a considerable portion of their time there; the theory being that the very nature of their employment subjects them to street dangers more than persons generally are subjected, and consequently injuries from such dangers must be considered as arising out of their employment. \* \* \*

[2] In the case at bar the learned counsel for the defendant argue that if the accident to plaintiff had been the result of a hammer flying off the handle or a nail striking him in the eye, a scaffold breaking and throwing him to the ground, or any of the accidents resulting from the hazards of a carpenter's trade, the injury would have arisen out of plaintiff's employment; but that a door blown to by the wind is not an accident which arises out of a carpenter's business any more than out of a merchant's, conductor's, painter's, housekeeper's, or any other line of business.

As we understand this argument it is to the effect that the cause of the injury, or, in other words, the agency producing it, must be something peculiar to the line of the employment. According to this, if a carpenter had to pass through a certain narrow alleyway on the employer's premises in going to and returning from his work and his foot went through the rotten floor, he could not recover, because he was not engaged in repairing this floor, and in a man's foot going through a rotten floor there is nothing peculiar to the line of business of a carpenter or incidental to the character of the work; but if a messenger boy or a collector, whose work consists mainly in going about from place to place, were to step into this same rotten floor, he could recover, because the accident had arisen out of a risk peculiar to his line of business. Or if the plaintiff in this case, in going to and from his work, had had to walk across the network of railroad tracks adjoining the said two repair tracks and in doing so had been run over by a locomotive, he could not have recovered; but a brakeman or flagman injured under the like circumstances could recover.

This, it seems to us, is putting too narrow a construction upon the statute. It ought to be sufficient that the nature of the employment was such that the risk from which the injury resulted was greater for the workman than for a person not engaged in the employment. This is certainly the view that has been taken in street accidents, where relief has been allowed in certain cases and not in others.

In the instant case the plaintiff would certainly not have been denied recovery if the car had fallen upon him while he was taking the measurements. And the reason would have been that the exigencies of his employment had imposed upon him the risk from his exposure to which he had suffered.



But what difference is there in principle between the car falling upon him while he is actually taking the measurements, and its door striking him while he is compelled to be near it on his way to take them, or else on his way back after having taken them? What difference between the case of a brakeman or locomotive engineer or fireman injured because of having to work in and about cars and about railroad tracks in the course of his employment, and that of a carpenter exposed in the course of his employment to the same risk? If one of the former had been struck by this door in going to or from his work we do not imagine any one would doubt that the injury had arisen out of the employment. We can see no difference between their case and that of the carpenter exposed to the same risks, and conclude that the injury to plaintiff arose out of his employment.

The learned counsel for defendant say that plaintiff was not working on the car, but under the shed, and therefore was not exposed to any danger peculiar to railroad operation. But the taking of these measurements was working on the car and in and about railroad tracks, as much so as if plaintiff had been nailing a board on the car or doing any other kind of work in or on it.

[3] Next, defendant contends that this carpenter's work was not hazardous, and that the said statute applies only to employments of a hazardous character; that if it applied to employments not of that character it would be unconstitutional. Plaintiff, on the other hand, contends that the particular work he had in hand was hazardous, since it was in and about railroad cars and tracks; but that even if it had been otherwise, still it would have been covered by the statute, and the statute would have been constitutional, as witness the decision of the Supreme Court of the United States in *Mobile & Co. v. Turnipseed*, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463.

Agreeing, as we do, with the first branch of this contention of plaintiff's, as appears from what has been already said in this opinion, we are dispensed from going into the constitutional question thus raised, and refrain from doing so—inviting though the field has been made by the thorough, strong, and clear presentation of the opposite sides of the controversy in the briefs of the learned counsel.

The next and last question is as to whether the disability of plaintiff is partial or total. Section 8 of the statute provides:

"(c) For injury producing permanent partial disability, the compensation shall be one-half of the difference between the average weekly wages of the injured employé before the injury and the average weekly wages which he is able to earn thereafter, subject to a maximum of ten dollars per week, to be paid for a period not exceeding three hundred weeks. \* \* \*

"(d) For injury producing permanent total disability to do work of any character, fifty per centum of the average weekly wages, but not

more than ten dollars, nor less than three dollars per week for a period not exceeding four hundred weeks."

Plaintiff was at the time of the injury 60 years old. His hip joint was fractured. One year later, at the time of the trial, he was still unable to go about without crutches, and he will never be able to do such parts of a carpenter's work as climbing ladders, or much walking around, or even much standing; but he may get well enough to engage in such manual labor as would not require the use of the injured limb. He will all his life need a crutch, more or less, but may perhaps get so as to be able to go about to some extent with the aid merely of a stick. Up to the time of the trial he had not been able to do any work of any kind; and he testified that, judging from how he then felt, he should never be able to do any.

[4, 5] In the case of *Mellen Lumber Co. v. Industrial Commission of Wisconsin*, 154 Wis. 114, 142 N. W. 187, L. R. A. 1916A, 374, Ann. Cas. 1915B, 997, the expression "total disability" was interpreted to mean total inability to perform work of the character in which the injured employé was engaged at the time of the accident, regardless of his earning capacity in other occupations. Such an interpretation is not possible under our statute, since its wording is "total disability to do work of any character." We have to hold, therefore, that the disability of a workman who has lost the use of one of his legs from the hip joint down is not necessarily total, since within the meaning of our said statute many lines of work are open to a man in that condition. Inasmuch, however, as up to the time of the trial the plaintiff had been unable to do work of any kind, he was up to that time totally incapacitated; and this incapacity will continue as long as the healing process of nature shall not have been so far accomplished as to enable him to do manual work of some kind. Moreover, the view taken by the English House of Lords in *Ball v. Hunt* [1912] A. C. (Eng.) 496, 81 L. J. K. B. N. S. 782, 106 L. T. N. S. 911, appears to us to be highly reasonable. Lord Atkinson expressed it as follows:

"The words 'incapacity for work' may mean physical inability to do work so as to earn wages, or it may mean inability to get employment due to the belief of employers in the unfitness of the workman to perform work owing to the injury they perceive he has suffered."

Elderly men are nowadays more or less out of the running when it comes to securing employment, and if by this infirmity plaintiff has been converted from an able-bodied carpenter securing work regularly in his trade into an infirm unable to secure remunerative employment of any kind, his incapacity must be held, we think, to be total under the statute. He is illiterate, and capable only of manual labor. The statute is one intended to be essentially practical in its operation. For a most illuminating note



on this topic of "Total Incapacity under Workmen's Compensation Act," see Ann. Cas. 1915B, 1000.

Another consideration is that, for rendering a judgment predicated upon "permanent partial disability," under paragraph c of section 8, supra, the record furnishes no data. Under this paragraph the judgment has to be for "one-half of the difference between the average weekly wages of the injured employé before the injury and the average weekly wages which he is able to earn thereafter." But how could this difference be ascertained in a case like the present, where the employé had not been well enough to engage in any remunerative employment whatever up to the time of the trial, and perhaps might never be well enough to do so; and, furthermore, even if well enough to work might be unable to obtain employment because of his unavailability resulting from his legless condition aggravated by his age?

The trial court gave judgment as for total disability. We shall affirm the judgment.

Paragraphs 1 and 3 of section 9 of the act, and the opening sentence of section 20, seem to contemplate the possibility of a subsequent change in the judgment to correspond with any change that may take place for better or worse in the condition of the injured person; but the second part of section 20 seems to limit this possibility to a change in favor of the workman, in the event of his condition getting worse, and not to allow any in favor of the employer in the contrary event; however, that is a point not up for decision in the present case.

Judgment affirmed.

(140 La. 350)

No. 21913.

METCALFE et al. v. GREEN et al.

In re METCALFE et al.

(Supreme Court of Louisiana, Oct. 6, 1916.  
Rehearing Denied Feb. 12, 1917.)

(Syllabus by the Court.)

1. MORTGAGES  $\S$  103—DESCRIPTION—CONSTRUCTION.

Where, in an act of mortgage, governmental subdivisions are designated by name and acreage as constituting the property mortgaged, and there is added a statement of the aggregate acreage, and a further statement of the plantation name by which the entire property is known, those three elements together constitute the description, and are to be regarded as employed in order that each may check and correct possible error in the others. It cannot, therefore, be said that either must, of itself, control the determination of the question of the true description of the property intended to be mortgaged.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig.  $\S$  212.]

2. PLEADING  $\S$  427—REFORMATION OF INSTRUMENTS  $\S$  41—OMISSION OF TRACT—CORRECTION—ALLEGATION AND PROOF—OBJECTIONS.

Where an act of mortgage declares that the appearer mortgages certain tracts of land, des-

ignated according to governmental surveys and acreage as "containing, in the whole," a stated number of acres, and "forming what is known as" a named plantation, and a tract actually forming part of such plantation is omitted, the error, in the omission, should be alleged and proved by him who seeks its correction; but where, in the absence of such allegation, the necessary proof is administered without objection, it will be given effect as though the allegation had been made.

[Ed. Note.—For other cases, see Pleading, Cent. Dig.  $\S$  1428-1432; Trial, Cent. Dig.  $\S$  266; Reformation of Instruments, Cent. Dig.  $\S$  153.]

3. CONTRACTS  $\S$  170(1)—CONSTRUCTION BY PARTIES.

When the intent is doubtful, the construction placed upon a contract by the parties thereto, or by one, with the assent of the others, furnishes a rule of interpretation.

[Ed. Note.—For other cases, see Contracts, Cent. Dig.  $\S$  753.]

4. QUIETING TITLE  $\S$  44(1)—REFORMATION OF INSTRUMENTS  $\S$  43—STATUTES—BURDEN OF PROOF.

Act No. 38 of 1908, being "An act to authorize \* \* \* suits to establish title," etc., contemplates a suit in which the litigants come before the court upon equal terms, and subject only to the ordinary rules in regard to the burden of proof, one of which is that he who alleges error in an authentic act, or in any act under which he asserts title to real estate, carries the burden of proving what he alleges.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig.  $\S$  89; Reformation of Instruments, Cent. Dig.  $\S$  154.]

Suit by Anne Metcalfe and others against Thomas K. Green and others. Judgment for defendants, and plaintiffs apply for certiorari. Application rejected, and suit dismissed.

Gilbert Potter Bullis, of Vidalia, for plaintiffs. Dale & Young, of St. Joseph, for defendants.

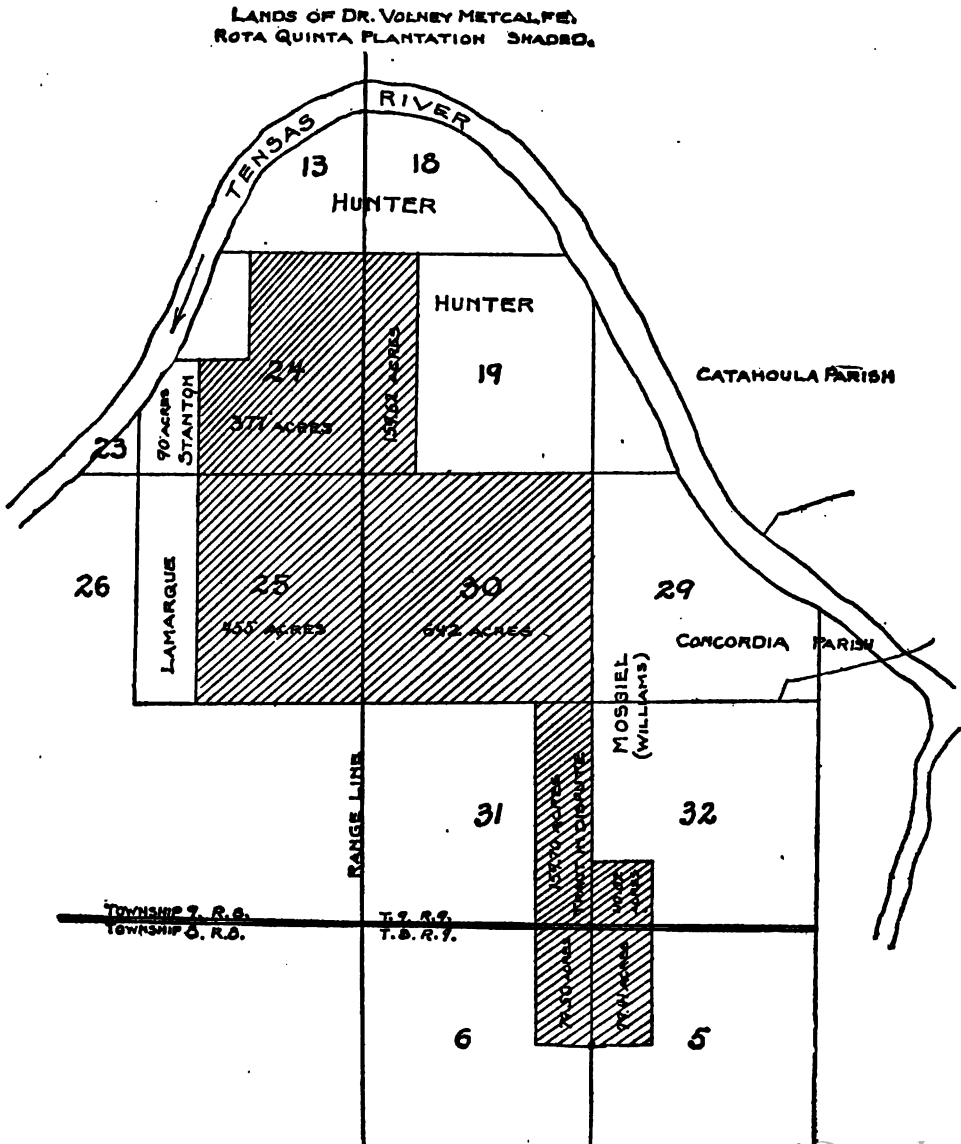
Statement of the Case.

MONROE, C. J. Plaintiffs, the widow and heirs of Dr. Volney Metcalfe and of a deceased coheir, brought this suit, under Act No. 38 of 1908, to "establish title" to the east half of the east half of section 31, township 9 north, range 9 east, in the parish of Concordia, and they are before this court asking for the review of an adverse judgment, rendered by the district court and affirmed by the Court of Appeals, Second Circuit. The parties named in the petition and W. D. Mounger, receiver of the Tensas River Planting Company, appeared, and, by way of answer, alleged that the tract described was included in and sold as part of the "Rota Quinta Plantation," under a mortgage imposed upon the plantation by plaintiffs, and was so acquired, through mesne conveyances and inheritance, by the defendants Mrs. Ellen H. Green and her children; that Mrs. Green died since the institution of this suit, and her children, inheriting her interest, conveyed the plantation, including the tract in question, to Ellen H. Green Company, by which it was similarly conveyed to First

Natchez Bank, which, in like manner, conveyed it to W. P. Campbell, who conveyed it, as part of said plantation, to Tensas River Planting Company, of which the defendant W. D. Mounser is receiver. They alleged that they and their authors in title had enjoyed open and uninterrupted possession of said plantation and tract, under a title transmissive of property, for more than 10 years prior to the institution of this suit, and they pleaded the prescription of 10 years. They also alleged that if plaintiffs ever had any interest in said property, they had abandoned it for more than 30 years, and were estopped to disturb defendants with respect to such interest which defendants had, in the meanwhile, acquired.

The subjoined sketch, which is a composite of the several plats of survey that we find

in the transcript, shows with sufficient accuracy (in the shaded areas) the land owned by Dr. Metcalfe at the time of his death. As to the acreage, the figures on the sketch (taken from one of the plats in the record) differ slightly from those found by the counsel, respectively, but the difference is immaterial, for the purposes of this opinion. The main body, of say 1,100 acres, being the land in sections 25 and 30, was bought in 1845, under one title, from J. Franklin Ford, and the various other tracts were acquired from the United States, by different entries, in 1846, the E.  $\frac{1}{2}$  and S. W. (fractional)  $\frac{1}{4}$  of section 24 having been included in those entries, but Dr. Metcalfe in 1851 sold to Fred Stanton, as "supposed to contain about 90 acres," that portion of section 24 which, on the "sketch," bears the legend "90 acres, Stanton."



The land so acquired was used as a cotton plantation, the arable portion of it lying in sections 19, 24, 25, and 30, whilst that lying in sections 31, 32, 5, and 6, was, as we take it, a wooded swamp. Dr. Metcalfe died in 1852, leaving six children, all minors, one of whom died in infancy. His widow, originally plaintiff herein (who has died since the institution of this suit) presented to the district court a petition in which she alleged the death of her husband, and that he had "left, at his death, in this parish, considerable property, consisting of a cotton plantation, slaves, and personal property," and she caused an inventory to be made, of which only an excerpt relating to the land is copied in the transcript, with a notation, however, concerning the other property, as follows:

"A tract of land situated on, and adjacent to, the river Tensas, in this parish, cultivated as a cotton plantation and bounded on the north and east by lands of B. F. B. Hunter; south-east, by D. P. Williams' Mosgiel place; south-west and west, by lands of Fred Stanton, containing 3,200 acres; appraised at \$26,000. [Next follows a long list of slaves and other property.]"

It is beyond dispute, notwithstanding the estimated acreage as thus stated in the inventory, that the decedent owned no other land in the parish at the time of his death, and had never owned any other than that which is exhibited on the above-mentioned sketch.

The widow and tutrix went on with the cultivation of the plantation, and in April, 1867, in her own behalf and as tutrix of James A. Metcalfe, who was still a minor, and in conjunction with the other children, who had attained majority or had been emancipated, she executed an act of mortgage in favor of M. Gillis & Co. (to secure three notes given by the mortgagors for advances) in which the mortgaged property is described as follows (omitting so much as is not here needed), to wit:

"First. A certain tract of land, \* \* \* being the whole of section number thirty (30) in township number nine (9) of range number nine (9) east, and such part of section number twenty-five (25) of township nine (9) of range number eight (8) east, as will make up eleven hundred acres; \* \* \* and \* \* \* the west half of the northwest quarter and west half of the southwest quarter of section nineteen (19), township nine (9), range nine (9), \* \* \* containing one hundred and fifty-nine 62/100 acres. 159.62.

"East half and southwest quarter, fractional quarter, section twenty-four, township nine (9), range nine (9) east, \* \* \* containing four hundred and sixty-seven acres. 467.

"West half northwest quarter, section five, township eight (8), range nine (9), \* \* \* containing seventy-nine 41/100 acres. 79.41.

"East half northeast quarter section six, township eight (8), range nine (9), \* \* \* containing seventy-nine 50/100 acres. 79.50.

"Containing, in the whole, about nineteen [hundred] acres, and forming what is known as Rota Quinta Plantation."

In January, 1872, Charles E. Alter obtained judgment by confession, on two of the notes to secure which the mortgage thus men-

tioned was executed, with recognition of the mortgage, but with a stay of execution, and it was not until February 28, 1877, that he caused execution to be issued, under which, on March 2d, the mortgaged property was seized and advertised to be sold on April 7th. On February 28th, also, an instrument under private signature was executed with a view to effecting an amicable partition of the "Succession, \* \* \* consisting of the Rota Quinta Plantation, \* \* \* being the whole of section number thirty (30)," etc. (the description being the same as contained in the mortgage to M. Gillis & Co.), which description was followed by an agreement whereby Mrs. Metcalfe renounced her interest. Sections 25 and 30 were to be divided, by lines running from north to south, into five lots, containing, each approximately, 100 acres of arable land, and numbered from 1 to 5, beginning at the east side of section 30 and counting westward, and "all the swamp or wild lands of said plantation," lying south of said sections 25 and 30, were to be annexed to, and form part of, lot 1. A. W. Metcalfe, who was managing the plantation at that time, was the only party in interest who was present and signed the instrument, the others having been absent from the state and represented by an attorney at law, who also acted as their attorney in fact.

Thereafter, on April 6th, James A. Metcalfe and A. W. Metcalfe (proceeding in separate suits) enjoined the seizure under the judgment obtained by Alter, and thus inaugurated a litigation which was terminated by a judgment of this court, wherein it was held that the mortgage, judgment, and seizure were void as to James A. Metcalfe and his interest in the property, because of his minority, and that the attempted partition was a nullity, on its face, for several reasons; it being found, among other things, that the authority of the attorney who acted as agent was not sufficiently shown, and that he could not represent five different interests in the same transaction. *Metcalfe v. Alter*, 31 La. Ann. 389.

Alter then proceeded with the execution of his judgment, as amended, and, the sheriff having seized an undivided four-fifths interest in the mortgaged property, it was adjudicated to the plaintiff in execution, who, on May 10, 1881, received a sheriff's deed in which the description of the property as contained in the act of mortgage was amended by the insertion of the word "hundred," after the word nineteen. On June 10, 1881, Alter sold the interest so acquired, with the same description of the whole property, to James H. Pendleton, and, subsequently, caused it to be again seized, in a proceeding via executiva, in which, on April 21, 1885, it was adjudicated to Mrs. P. J. Pendleton, who on March 25, 1886, acquired also the interest of James A. Metcalfe, and on March 2, 1891, as a widow, with her son, James H. Pendleton, mortgaged the entire property to

Norman F. Thompson, by a description which was practically identical with that contained in the mortgage to Gillis & Co. and in the sale thereunder, save that the tract supposed to contain about 90 acres, which had, previously, been sold to Stanton, was omitted and that the acreage was fixed at 1,796.13 acres, more or less; the statement of the aggregate acreage being followed (as in previous acts) by the statement "and is known as Rota Quinta Plantation."

On May 8, 1896, Mrs. Pendleton conveyed the entire property to the Equitable Securities Company, by the description last above given; and on December 28, 1896, that company conveyed it, by the same description, to Edward H. Green and Thomas K. Green. Thomas K. Green thereafter died, and on December 31, 1901, Edward H. Green conveyed the half interest which he had acquired to Mrs. Ellen H. Green, the widow of Thomas K. Green, the description of the entire property being the same as that last above mentioned and the conveyance containing the usual warranty of title. There is, however, added to the deed, the following, to wit:

"And the said Edward H. Green, also, by these presents, \* \* \* doth release and quitclaim all title and interest and claim he may have, being an undivided one-half interest, unto the said Ellen H. Green, \* \* \* in and to the east half of the east half of section thirty one (31) in township nine (9) north, range nine east, \* \* \* containing one hundred and fifty-nine and seventy-five hundredths (159.75) acres, more or less."

And the title stood in that way (in Mrs. E. H. Green and the heirs of T. K. Green) at the time of the institution of this suit.

During the years 1890, 1891, 1892, 1893, and 1894 "Rota Quinta" was assessed in that name and by boundaries (i. e., the names of the adjacent plantations or proprietors alone being given). From 1896 to 1899, inclusive, it was assessed in that name, and also by the governmental descriptions of the five tracts mentioned in the title.

In 1900 the levee board employed counsel to search for property that was escaping taxation, and they reported the tract in dispute which their search had failed to disclose as included in either the title or the assessments of "Rota Quinta Plantation," and thereupon, and thereafter, the plantation was assessed by name and according to the acreage of the five governmental subdivisions, of which it had previously been described as constituted, and with reference to which it had been assessed and the tract in dispute was assessed as a separate property and continued to be so assessed until 1911, when, by advice of counsel, defendants had it included by the governmental description as one of the tracts constituting Rota Quinta Plantation, and it appears to have been so assessed since that time.

A. W. Metcalfe was deputy sheriff and ex officio tax collector of the parish for a number of years and never caused the prop-

erty here claimed to be separately assessed, or, save in casual conversations, asserted any interest in it, and when he died (in 1895) no land was inventoried in his estate.

#### Opinion.

The jurisprudence of this court is well settled, and well founded, to the effect that article 3306 of the Civil Code, which declares that it is necessary to the validity of a conventional mortgage that it should "state precisely the nature and situation" of the mortgaged property, is sufficiently complied with if the description identifies the property with reasonable certainty and is of such a character as not to mislead, or keep in the dark, creditors of the mortgagor or other persons having an interest.

In *City Bank v. Denham*, 7 Rob. 40, 41, it was said:

"The defendant cannot complain that he has been misled by the erroneous description of the lot. \* \* \* The lot was described with sufficient certainty, and in a manner not calculated to mislead or deceive any one."

In *Ellis v. Sims*, 2 La. Ann. 254, it was said:

"The land is described as situate on the Mississippi river, in the parish of Concordia; boundaries are stated, and the expression 'my land,' especially in the absence of any evidence showing the ownership of other land by Sims, is fairly comprehensive of the entire tract. \* \* \* The question is whether, under the circumstances any one contracting with Sims, or in anywise trusting him, \* \* \* would have been misled or kept in the dark by the omission to state the township, range and section, and the quantity of acres in Sims' tract. We think not; and are of opinion that in this case there has been a fair compliance with the requisition of law, that the mortgage and its registry shall 'state precisely the nature and situation' of the property."

In *Baker v. Bank of Louisiana*, 2 La. Ann. 371, the act of mortgage which was the subject of litigation described the mortgaged property as:

"A certain tract of land, or parcel of ground, with the improvements thereon, situate, lying and being in said parish, on the bayou Tunica, being the land and plantation purchased by the said Samuel Wimbish, at the probate sale of Samuel Davis, deceased, containing five hundred acres."

The court said:

"We consider the description sufficient. It states the parish, a stream on which the property lies, the number of acres, and the use made of the property, and recites the origin of Wimbish's title."

In *City National Bank v. Barrow*, 21 La. Ann. 396, it appeared that the mortgaged property was described as:

"Her entire landed interest in the aforesaid parish of West Feliciana, situated on and adjacent to the Mississippi river, and composed of 3,800 acres of land more or less, as per acts of sale to be found at my [the parish recorder's] office in the town of St. Francisville, parish aforesaid."

It was said by the court:

"The description is inartificial, but it can hardly be said to be insufficient. In the first place it declares the object mortgaged to be 'her entire landed interest in the parish of West Fe-

liciana"; in the second place it is stated to comprise 3,800 acres, more or less; in the third place it is stated to be on and adjacent to the Mississippi river; and finally it refers to certain titles of the mortgagor to be found in the office of the recorder, and to which we will again allude. \* \* \*

Thereafter, alluding to the titles, in answer to the contention that, at the date of the mortgage, there were four patents calling for 1,269.66 acres which were not in the recorder's office, the court said:

"We think this position untenable. The mortgagor hypothecated her entire landed interest in the parish, and at the time she owned the lands embraced in the four patents. She described it as embracing about 3,800 acres, and the amount of the eight tracts corresponds with that portion of the description. We regard the reference, 'as per acts of sale,' etc., not as limiting the previous portion of the description, but as merely explaining it, *pro tanto*."

In Consolidated Association v. Mason, 24 La. Ann. 518, the description in dispute was:

"Une terre de cinque arpents de face, limitrophe à la ville de Monroe, sur quarante arpents de profondeur, dont cinquante arpents sont cultivés en coton et maïs, le surplus étant en trois actions."

And the court said of the property so described:

"The situation of the property was adjoining or bounding the town of Monroe, and of such a shape, quantity and position as to inform any reasonable man of ordinary experience examining the public records for incumbrances on Mr. and Mrs. Mason's property, where the land was which they mortgaged," etc.

In Roberts v. Bauer, 35 La. Ann. 454, it appeared that the mortgaged property was described as "un vaste terrain à l'encolgnure des rues Orléans et Bourbon." The court quoted from Troplong (Hyp. et Priv. No. 536):

"Il ne faut pas apporтер esprit trop minutieux dans l'exigence de ces conditions. Il suffit que les parties aient employé telle ou telle désignation qui ne laisse pas de doute sur l'identité de l'immeuble"

—and held that the description was a fair compliance with the law.

In Dickson v. Dickson, 36 La. Ann. 870, it was held (quoting the syllabus):

"Where in an act of mortgage the property mortgaged is first described by legal subdivisions and these subdivisions are then declared to compose a certain plantation, giving the name thereof and otherwise sufficiently describing it apart from the subdivisions mentioned, held that the mortgage rested on the plantation and that parol evidence was admissible to show that the description by the legal subdivisions was erroneous and that said numbers did not, in whole or in part, compose the plantation."

In Bryan v. Wisner, 44 La. Ann. 832, 11 South. 290, it was held (quoting from the syllabus):

"If a portion of the description would mislead, it must be read with, and controlled by other parts which explain it; and an error in a description by legal subdivisions may be cured by other descriptive designations of the property in the conveyance, which leave no doubt of the particular tract that was intended to be sold."

See, also, Fleming & Baldwin v. Scott, 26 La. Ann. 545; Thornhill v. Burthe, 29 La. Ann. 639; Favrot v. Stauffer, 112 La. 164,

36 South. 307; Penn v. Rodriguez, 115 La. 174, 38 South. 955.

[1] In the instant case, the act of mortgage, after acknowledging the amount and form of the debt to be secured, proceeds as follows:

"Now, therefore, in order to secure \* \* \* the full and punctual payment thereof, \* \* \* the said parties \* \* \* do, by these presents, mortgage \* \* \* the following described property [and then follow descriptions, according to governmental surveys, with statements of acreage, of the five specified tracts of land, after which the act again proceeds], containing, in the whole, about nineteen acres, and forming what is known as 'Rota Quinta Plantation.'"

The subdivisions, the acreage of the subdivisions, separately and in the aggregate, and the recognized name and use made of the property, thus together constitute the description, and the purpose in employing them all was that each might check and correct errors in the others. And in that connection, we may say that, though the conclusion of the court, in Dickson v. Dickson (*supra*) seems to have been entirely authorized by the facts, it appears to us that the opinion is not altogether clear in its discussion of the relative importance of the descriptions of the subdivisions and of the designation, by name, of the plantation, since it is equally as competent for the vendor and vendee of a plantation to agree upon the parts of which it is composed as to agree upon the sale and purchase of the whole; and in the end the case was decided upon the ground that there was error in the description of the parts; and so, as we think, there was here.

[2] Dr. Metcalfe, in 1845 and 1846, purchased various contiguous tracts of land and went into the business of planting cotton. He appears to have had no other business that required the use of land, and at the time of his death all the land so purchased was inventoried as a cotton plantation, and he owned no other. His widow continued the planting of the place from 1852 until 1867, and obtained advances from her factors for that purpose. In the year last mentioned she, individually and as tutrix (of one of her children), and her major and emancipated children gave the mortgage to Gillis & Co. upon certain described tracts, and the mortgage concluded with the statement, "containing, in the whole, about nineteen acres, and forming what is known as Rota Quinta Plantation."

The omission of the word "hundred" (between the words "nineteen" and "acres") is said to have been corrected in the sheriff's deed, and appears in the copy of the act of mortgage, as we find it in the transcript. It is said that the property mortgaged was that which was stated in the act to have been mortgaged, to wit, the five tracts of land which were described, but the description did not end there; it went on to say that the property mortgaged consisted of about 1,900 acres of land, and that it was "known as

Rota Quinta Plantation," and as a matter of fact, the plantation, as it was then "known" and had always been known, consisted of the described tracts, plus two tracts that were not included in the description, to wit, the tract here in dispute and the tract of 40.02 acres in section 32; but, whilst the tracts, as described, contained but 1,885.53 acres, the addition of the two tracts that were omitted would make a total of 2,085.30 acres, and the subtraction therefrom of the 90 acres, sold to Stanton, would leave 1,995.30 acres, or 108.77 acres in excess of the estimated total called for by the title. Corroborative evidence to the effect that all the land left by Dr. Metcalfe had been, and continued to be, known as a single plantation, is however, to be found in the proceedings with a view to the partition. Conceding that those proceedings were void for the various reasons stated by this court, they, nevertheless, at a time unsuspecting and in a matter wherein the participants were acting wholly in the interests of the defendants, expressed a recognition of the fact, in harmony with all the other facts that are disclosed, that the succession of Dr. Metcalfe, as to the real estate, consisted of Rota Quinta Plantation, and that Rota Quinta Plantation included all the wild lands lying to the south of sections 25 and 30; which is a matter of no little significance, since Andrew W. Metcalfe himself was one of the participants in the proceedings, and this court found that about the time that the mortgage was executed he "had control and management of the plantation," from which it is fair to infer that he was fully informed as to its composition.

Again, by reference to the "sketch," it will be seen that the tract in dispute, being a strip a mile long by a quarter of a mile in width, is the connecting link between the body of the plantation and the smaller tracts lying in sections 5, 6, and 32, and that, by leaving it out, the mortgage would be left to rest upon a plantation consisting of two parts, a mile away from each other, the one composed of over 1,600 acres of arable land, and the other, counting the tracts in sections 5 and 6, of say 160 acres of swamp, or woodland, acquired, presumably, in order to supply the plantation with fuel, fencing, and perhaps lumber.

And, in addition to the circumstances mentioned, there appears the fact that, from the date of the sale to Alter in 1881, until this suit was filed, on December 30, 1911, a period of 30 years, neither of the heirs ever suggested the idea that the disputed tract had not been included in that sale and in the various sales which followed, and, though Andrew W. Metcalfe had, in the meanwhile, been deputy sheriff, sheriff, and tax collector, and was therefore in a position to have become informed of his rights, he died in 1894, leaving no real estate, or claim to real estate in the

parish, so far as appears from the proceedings in his succession.

[3] "When the intent of the parties is doubtful," says the Code, "the construction put upon it, by the manner in which it has been executed by both, or by one with the express or implied assent of the other, furnishes a rule for its interpretation." C. C. art. 1956; *Marcotte v. Coco*, 12 Rob. 167; *Fontenot v. Manuel*, 46 La. Ann. 1373, 16 South. 182; *Succession of Bidwell*, 51 La. Ann. 1986, 26 South. 692.

It is true that in the meanwhile also the tract in question had not appeared, with the others described in defendant's title, upon the assessment rolls, but that was for the same reason that it had not appeared in the title, to wit, it had been overlooked. As a legal proposition, we are of opinion that the adjudicatees under the Alter judgments, and their immediate successors, in taking possession of the property "known as Rota Quinta Plantation," had taken possession of it, as they had acquired it, i. e., as part of that plantation. The learned counsel for plaintiffs argue that there could have been no consent, and hence no contract, concerning property of the existence of which the contracting parties were ignorant; but that is not the law. The articles of the Civil Code, to which he has referred us, declare that:

"However general be the terms in which a contract is couched, it extends only to the things concerning which it appears that the parties intended to contract" (article 1959); but that "when the object of the contract is an aggregate composed of many or of different articles, \* \* \* the \* \* \* aggregate name will include all the particular articles which enter into the composition of the whole," though not specified and even though "unknown to both or either of the parties" (article 1960).

An exception is provided to the rule last stated, however, in a case where, although the aggregate appellation be used, it appears from some other part of the contract that the intent of the parties was "not to include the whole, but only that part of which they had notice, in which event, such evident intent," says the lawmaker, "shall correct the universality of the description." And by way of illustration it is said:

"Thus, in a release of a whole share in a succession, if there be a reference to an inventory as descriptive of what that share is the contract, notwithstanding the general terms, shall be confined to what is contained in the inventory." Article 1961.

It might, perhaps, be contended that this case falls within the exception thus provided, and that, if a reference to the inventory, in the case of the sale of a share in a succession, confines the contract to what is contained in the inventory, a fortiori will the enumeration, in the contract itself, of the parcels of land said to constitute the property mortgaged, confine the mortgage to the parcels mentioned in the enumeration. The answer to that contention is that the mention of the parcels of land with which we are concerned was not in-

tended as an "enumeration," in the technical sense of that term, but was made as one part of the description of the property intended to be mortgaged, the other parts of which were the statements of the aggregate acreage and of the designation whereby the entire property was known, and that all the parts are to be construed together, and so far as possible, harmonized, in the light of the surrounding circumstances.

It will be observed that the article of the Code reads:

"Such evident intent shall correct the universality of the description."

But, in this instance, we think the intent, though perhaps not evident on the face of the instrument, has been made evident by the surrounding circumstances, and that it was the reverse of that which would be required to bring this case within the exception to the general rule established by Act No. 196.

It is true also that in 1881 Mrs. Pendleton (widow) and J. H. Pendleton, as owners and mortgagors, with Norman F. Thompson, as mortgagee, agreed upon a correction of the description of the property, "known as Rota Quinta Plantation," whereby and wherein the tract which had been sold to Stanton was eliminated (no attempt being made to include the tract here in dispute or the 40.02 acres in section 32), and the aggregate acreage of the property, as acquired under the Gillis & Co. and Pendleton mortgages, was reduced from "about 1,900 acres" to 1,796.13 acres, and it was according to that title and that acreage that the property passed to defendants, whose immediate authors therefore bought it as containing 1,796.13 acres, and, so far as we are informed, got all that they bought, as did the defendants; so that the loss resulting from the error in the description in the mortgages appears to have fallen, not on the defendants, but on the Pendletons, who bought the property as containing "about 1,900," and sold it as containing 1,796.13 acres. It is likewise true that in 1901 Edward H. Green sold his undivided one-half interest in the property "known as Rota Quinta Plantation," with full warranty of title (and on the basis of 1,796.13 acres for the whole) to Mrs. Ellen H. Green, and that by the same act he "quitclaimed" to Mrs. Green his interest (described as an undivided one-half) in the tract in dispute. It is further true that, from 1900 to 1911, the tract in dispute was not assessed as part of "Rota Quinta," but as a separate property, and was assessed as part of the plantation for the first time in 1911, from which we infer that from 1881 to 1900 there were no taxes paid on it by defendants. On the other hand, there were no taxes paid during that period by plaintiffs, nor, as we imagine, have any been paid since then. If, however, the view that we have taken of the matter be correct, and we hold it to be, the facts thus recapitulated are of no interest to plaintiffs, since it

must follow that they were divested of their title to the property in controversy by the sales made, the one by James A. Metcalfe of his interest in 1878, the other by the sheriff, under the Alter judgment, in 1881.

In conclusion, we may say that as the Gillis & Co. mortgage purports to show the different tracts of which the property therein designated as the "Rota Quinta Plantation" was comprised, and as the tract held in dispute, though one of them, was not included, we are of opinion that its omission was an error in defendants' title which defendants should have alleged as a condition precedent to proving; but, though they made no such allegation and rested on the mere averment that the tract was conveyed as part of "Rota Quinta," the evidence showing, not only that it was part of Rota Quinta but that it was reasonably certain that it had been omitted from the mortgage through error, was admitted without objection, and hence has been considered as supplying the formal allegation of error in the title.

[4] Act No. 38 of 1908, being an "Act to authorize \* \* \* suits to establish title to real estate where none of the parties are in \* \* \* actual possession of the same," etc., we think contemplates a suit in which the litigants come before the court upon equal terms and subject only to the ordinary rules in regard to the burden of proof, one of which is that he who alleges error in an authentic act or in any act under which he claims title to real estate carries the burden of proving what he alleges. We have considered the case from that point of view and are of opinion that defendants have carried the burden of proof, and that the learned judges of the district court and Court of Appeals, whose able opinion we appreciate, have correctly decided that they have the better title.

It is therefore ordered that the demands of the applicants herein be rejected, and this proceeding dismissed at their cost.

(140 La. 969)

No. 21944.

# HIBERNIA BANK & TRUST CO. v. SUCCESSION OF CANGIENNE.

(Supreme Court of Louisiana. Feb. 12, 1917.)

(Syllabus by the Court.)

## 1. CORPORATIONS — 325 — GUARANTY — 7(2) — DIRECTORS — FIDUCIARY RELATION — KNOWLEDGE.

The directors of a corporation are charged with knowledge of its financial condition and transactions. They are in the position of trustees, and the creditors, like the stockholders, of the corporation, are the cestui que trust. On account of that fiduciary relation of the directors of a corporation to its creditors, the directors are under a certain moral obligation to see that the creditors of the corporation are paid. Hence one who signs a continuing guaranty to be responsible for any loans or advances made or to be made to a corporation of which

he is a director is charged with knowledge of the debts contracted on the faith of his guaranty and is not entitled to receive a formal notice from the guarantee of the acceptance of the contract of guaranty in order to bind him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1442, 1457, 1458; Guaranty, Cent. Dig. § 9.]

## 2. GUARANTY ⇌21—NOTICE OF ACCEPTANCE—WAIVER.

Although one who merely offers to become a guarantor for the payment of debts to be contracted by a third party is entitled to have notice of acceptance from the guarantee in order to complete the contract, such notice may be waived by the guarantor, and the waiver may be implied from the language or terms of the instrument of guaranty.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 23.]

## 3. GUARANTY ⇌7(1)—ACCEPTANCE—NOTICE—LIABILITY.

One who signs as guarantor an instrument whereby he declares that he binds himself to an amount stated in the instrument, for the payment of any indebtedness of the third party named therein to the guarantee named therein, whether existing or to be thereafter incurred, expressly binding himself in solido with the principal debtor as if the debts were contracted by him in person, is not entitled to be notified by the guarantee of the acceptance of the guaranty in order to render the guarantor liable for debts contracted on the faith of the guaranty.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 9.]

## 4. GUARANTY ⇌7(1)—COMPLETION OF CONTRACT—NOTICE OF ACCEPTANCE.

When an instrument of guaranty has been signed by the guarantor at the request of the guarantee and delivered by the guarantor to the guarantee or to the principal debtor to be by him delivered to the guarantee, the contract of guaranty is completed by the guarantee's acting upon it by advancing or loaning money to the principal debtor on the faith of the guaranty, and the guarantor is not entitled to notice of acceptance of the guaranty from the guarantee.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 9.]

## 5. GUARANTY ⇌53(1)—CONTINUING GUARANTY—LIABILITY.

A continuing guaranty, whereby the guarantor binds himself for the payment of such debts as the party named in the instrument may incur from time to time, continues in force until it is revoked. The guarantor, under a continuing guaranty, is not released from his liability by the fact that the debt contracted on the faith of the guaranty was discharged and revived during the term of the guaranty.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 64, 66.]

## 6. GUARANTY ⇌38(2) — CONSTRUCTION — CONTINUING GUARANTY.

Although the amount of the liability of the guarantor be limited, if the time be not expressly limited, the instrument is a continuing guaranty, to the amount for which the liability of the guarantor is limited, if the language of the instrument shows that the purpose was to give a standing credit to the principal debtor to be used from time to time.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 47.]

## 7. GUARANTY ⇌53(1)—RELEASE—EXTENSION OF EXCESS CREDIT.

In the absence of an express stipulation that the guarantor shall be released from liability in the event the guarantee extends credit to

the principal debtor beyond the amount stipulated, the guarantor is not released by the mere fact that credit is extended beyond the limit of the guarantor's liability. In such case the guarantor is liable to the amount stipulated, though not for the excess.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 64, 66.]

## 8. GUARANTY ⇌77(2) — LIABILITY — CONDITION PRECEDENT — PROCEEDING AGAINST PRINCIPAL DEBTOR.

If the guarantor expressly declares in the instrument of guaranty that he binds himself in solido with the principal debtor as if the obligation were contracted by him, the guarantor, in person, the latter is not entitled to the plea of discussion or to require the guarantee to proceed against the principal debtor before proceeding against him, the guarantor.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 89.]

Appeal from Twenty-Seventh Judicial District Court, Parish of Assumption; Charles T. Wortham, Judge.

Action by the Hibernia Bank & Trust Company against the Succession of Leo Candienne. Judgment for plaintiff, and the administratrix of the succession appeals. Affirmed.

Marks, Le Blanc & Talbot, of Napoleonville, and Grant & Grant, of New Orleans, for appellant. McCloskey & Benedict and Frank Wm. Hart, all of New Orleans, for appellee.

O'NIELL, J. The administratrix of the succession of Leo Candienne has appealed from a judgment rendered against the succession for the sum of \$15,000, with legal interest from judicial demand.

The suit was upon two written instruments dated, respectively, the 16th of August, 1911, and the 23d of September, 1911, signed by Leo Candienne, for \$7,500 each, purporting to guarantee the payment of any indebtedness to that amount due or to become due to the Hibernia Bank & Trust Company by the Sugar Planters' Storage & Distributing Company. The instruments, being on printed forms furnished by the bank, are identical, except as to the date. In the following copy of one of them the words and figures written with a pen are produced in italics, to distinguish them from the printed matter in the form of the instruments, viz:

### "Continuing Guaranty.

"In consideration of the giving of credit to *Sugar Planters' Storage & Distributing Co.* hereby give this continuing guaranty to the Hibernia Bank & Trust Company, New Orleans, La., for the payment in full, together with all interest, fees, and charges of whatever nature and kind, of any indebtedness of said company to said Hibernia Bank & Trust Company, up to the amount of *seventy-five hundred dollars*, whether on open account or evidenced by note, secured or unsecured, due and owing at the present time, or that hereafter may be due and owing by *Sugar Planters' Storage & Distributing Company, I*, holding myself, my heirs and assigns, in solido with the said company responsible for the said obliga-



tions, precisely as if the same had been contracted and due or owing by me in person; and, waiving pleas of discussion and division, I agree to pay upon demand at any time, the full amount due by said company to said bank, up to the amount of this guaranty, together with interest and charges, becoming subrogated in the event of payment in full by me to the claim of said bank, together with whatever security it may hold against said indebtedness.

"This done and signed this 28d day of September, 1911.

"Witness: [Signed] L. Cancienne.

"[Signed] Emile Cancienne."

The defenses to this suit are as follows, viz.:

First. That Leo Cancienne's signature to the instruments was obtained by the Sugar Planters' Storage & Distributing Company by fraud and misrepresentation, when the latter was not legally incorporated and was insolvent, to the knowledge of the plaintiff.

Second. That each of the instruments sued on is a nudum pactum, because the bank did not give notice to Leo Cancienne of an acceptance of his guaranty or offer of guaranty, and, in fact, did not accept the same, and hence there was no obligation on the part of the bank to loan or advance money to the Sugar Planters' Storage & Distributing Company after the signing of the instruments.

Third. That whatever indebtedness, if any, was due to the bank by the Sugar Planters' Storage & Distributing Company before the instruments were signed by Leo Cancienne has since been paid and satisfied by collections made by the bank from, or for account of, the Sugar Planters' Storage & Distributing Company.

Fourth. That the plaintiff has no cause or right of action against the defendant without having obtained judgment against, and without having discussed and exhausted the property of, the Sugar Planters' Storage & Distributing Company, and that no judgment can be obtained against the latter in this suit, because the company is not a party hereto.

Taking up the defenses in the order stated above, we find no merit whatever in the first of them. The instruments sued on were signed by Leo Cancienne voluntarily and with full knowledge of the responsibility he was incurring. The allegation that the Sugar Planters' Storage & Distributing Company was not legally incorporated is not borne out by the evidence and would be unimportant to the issues in this case, if true. Leo Cancienne was one of the directors of the company continuously from the time of its incorporation until liquidators were appointed to settle its affairs. He was present at the meeting of the board of directors at which one of its officers explained the proposition of the Hibernia Bank & Trust Company to have the directors sign the continuing guaranties, of which Mr. Cancienne afterward signed the two sued on. There is evidence to the effect that, when Mr. Cancien-

ne signed the instruments, only the amount, \$7,500, was written in the printed form, and that he said he was signing only as a matter of form. It also appears, however, that the idea expressed at the previous meeting of the board of directors that the signing of these instruments was only a matter of form was based upon the belief that the guarantors would be fully protected by the pledges that were afterwards made to the Hibernia Bank & Trust Company of certain molasses bought with the funds loaned by the bank on these guaranties. The binding effect of signing as guarantor or surety with such an understanding was recognized in the decisions in *Interstate Trust & Banking Co. v. Irwin*, 138 La. 337, 70 South. 317, and *First State Bank v. Davis et al.*, 139 La. 723, 72 South. 186.

Mr. Cancienne delivered the instruments to the manager of the Sugar Planters' Storage & Distributing Company to be turned over to the bank; and all of the writing on them was done before they were delivered to the bank. Mr. Cancienne knew that the bank would not accept his guaranty only as a matter of form.

[1] The question of solvency or insolvency of the Sugar Planters' Storage & Distributing Company at the time these guaranties were signed is a matter of no importance whatever. The evidence shows that the capital stock of the corporation was paid in, but that the corporation had no funds with which to buy molasses except what money it borrowed from the Hibernia Bank & Trust Company. It was to secure the loans made and to be made for that purpose that these guaranties were signed. It is presumed that Mr. Cancienne, as a director of the Sugar Planters' Storage & Distributing Company, had knowledge of its financial condition and transactions. The directors of a corporation are trustees, and its creditors, like the stockholders, are the *cestui que trust*. On account of that fiduciary relation of the directors to the corporation and to its creditors, the directors are under a certain moral obligation to see that its creditors are paid. See *Brashear v. Alexandria Cooperage Co.*, 50 La. Ann. 589, 23 South. 540; *Cahill v. People's Slaughterhouse & Refrigerating Co.*, 47 La. Ann. 1483, 17 South. 784; *Hancock v. Holbrook*, 40 La. Ann. 53, 3 South. 351; *Frellsen v. Strader Cypress Co.*, 110 La. 877, 34 South. 857; *Cochran v. Ocean Dry-Dock Co.*, 30 La. Ann. 1385; *Jackson v. Ludeling*, 21 Wall. 616, 22 L. Ed. 492; *Drury v. Cross*, 7 Wall. 299, 19 L. Ed. 40; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328. Hence the directors are charged with knowledge of the contractual obligations of the corporation.

[2-4] With regard to the second defense it is conceded by the plaintiff that the bank did not notify Mr. Cancienne of its acceptance of his contract of guaranty. The bank did accept the guaranties and acted upon them by

making further loans to the Sugar Planters' Storage & Distributing Company. Our opinion is that it was not necessary for the bank to notify the guarantor of the acceptance of his guaranty, for the following reasons: (1) The instruments were not mere offers to guarantee the indebtedness of the Sugar Planters' Storage & Distributing Company, but were direct and absolute promises on the part of the guarantor to be responsible in solido with the company for its debts to the amount stated in the instruments, and waiver of notice of acceptance is implied from the terms of the instruments; (2) the guarantor in this case, having been a director of the corporation whose debts he guaranteed, is charged with knowledge of the debts contracted by the corporation on the faith of his guaranty; (3) the instruments sued on were executed and delivered at the request of the plaintiff bank, and their execution and delivery to the bank was an acceptance of the latter's proposition and completed the contract of guaranty.

In support of the proposition that it was necessary for the bank to give notice to the guarantor of the acceptance of the guaranty, in order to complete the contract and hold the guarantor liable under it, the defendant's counsel cite the following as authority, viz.: *Bank of Illinois v. Sloo & Byrne et al.*, 16 La. 539, 35 Am. Dec. 223; *Lachman & Jacob v. Block & Bro.*, 47 La. Ann. 505, 17 South. 153, 28 L. R. A. 255; *Douglas et al. v. Reynolds, Byrne & Co.*, 7 Pet. 113, 8 L. Ed. 626; *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524, 6 Sup. Ct. 173, 29 L. Ed. 480.

In *Bank of Illinois v. Sloo & Byrne et al.*, 16 La. 539, 35 Am. Dec. 223, Sloo & Byrne, in New Orleans, addressed a letter to the cashier of the bank at Alton, Ill., authorizing A. G. Sloo & Co., of Alton, Ill., to draw on them, Sloo & Byrne, at such times and for such sums as might suit the convenience of A. G. Sloo & Co., to the amount of \$50,000. The firm of Shields, Turner & Renshaw and the firm of A. W. & R. M. Haines signed the following guaranty, written upon or under the letter of credit, viz.:

"We do hereby guaranty the punctual payment of any bill drawn and negotiated upon the faith of the within letter."

It was held, citing *Douglas v. Reynolds*, 7 Pet. 113, 8 L. Ed. 626, that Shields, Turner & Renshaw and A. W. & R. M. Haines were entitled to notice from the bank if the latter accepted the guaranty. Not only did the form of the guaranty require notice to the guarantors, but the circumstances were such that credit might have been given on the original letter of credit, signed by Sloo & Byrne, and not on the faith of the guaranty signed by Shields, Turner & Renshaw and A. W. & R. M. Haines. Hence it was necessary, to constitute a contract between the bank of Illinois and the guarantors, Shields, Turner & Renshaw and A. W. & R. M. Haines, that these guarantors should be notified if the

bank accepted the proposition of Sloo & Byrne. The reasons for the decision rendered in that case can have no application to the form and terms of the guaranties signed by Leo Cancienne. Nor did it appear that the guarantors in the case cited were chargeable with knowledge of the financial transactions of A. G. Sloo & Co., or that the guaranty was executed at the request of the guarantee, the State Bank of Illinois.

In *Lachman & Jacobi v. Block & Bro.*, 47 La. Ann. 505, 17 South. 153, 28 L. R. A. 255, the instrument sued on was not a direct promise to pay the debt of the third party, but was, in precise terms, an offer or agreement to become surety. Hence the decision that the party who proposed to become a guarantor for debts to be contracted by the other party was entitled to notice if his proposition or agreement was accepted by the guarantee can have no application to the form of the guaranties sued on in the present case. The signing of the agreement to become surety in that case was not done at the request of the guarantee, nor was the guarantor chargeable with knowledge of the debts contracted by the third party for whom the guarantor agreed to become surety.

In the case of *Douglas et al. v. Reynolds, Byrne & Co.*, 7 Pet. 113, 8 L. Ed. 626, not only was the instrument sued on a mere offer to become surety for a third party, but it was a conditional offer, depending upon whether that third party would require the aid to be given him by the proposed guarantee. It was a letter of credit addressed to Reynolds, Byrne & Co., thus:

"Gentlemen: Our friend, Mr. Chester Haring, \* \* \* may require your aid, from time to time, either by acceptance or indorsement of his paper, or advances in cash; in order to save you from harm by so doing, we do hereby bind ourselves, severally and jointly to be responsible to you at any time, for a sum not exceeding eight thousand dollars, should the said Chester Haring fail to do so."

The decision that the party proposing to become surety for Chester Haring in the event he should require the aid of the proposed guarantee was entitled to notice of the acceptance of the proposition can have no application to the form of guaranty in the case before us. Besides, the signing of the instrument in the case last cited was not done at the request of the guarantee, nor was the signer of the instrument chargeable with knowledge of the debts contracted on the faith of the instrument.

In the case of *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524, 6 Sup. Ct. 173, 29 L. Ed. 480, the instrument sued on was held to be a mere offer to become surety or guarantor. In the following copy of the syllabus we put in italics an expression which makes the decision inapplicable to the case before us, viz.:

"The guaranty signed by the guarantor *without any previous request of the other party*, and in his absence, for no consideration moving between them except future advances to be

made to the principal debtor, \* \* \* is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance \* \* \* to complete the contract."

In *Davis v. Wells Fargo & Co.*, 104 U. S. 159, 26 L. Ed. 686, the doctrine applicable to the case before us was stated, viz.:

"The rule requiring notice of the acceptance of a guaranty, and of an intention to act under it, applies only in those cases where, in legal effect, the instrument is merely an offer or proposal, acceptance of which by the guarantee is necessary to that mutual assent without which there can be no contract."

"If the guaranty is made at the request of the guarantee, it then becomes the answer of the guarantor to a proposal made to him, and its delivery to or for the use of the guarantee completes the communication between them and constitutes a contract. The same result follows where the agreement to accept is contemporaneous with the guaranty and constitutes its consideration. It must be so \* \* \* where the instrument is in the form of a bilateral contract, \* \* \* or which otherwise creates by its recitals a privity between the guarantee and guarantor. In each of these cases the mutual assent of the parties is either expressed or necessarily implied."

"Where a guaranty declares that the guarantor thereby guaranties unto the guarantee, unconditionally at all times, any advances, etc., to a third person, notice of demand of payment, and the default of the debtor is waived, as well as notice of the amount of the advances when made, when either or both would otherwise be required."

The doctrine expressed in *Davis v. Wells Fargo & Co.*, supra, which is directly applicable to the case before us, was not overruled, but, on the contrary, was expressly affirmed in the later case relied upon by the defendant here, *Davis Sewing Machine Co. v. Richards*, supra. In the latter case it was said that the decision depended upon the application of the rules of law stated in *Davis v. Wells Fargo & Co.*, and the rules were summed up as follows:

"A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor without any request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract."

That distinction, between a mere offer to become a guarantor, which requires notice of acceptance by the guarantee to the guarantor to complete the contract, and a direct promise or guaranty to pay the debt of a third party, whereby the notice is either expressly or impliedly waived, has been recognized by this court. In the case of *Peoples' Bank v. Lemarie*, 106 La. 429, 81 South. 138, it was said that notice of acceptance of guaranty may be waived by the form of the instrument or

be implied from its terms. In that case notice of acceptance of the guaranty by the guarantee bank was not given to the guarantor, nor was the notice expressly waived, but the waiver was implied from the terms and form of the instrument. To the same effect are the decisions in *Louisiana & Western Ry. Co. v. Dillard et al.*, 51 La. Ann. 1484, 26 South. 451, and *Heltmann Co. v. K. C. Southern Ry. Co.*, 136 La. 825, 67 South. 895.

[5, 6] With regard to the third defense to this suit, the evidence shows that the Sugar Planters' Storage & Distributing Company is indebted to the plaintiff for an amount exceeding \$15,000. The transcript of the account of the company with the bank, filed by the plaintiff in response to the defendant's prayer for oyer, discloses that collections were made by the bank at various times and applied to the credit of the Sugar Planters' Storage & Distributing Company; but it does not appear that the account was ever balanced or that the indebtedness was ever reduced below the amount of the guaranties. In our opinion, it would make no difference in the defendant's liability if the debt was discharged and revived by the transactions had between the bank and the Sugar Planters' Storage & Distributing Company after these guaranties were given, but before the suit was filed, because they are continuing guaranties. They are so declared and described in the instrument, and are so characterized by their language, even without the express declaration. In one of the cases cited by the defendant's counsel, that of *Douglas et al. v. Reynolds, Byrne & Co.*, 7 Pet. 122, 8 L. Ed. 630, the guaranty was held to be a continuing guaranty because the language showed that the parties contemplated more than one transaction by the use of the terms "from time to time."

The learned counsel for the defendant contend that the instruments sued on in this case cannot be regarded as continuing guaranties because the amount of the guarantor's liability is limited. It is not inconsistent for a contract of guaranty to be limited in the amount of the liability of the guarantor and yet be continuing or unlimited in time. The rule laid down in 20 Cyc. 1440, citing *Mathews v. Phelps*, 61 Mich. 327, 28 N. W. 108, 1 Am. St. Rep. 581, and *Kimball Co. v. Baker*, 62 Wis. 526, 22 N. W. 730, is that, although the amount of the liability of the guarantor be limited, if the time is not expressly limited, the guaranty is nevertheless a continuing guaranty, to the amount for which the liability of the guarantor is limited, if the terms of the instrument indicate that the purpose was to give a standing credit to the principal debtor to be used from time to time.

[7, 8] In this connection the learned counsel for the defendant advance the argument in their brief that the effect of the bank's

extending credit to the Sugar Planters' Storage & Distributing Company beyond the amount of the guaranty was to release the guarantor from all liability. In support thereof they cite *Spencer on Suretyship*, p. 137, par. 101. But the view expressed by the author is entirely against their contention, viz.: In the absence of an express stipulation that the liability of the guarantor is to depend upon credit not being extended to the principal debtor beyond the amount stipulated, the guarantor is not relieved from his obligation to the amount stipulated by the mere fact that credit is extended to the principal debtor beyond the amount to which the guarantor's liability is limited. In such case the guarantor is liable to the amount stipulated, but not for the excess.

The fourth defense, that the plaintiff has no cause or right of action against the guarantor without having proceeded against, and discussed and exhausted the property of, the principal debtor, is destroyed by the fact that the instruments sued on contain an express waiver of the plea of discussion and division and declare that the guarantor is liable in solido with the principal debtor, the same as if the obligation had been contracted by the guarantor in person. Article 2094, R. C. C., provides that the creditor of an obligation contracted in solido may proceed against any one of the debtors, and the defendant will not be entitled to a plea of discussion or division. And article 3045, R. C. C., declares that a surety who has renounced the plea of discussion or bound himself in solido and jointly with the principal debtor is not entitled to a seizure and discussion of the property of the principal debtor, or to demand that the creditor proceed against the principal debtor before proceeding against him, the surety. See, also, *Bank v. Sloo & Byrne* (on rehearing), 16 La. 544, 35 Am. Dec. 223.

Our conclusion is that there is no merit in any of the defenses made to this suit, and that the judgment appealed from is correct.

The judgment appealed from is affirmed at the cost of the appellant.

(113 Miss. 175)

**SICK et al. v. CITY OF BAY ST. LOUIS.**  
(No. 19458.)

(Supreme Court of Mississippi, Division B.  
Feb. 19, 1917.)

# 1. MUNICIPAL CORPORATIONS §918(1) — BONDS—ISSUES.

Laws 1916, c. 287, authorizes the city of Bay St. Louis to issue bonds in the sum of \$200,000 or so much thereof as may be necessary, and to levy a special tax to pay the bonds and interest not exceeding 10 mills on the dollar for the purpose of building a sea wall. The act is silent as to how the bonds are to be issued and as to how the sea wall is to be constructed. Laws 1914, c. 147, applying to all municipalities, declares that when bonds are issued in excess of 7 per cent. of the assessed valuation of the property of a municipality, the

question must be submitted to and ratified by the qualified voters before such issuance shall be made. *Held* that, as the act of 1916 is a mere enabling act, conferring upon the city of Bay St. Louis additional power for the issuance of bonds, the bonds cannot be issued without the election provided for.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1919.]

## 2. MUNICIPAL CORPORATIONS §213—OFFICERS—VALIDITY OF ACTS.

Bond commissioners appointed by the mayor and board of aldermen of a city to construct a sea wall for which bonds were to be issued are, the municipal charter providing for their appointment, at least de facto officers, and under Code 1906, § 3473, their acts are valid, and their right to the office can be questioned only by the state.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 573, 574.]

## 3. MUNICIPAL CORPORATIONS §46—CHARTER—AMENDMENTS.

The board of aldermen and the mayor of a city need not readopt a charter amendment and enter it on their minutes after its publication and approval by the Governor and Attorney General, the first adoption by the board and approval by the electors, together with its recordation on the ordinance book after approval by the Governor, being sufficient.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 123-125.]

## 4. MUNICIPAL CORPORATIONS §284(5)—PUBLIC IMPROVEMENTS—ASSESSMENTS.

There being no constitutional assessor for municipalities, the power to assess special benefits on account of a sea wall constructed by a municipality may be conferred on bond commissioners appointed by the board of alderman and mayor to construct the wall.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 756.]

## 5. MUNICIPAL CORPORATIONS §412—PUBLIC IMPROVEMENTS—WHAT ARE.

A sea wall to protect a city from tides and floods is a public improvement for which the city can lay an ad valorem tax on the whole property of the municipality.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1013.]

## 6. MUNICIPAL CORPORATIONS §455—PUBLIC IMPROVEMENTS—SPECIAL BENEFITS.

A city cannot arbitrarily assess special benefits against property owners for improvements, but such assessments must be reasonable, having reference to the benefit conferred, and before the assessment is made, notice must be given the property owners with an estimate of the cost of the improvement, with the right to submit evidence and make objections.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1084-1093.]

## 7. MUNICIPAL CORPORATIONS §917(1)—PUBLIC IMPROVEMENTS—BOND ISSUES.

Where a municipality desired to construct a sea wall, issuing bonds for that purpose, the special assessment of benefits, notice, hearing, etc., should be made before the bonds are issued, unless the city is primarily liable for the whole amount, with the right to reimburse itself by special assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1913-1917, 1941.]

## 8. EMINENT DOMAIN §30—MUNICIPAL CORPORATIONS—POWER OF.

Where a city, to protect itself from floods, desired to construct a sea wall, it may condemn property for such purpose, and a bond issue for such purpose cannot be attacked on the

ground that the sea wall would have to be constructed on private property.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 5, 77.]

**9. MUNICIPAL CORPORATIONS §—456(1)—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS.**

Where a municipality constructed a sea wall, it cannot arbitrarily impose one-half of the expense on property owners, abutting the improvement, regardless of the cost of construction and the actual benefit conferred, for such assessment might be confiscatory.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1094, 1097, 1099.]

Appeal from Chancery Court, Hancock County; W. M. Denny, Chancellor.

Bill by Conrad Sick and others against the City of Bay St. Louis. From decree for defendant, complainants appeal. Reversed and remanded.

R. L. Genin and Harry J. Boyle, both of Bay St. Louis, for appellants. E. J. Gex, of Bay St. Louis, for appellee.

**ETHRIDGE, J.** Complainants exhibited their bill in the chancery court of Hancock county, Miss., against the city of Bay St. Louis, alleging that the complainants are citizens and taxpayers of the city of Bay St. Louis, and that the appellant Conrad Sick owns land situated on the beach front in said city, and that the appellant Octave Favre owns land in the city on a rear street of the city, and that the city of Bay St. Louis is undertaking to issue bonds in the sum of \$200,000, as empowered by chapter 287 of the Laws of 1916, without having submitted or offered to submit to the qualified voters of the city the question of whether said bonds shall be issued or not, the said amount proposed to be issued by them being in excess of 7 per cent. of the assessed value of the property of the city of Bay St. Louis; that the assessed value of the property is \$1,600,000; that the city is attempting to exercise this authority through five citizens who have been constituted or named by the mayor and board of aldermen as "bond commissioners" of the city with power to construct a sea wall by virtue of an amendment to the charter of the city of Bay St. Louis shown as exhibits to the bill of complaint; said city is a municipality operating under a special charter, under Laws 1886, c. 297; that Exhibits B and C to the bill are not a part of the charter of the said city because they were never entered on the minutes of the board of mayor and aldermen, after being approved by the Governor, and are void because they attempt to place the power of assessment of special taxes in the bond commission and that they could not delegate to the bond commission this power. They allege, further, that the city cannot construct an improvement such as a sea wall, arbitrarily fixing an amount to be collected from the party upon whose property it is constructed; that a sea wall is not in its nature a public improvement for

which the city can levy a general tax. They further contend that the complainants have never received any knowledge, or notice, of the amount that they are to be assessed for the said improvements, and that they do not know the character or cost of said improvement, and that if the amendment to the charter is valid and improvements made that it would place an unknown burden on the complainants without notice, and that they would be unable to object to the same or complain until the said improvement is completed; that under the scheme proposed that 50 per cent. of the bonds are to be paid by the entire town for the construction of a sea wall on the privately owned property on the beach front; and that the property situated in the rear of the city would be required to pay a large proportion of the said bonds without receiving any benefit from the improvement, and that this would take the complainant's property without due compensation and without due process of law. The prayer of the bill is for a temporary injunction restraining the mayor and board of aldermen from issuing the said bonds and erecting the said sea wall, and for the declaring of the amendments to the charter void and a perpetual injunction against the city.

[1]. Chapter 287, Laws 1916, omitting the title and enacting and enforcing clauses, reads as follows:

"That, the city of Bay St. Louis, Hancock county, Mississippi, be and is hereby authorized to issue bonds in the sum of two hundred thousand dollars (\$200,000.00), or so much thereof as may be necessary, at a rate of interest not exceeding six per cent. per annum, and levy a special tax to pay said bonds and interest upon all the property within its limits, not exceeding ten (10) mills on the dollar, for the purpose of building a sea wall to protect the banks from caving and overflow from storms and tide water."

This act is silent as to how bonds shall be issued, and is silent as to how the sea wall shall be constructed, not containing any machinery for either issuing the bonds or erecting the sea wall. Chapter 147 of the Laws of 1914 applies to all municipalities, and provides that where bonds are issued in excess of 7 per cent. of the assessed valuation of the property of the municipality the question must be submitted to and ratified by the qualified electors voting at said election before such issuance shall be made. Chapter 287 of the Laws of 1916 is a mere enabling act in the nature of a charter amendment conferring additional power on the municipality; and, not having the machinery for the issuance of said bonds, must be construed in connection with the general law upon the subject, except as modified by the later act (and the later act does not modify this requirement of a bond issue, but does modify the 10 per cent. limitation imposed by that act as a total amount which may be issued), the law of 1914 controls this bond issue. In other words, the city is not limit-

ed to a bond issue of 10 per cent. of its assessed valuation, but may issue such bonds to the amount of \$200,000. But this does not change the requirement that the question must be submitted to a vote of the qualified electors for their approval.

It being admitted in the agreed statement of facts that no such election was ordered or contemplated in the issuance of the bonds in question, and that no election was intended to be held on the question, it follows that the board was acting without authority, and that the injunction should have been granted. The case will therefore be reversed, with direction to grant the injunction against the issuance of the bonds until the same shall have been submitted to the qualified electors and approved by a majority of those voting in said election voting therefor.

[2] Inasmuch as the case must be reversed and further proceedings had before the bonds can be issued, and as it may be that litigation and delay will be saved by so doing, we will dispose of other questions in the record. There is no merit in the contention that the bond commission is unlawful and their acts void. They are at least de facto officers whose acts within lawful authority are valid under section 3473, Code 1906, and only the state can complain as to the questions of terms and tenure, etc.

[3] There is no merit in the contention that the board of mayor and aldermen must readopt a charter amendment and enter it on their minutes after its publication and approval by the Governor and Attorney General. The first adoption by the board of mayor and aldermen with its publication and approval by the electors gave it life and its recordation on the ordinance book of the city after its approval by the Governor was all that was necessary.

[4] There is no merit in the contention that the power of assessment could not be conferred on the bond commissioners by charter amendment. There is no constitutional assessor for municipalities.

[5, 6] There is no merit in the contention that a sea wall is not in its nature a public improvement for which a city can lay a general ad valorem tax on the whole property of the city. The city cannot arbitrarily assess special benefits against property owners for improvements, but such assessments must be reasonable, having reference to the benefit conferred; and before this assessment of benefits is made, notice must be given the property owner, with an estimate of the cost of the improvement to be made, with a right to submit evidence and make objections thereto.

[7, 8] Unless the city is primarily liable for the whole amount, with right to reimburse itself by the special assessment, the notice, hearing, etc., should be made before the bond issue is made. Board of Mayor, etc.,

of Waveland v. Moreau, 109 Miss. 407, 69 South. 214. The city has the power to condemn property for public use under its charter, and may exercise the power to erect a sea wall and acquire right of way, etc., and there is therefore no merit in the objection as to this matter, nor will the sea wall if erected become private property.

[9] It follows from what we have said that the charter amendment made Exhibit B to the bill presents a valid and workable scheme for the issuance of said bonds, if authorized by a vote of the qualified electors of the city. But Exhibit C (being another amendment to the charter) is not free from objection, and should be redrafted or abandoned in the issuing of bonds. It arbitrarily imposes one-half the expense of building the sea wall on the property owners abutting the improvement, regardless of the cost of construction and the actual benefit to be conferred. Under it the city cannot be made liable for more than one-half of the cost, even though the judiciary should decide that one-half of the cost of the improvement was an unreasonable burden on the abutting owners and confiscatory of his property; in which contingency there would be no method by which to raise money to pay all the bonds. Reversed and remanded.

(112 Miss. 235)

McLAUGHLIN et al. v. O'BYRNE.  
(No. 18799.)

(Supreme Court of Mississippi, Division B.  
March 5, 1917.)

1. EXECUTORS AND ADMINISTRATORS  $\Leftrightarrow$  111(6)  
— ACCOUNTING — SOLICITOR'S FEE — ALLOWANCE.

The allowance of a fee of \$1,000 to the solicitor for the administrator of an estate, consisting of a bank deposit of about \$4,000 and a note of \$1,000, not called on to perform any unusual labor or to advise on any complicated questions of law or fact, was excessive.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 456.]

2. EXECUTORS AND ADMINISTRATORS  $\Leftrightarrow$  82 —  
CONTROL OF CHANCELLOR.

An administration is always under the control of the chancellor, who, in theory, is the administrator charged with the duty to see that the agent of the court executes his trust in the interest of the beneficiaries thereof.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 335.]

Appeal from Chancery Court, Noxubee County; James F. McCool, Chancellor.

Exceptions by Bridgett McLaughlin and others, to the final account of M. O'Bryne, administrator of the estate of James Haffey, deceased. Exceptions overruled and final account allowed, and the objectors appeal. Reversed and remanded.

Harden Brooks, of Meridian, for appellants. A. T. Dent and I. L. Dorroh, both of Macon, and Green & Green, of Jackson, for appellee.

COOK, P. J. This case comes to this court on exceptions to the final account of the administrator of the estate of James Haffey, deceased. The exceptions were overruled by the chancellor, and the final account allowed. From this judgment the objectors appeal.

The estate consisted of money in bank, about \$4,000, and a promissory note of \$1,000, the aggregate of the assets was between \$5,000 and \$6,000.

[1] The main contention here is the allowance of solicitor's fee of \$1,000 was grossly excessive, and it is also insisted that the solicitor for the objectors was denied a sufficient time to present his proof and exceptions. The hearing and entry of the decree was had and done in vacation. An inspection of the record has convinced this court that the fee allowed appears to have been excessive, and we think that the chancellor was controlled, no doubt, by the opinions of lawyers, given, we believe, in answer to hypothetical questions which did not embrace all the facts of the case. The administration of this estate was a very simple matter, and the administrator's attorney was never called on to perform any unusual labor, or to advise about any complicated questions of law or fact. This being true, we are of opinion that the allowance was excessive. There may have been special circumstances justifying the allowance of a fee, excessive on its face, but no such circumstances are of record. If this was an ordinary case, involving a contract between a lawyer and his client, we, of course, would not assume the functions of guardianship of the client who had made a bad trade. The case before us, however, is not of that character.

[2] An administrator is always under the control of the chancellor, who, in theory, is the administrator charged with the duty to see that the agent of the court executes his trust in the interest of the beneficiaries thereof.

In the light of the facts of record we are convinced that the decree allowing the final account should be reversed, and the cause remanded, for further proceedings after all parties have been given a full hearing, on all the items of the account.

Reversed and remanded.

(113 Miss. 337)

McCALEB et al. v. McCALEB et al.  
(No. 17178.)

(Supreme Court of Mississippi, Division A.  
March 12, 1917.)

COSTS ~~§~~175—ITEM—JURY FEES.

The fees of jurors summoned on an issue *devisavit vel non*, paid out of the county treasury, cannot thereafter be charged against the losing party as costs in the case.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 696, 699.]

Appeal from Chancery Court, Harrison County; J. M. Stevens, Chancellor.

On motion to retax costs after decree was affirmed. For former opinion, see 110 Miss. 486, 70 South. 563. Decree modified by eliminating the provision for certain costs.

Neville & Morse, of Gulfport, for appellants. Mize & Mize, of Gulfport, for appellees.

SMITH, C. J. The decree of the court below was affirmed on a former day of this term, and in responding to a suggestion of error filed by counsel for appellants we said: [The opinion in full is reported in 110 Miss. 486, 70 South. 563.]

Pursuant to this permission, counsel for appellants have filed a proper assignment of error and brief; and, upon an examination of the question presented, we are of the opinion that the fees of the jurors should not have been taxed against the litigants, as we have been unable to find any statute authorizing that to be done.

The decree of the court below, therefore, will be modified by eliminating this provision therefrom.

(113 Miss. 338)

BECKER v. DUNAGIN. (No. 18901.)

(Supreme Court of Mississippi, Division B.  
March 5, 1917.)

REFORMATION OF INSTRUMENTS ~~§~~21—DEEDS  
—CONFORMING TO AGREEMENT—FRAUD.

Where, in negotiations for the sale of a house, nothing was said about the land to be embraced in deed, failure of buyer, who has undertaken to prepare deed in conformity to agreement, to point out to seller land conveyed by deed, she being unable to understand description in deed conveying more land than intended, constitutes fraud authorizing reformation.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 80.]

Appeal from Chancery Court, Jones County; Sam Whitman, Chancellor.

Bill by Sophie Becker against W. A. Dunagin. Decree for defendant, and plaintiff appeals. Reversed and remanded.

Shannon & Schaubert, of Laurel, for appellant. Street & Street, of Laurel, for appellee.

COOK, P. J. Mrs. Becker, appellant, was the owner of a triangular piece of land situated in the city of Laurel, on which she had erected five dwelling houses, four of which faced east on the street, the west line marked by a fence; the fifth faced west. It appears that she had divided the land by an alley ten feet wide, thus making two blocks. In the eastern block was situated a frame dwelling occupied by appellant and used as a boarding house, and this house is the subject of this controversy. After some negotiations this dwelling house was sold to appellee. The record discloses that nothing

was said about the amount of land to be embraced in the deed, but in all the negotiations the object of the sale referred to was the house. It seems that the interested parties reached an agreement on the terms of the sale, when the undisputed proof shows that something was said about the preparation of the deed, and appellant, an aged woman of German extraction and of small knowledge of the English language, asked appellee if it would be necessary to employ a lawyer to draft the deed, and appellee replied that it would not be necessary, that his bookkeeper was well qualified to prepare the deed, and he would have the deed prepared at no expense to her, which was a rash promise as this lawsuit demonstrates. So it was, the old lady intrusted to the appellee the preparation of the deed, which was afterwards read to and signed by her. The deed of conveyance described the land conveyed by metes and bounds, beginning at a selected starting point, and ignoring the fence lines, which was Greek to an ordinary layman and signified nothing—and who would not know whether or not it correctly described the lot of land she had agreed to sell appellee. But it appears that she signed, acknowledged, and delivered the deed. Things rocked along and all was well, until appellee proceeded to take visible possession of the dirt called for by his deed. It will be recalled that appellant had divided her triangular piece of land, leaving an alleyway between. This was done so that she could conserve her interests and utilize to the utmost the entire property, and leave an outlet to each tenant of houses to be thereafter built, both from the front and from the back. It seems to be perfectly manifest that the closing of this alley at either end would seriously impair the value of all the lots embraced in the entire tract, and it also seems equally manifest that no reasonable man could have believed that she intended to make a conveyance which would accomplish this result. So, when appellee proceeded to assume possession and ownership of that portion of the alley at the rear of his lot the trouble began, and the promise to have the deed prepared without cost to anybody miscarried, and this bill was filed to reform the deed so as to make it conform to the intention of the contracting parties. The above statement of facts is the case reflected by this record trimmed of all details.

The bill charges fraud in the preparation of the deed, but the chancellor denied the relief sought and dismissed the bill, presumably because the proof did not authorize a belief that appellee had been guilty of any actual fraud. It was shown that the description in the deed was clear, specific, and definitely described the land which Mrs. Becker was conveying when she signed the deed. We take an entirely different view of

the matter, if the evidence is to be believed, and it is undisputed. We think, when Mr. Dunagin assumed the task of preparing this deed and guaranteeing its efficiency to record the trade, under all the facts, he should have pointed out on the ground the limits and boundaries of the lot described in the deed; for it seems manifest that any good business man, as Mr. Dunagin is shown to be, could not have thought that this woman knew that she was not only selling him the house, but was also making it possible for him to acquire, if he so desired, the balance of her holdings at his own price, or, at least, upon terms much to the advantage of a purchaser owning a part of the alley.

For these reasons, we think the decree should have been for the complainant.

Reversed and remanded.

(113 Miss. 344)

**HAMEL v. SOUTHERN RY. CO. IN MISSISSIPPI. (No. 18845.)**

(Supreme Court of Mississippi, Division A.  
March 12, 1917.)

**1. WITNESSES — 211(3) — PRIVILEGED COMMUNICATION TO PHYSICIAN — CAUSE OF DEATH.**

In view of Code 1906, § 3696, providing that communications by patient to physician are privileged, in action against railway company for death of plaintiff's husband, it was erroneous to allow defendant to prove by decedent's physician that injuries sustained were not the cause of death.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 773.]

**2. WITNESSES — 219(4) — PRIVILEGED COMMUNICATION TO PHYSICIAN — WAIVER.**

That plaintiff, suing for her husband's death, introduced testimony of his physician to rebut privileged testimony by another physician of her husband's introduced by defendant, showing that decedent's injuries did not cause death, did not cure error in admitting the privileged testimony by defendant's witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 769, 781.]

**3. TRIAL — 237(3) — INSTRUCTIONS — NEGLIGENCE — SUFFICIENCY OF EVIDENCE.**

Where plaintiff, suing for husband's death, had shown his injury inflicted by defendant's railway train, thus making out a prima facie case of negligence as provided by Code 1906, § 1985, which defendant failed to explain, instruction that plaintiff must prove by preponderance of the evidence that decedent was injured through defendant's negligence is erroneous, since the prima facie proof, unexplained, was sufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 548.]

**4. DEATH — 17 — GROUNDS OF ACTION — CAUSE OF DEATH.**

Plaintiff, suing for her husband's death, may recover, though the injury was not the sole cause of death; the true rule being that if the injury aggravated condition or hastened or contributed to death plaintiff could recover.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 19, 21.]

Appeal from Circuit Court, Sunflower County; H. P. Farish, Special Judge.

Suit by Myrtle Hamel against the Southern Railway Company in Mississippi. Judg-



ment for defendant, and plaintiff appeals. Reversed and remanded.

Frank E. Everett, of Indianola, and Jas. R. McDowell, of Jackson, for appellant. Moody & Williams, of Indianola, and T. C. Catchings, of Vicksburg, for appellee.

**HOLDEN, J.** This is a suit by Mrs. Myrtle Hamel, appellant, against the appellee, Southern Railway Company, to recover damages for the death of her husband, James B. Hamel, alleged to have resulted from injuries inflicted by the running of the cars of appellee railroad; and from a jury verdict and judgment in favor of the railroad company she appeals here. The case before us now is an action to recover damages only for the death of Mr. Hamel; a judgment for the injuries inflicted up to the date of his death having been obtained, and settled, in a suit filed by the appellant against the appellee prior to the filing of the case before us now. Therefore the only questions in the instant case are whether the deceased, Hamel died from the injuries inflicted by the appellee railroad or from some other cause, or whether such injuries hastened his death or contributed directly to it. These were the issues before the jury in the court below, and a verdict was returned in favor of the defendant railroad.

The appellant assigns several grounds of error, but we shall notice and discuss only three of these contentions, viz.: First. That the court erred in allowing Dr. S. T. Rucker, a witness for the defendant railroad, who was the attending physician of the deceased, to be introduced by the defendant and testify, over the objection of the plaintiff below, as to the condition of deceased and the cause of his death. Second. That the court erred in granting to the defendant below instruction No. 4, which reads as follows:

"The court instructs the jury that the law is that before the plaintiff can recover against the defendant in this case, she must prove by a preponderance of the evidence to your satisfaction: First, that J. B. Hamel was injured by the negligence of the defendant; and, second, that the death of the said J. B. Hamel was caused by said injury, and unless she has so proven, then your verdict must be for the defendant."

Third. That the court erred in granting to the defendant instruction No. 5, which reads as follows:

"The court instructs the jury that the burden is on the plaintiff to prove, by a preponderance of the evidence, to your satisfaction, that J. B. Hamel's death was caused by the injuries alleged to have been sustained by him at the time and place named in the declaration, and if from all of the evidence in this case you are unable to say what caused his death, then you must find for the defendant, and this is true even though you may believe from the evidence that the defendant is liable for such injury."

We will discuss the questions in the order given above.

[1] It appears that the plaintiff below in-

troduced her testimony, and proved her case under our prima facie statute (section 1986, Code of 1906), and rested. She did not introduce any physician to testify in reference to the injuries or death of her husband. After the plaintiff rested, the defendant railroad introduced Dr. S. T. Rucker, a witness in its behalf, who was the attending physician of the deceased Hamel, who was a patient under his, Dr. Rucker's, charge at the time and prior to his death. Strenuous objection was promptly made by the appellant to the introduction of this testimony, which objection was overruled by the court, and Dr. Rucker was permitted to testify fully as to the condition, injuries, and cause of the death, of the deceased; his testimony being to the effect that Mr. Hamel's death was not caused or hastened by the injuries inflicted by the railroad, but that he died from pellagra. The sole issue in the case being whether or not the injuries inflicted by the railroad had caused or contributed to the death, this testimony of Dr. Rucker was vital and very damaging to the plaintiff's case. Section 3695, Code of 1906, provides:

"All communications made to a physician or surgeon by a patient under his charge or by one seeking professional advice, are hereby declared to be privileged, and such physician or surgeon shall not be required to disclose the same in any legal proceeding, except at the instance of the patient."

In view of the plain meaning and purpose of the above statute, it was palpable error to permit this doctor to testify to these matters which are privileged communications, a disclosure of which cannot be required in any legal proceeding except at the instance of the patient.

[2] But counsel for the appellee here contends that the privileged communication under the statute was waived by the appellant, because the appellant introduced Dr. Kent, a physician of deceased, as a witness in rebuttal. This contention is unsound, for the reason that the introduction of the testimony by the appellant in rebuttal could, in no way, cure the error and wrong that had been committed in the first instance by the appellee railroad in introducing the attending physician of the deceased at a time when the appellant had introduced no attending physician's testimony whatever as to the cause of death, and had not, therefore, in any way opened the door to inquiry as to the injury and cause of death of deceased by the testimony of any attending physician.

We do not pass upon the question now as to whether the plaintiff below must have waived her right, under the statute, if she had, in proving her case, introduced a physician who had attended the patient, and he had testified on the particular subject of the cause of the death of the deceased, and thereby opened the door to a full inquiry on that particular subject which she had thus put in issue in the case by the testimony of any physician in charge of the patient.

[3] As to the second contention of appellant, we think that instruction No. 4, granted to the defendant below, was error. The error appears in this: That it was not incumbent upon the appellant to prove by a preponderance of the evidence that Mr. Hamel was injured by the negligence of the appellee railroad, because the appellant had made out her case under our prima facie negligence statute (section 1985, Code of 1906), and, the railroad having failed to explain the injury and exculpate itself, the proof of the injury inflicted by the running of the appellee's locomotives and cars was all that was required of the appellant, and it was not necessary that the appellant prove negligence on the part of the railroad, but the proof made under the statute was sufficient. When proof of injury is made by the plaintiff under the prima facie statute in any case, the plaintiff is never required to show negligence of the defendant until the defendant has explained the injury by testimony putting it beyond and without the statute, in which event both parties would then stand upon the same legal footing, and the plaintiff would have the burden of showing negligence on the part of the defendant before a recovery could be had. *Railroad v. Thornhill*, 106 Miss. 387, 63 South. 674; *Railroad v. Hamilton*, 62 Miss. 503; *Railroad v. Doggett*, 67 Miss. 250, 7 South. 278; *Railroad v. Brooks*, 85 Miss. 269, 38 South. 40; *Railroad v. Landrum*, 89 Miss. 399, 42 South. 675; *Fuller v. Railroad*, 100 Miss. 705, 56 South. 783; *Jefferson v. Railway Co.*, 105 Miss. 571, 62 South. 643; *Railroad v. Carney*, 109 Miss. 223, 68 South. 166.

[4] As to the third ground of error, which was the granting of instruction No. 5 to the appellee, and the refusal of the court to grant any instruction to the appellant stating the true rule, we think was error. Instruction No. 5 is erroneous because it instructs the jury, in effect, that no recovery by the plaintiff could be had unless the injury inflicted by the railroad was the sole cause of the death, and at the same time denying to the plaintiff the benefit of the true rule, as announced by instructions requested by plaintiff, that the plaintiff should recover if the injuries inflicted aggravated the condition of the deceased and hastened his death, or contributed directly to his death. We think the refusal of the lower court to grant the instructions requested by plaintiff announcing this rule, and the granting to defendant the instruction No. 5, was substantial error. *R. O. L.* vol. 8, p. 433, par. 11; 13 Cyc. p. 31; *Louisville, etc., R. Co. v. Jones*, 83 Ala. 376, 3 South. 904; *Tidwell v. State*, 70 Ala. 33; *Lapline v. Morgan's, etc., Co.*, 40 La. Ann. 661, 4 South. 875, 1 L. R. A. 378.

The judgment of the lower court is reversed, and the case remanded.

Reversed and remanded.

(113 Miss. 359)

**CARTWRIGHT-CAPS CO. v. FISCHER & KAUFMAN.** (No. 18875.)

(Supreme Court of Mississippi. Division B. March 5, 1917.)

**1. LIBEL AND SLANDER § 25—PUBLICATION—SUFFICIENCY.**

The dictation of a letter to a stenographer employed by a person or corporation in its business is not a sufficient publication of matters therein alleged to be libelous per se, in the absence of any repetition by the person or stenographer to other persons.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 107, 108.]

**2. LIBEL AND SLANDER § 45(2)—PRIVILEGE—BUSINESS LETTER.**

A letter written by defendant corporation to plaintiff concerning a business transaction between them, and urging payment for machinery sold to plaintiff, sent under seal and for plaintiff's inspection alone, was privileged, and alleged libelous statements therein did not constitute actionable libel.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 139.]

Appeal from Chancery Court, Warren County; E. N. Thomas, Chancellor.

Suit by Fischer & Kaufman against the Cartwright-Caps Company. Demurrer to bill overruled, and defendant granted an appeal under the statute. Reversed and remanded.

Hirsch, Dent & Landau, of Vicksburg, for appellant. Brunini, Hirsch & Griffith, of Vicksburg, for appellees.

ETHRIDGE, J. Fischer & Kaufman, a partnership composed of Jewish citizens doing business in Vicksburg, brings this suit in the chancery court for an alleged libel contained in certain correspondence written by the appellant to the appellees. It seems that the appellees are engaged in the laundry business and purchased certain machinery from the appellants known as a "water softening outfit," and the correspondence grew out of the transactions regarding the purchase and use of this machinery. It is alleged that on or about the 4th of November the appellant mailed to the appellees a letter which, omitting the immaterial parts, reads as follows:

"We cannot help but feel that you are exercising the prerogative of a cheap Jew, and in order to get these notes paid and forget them we are sending draft amounting to \$406.42 for notes, less W. H. Bruser invoice of \$43.58, as per your letter of October 19th. Please honor same."

"Yours very truly, Cartwright-Caps Co."

"Per Chapin A. Cartwright, President."

"P. S.—The above draft will be presented on November 13th, the day the last note is due."

There was another letter, alleged to have preceded this letter, and marked "Exhibit A" to and made a part of the bill, as follows:

"Chicago, Oct. 23, 1914."

"Messrs. Fischer & Kaufman, Prop. Pearl Laundry, Vicksburg, Miss.—Gentlemen: We are at a loss to understand your attitude regarding the payment of your notes, and also that part of your letter which reads as follows:

"That after plant was installed, gave us no satisfaction"—especially after receiving your letter in which you state how delighted you were, and in addition having been personally told of the satisfactory results you were obtaining. Further, we do not see why, if you want to be square, you should ask us to send these notes for collection. Your contract called for this money in Chicago funds. From this letter you evidently want to ignore our bill for the castings and room and board of our man while making the change in your filter. It seems that no dependence whatever can be put in you. We have your several promises of paying, yet you do not honor our drafts when sent to the bank. We feel that you are very unjust and unkind in trying to hold us up for this tank, for, as we have stated several times, we do not feel that our equipment was at fault, and the suggestions that have been made were made to you with a view of giving you something which would in a way protect you against your own carelessness, if you did neglect it or fail to take care of it. The original filter which was put in the tank—had the water been kept away from the foundations—would have given you perfect filtration, but in the condition in which the writer found your tank, and the water still running around the foundations, the chances are there wasn't a tight joint in the whole filter box. Yet in one of your letters you state that at the expense of a very few dollars you could have repaired that, but instead of acting on your own initiative you were writing letters of complaint in here and holding up payment of your notes. Please tell us what is to be done with such people. As your Mr. Kaufman stated to the writer, and also wrote to this office, how easily and how cheaply the repairs could have been made, we are at a loss to understand why you permitted our Mr. Aagaard to make any change whatever. The Cartwright-Caps Company stand back of every machine they put out, but we cannot anticipate nor forstall carelessness and neglect. As stated in our previous letters, we do not feel obligated for expense you were put to for installing the auxiliary tank, and feel you are using your nerve in presuming to hold us up for this money. Until you pay your notes, some of which are long past due, and advise us of your intentions regarding the bill for castings and Mr. Aagaard's expense, we cannot enter into any discussion in regards to allowances. Yours very truly,

"Cartwright-Caps Co.,

"Per Chapin A. Cartwright, President."

The publication alleged of this letter is that it was published among the clerical force of the office of the appellant. The bill does not set out by averment the particular meanings of the portions of the letter relied on, but relies on the statements as being libelous per se, without innuendo or allegation as to what the letter was understood to mean by the parties by whom and to whom they were written.

This bill was demurred to by the defendants—first, on the ground that the bill of complaint does not set forth facts sufficient at law to constitute a cause of action; second, that it does not set forth facts sufficient to grant relief; third, that the letters are not, nor is any part thereof, libelous and defamatory. This demurrer was overruled by the chancellor, and an appeal granted under the statute to settle the principles of the case.

The contentions made by the appellees are that the letters are libelous per se, and that they are not privileged, and that the dicta-

tion of the letters to the stenographer of the complainant was a sufficient publication. The case was filed in the chancery court because, under a statute of this state, there is a proceeding in chancery authorizing attachments against nonresidents both on contract and in tort.

[1] In our view of the case it is not necessary to decide the question as to whether the statements in the letters alleged to have been written were libelous per se or not. Under the facts of this case we think that the letters were privileged, and that there was not, in a legal sense, a publication of the letters in question. The appellant in this case is a corporation, and, of course, can act only through agents, and the acts of both the president and the stenographer to whom the letter was dictated are the acts of the corporation. In our opinion, under the present conditions, the dictation of a letter to a stenographer, when employed by the person or corporation as a stenographer in the business, is not a sufficient publication, in the absence of any repetition by the person or stenographer to other persons.

[2] In the second place, we think the letter in this case was privileged, because it was written by the corporation to the appellees concerning a business transaction existing between them, and while in tone the letters may not come up to the standards of business courtesy and propriety, we do not think, where they are sent to the party to whom written, sealed and for his inspection alone, that they constitute actionable libel. It was held by the Arkansas court in the case of *A. Bohlinger v. Germania Life Insurance Co.*, 100 Ark. 477, 140 S. W. 257, 36 L. R. A. (N. S.) 449, Ann. Cas. 1913C, 613, that a report by one employed to ascertain the character of another as an insurance risk, and his fitness for the position of agent, which states that he had lost a position through carelessness, and had paid too much attention to women and drank some, is made in good faith, and is seen only by those having an interest in the matter and confidential stenographers, is privileged, even when sent by the company requesting it, to the examiners and agents who had recommended the risk and employment, to check the correctness of their recommendation. The report of this case in *L. R. A. supra*, with the case note appended thereto, is filled with authorities covering the learning on this subject, and we do not deem it necessary to go into the authorities elaborately on this question, even though it is a new one in this state.

It is inconceivable how the business of the country, under the present conditions, can be carried on, if a business man or corporation must be subject to litigation for every letter containing some statement too strong, where it is only sent to the person to whom directed, and only heard by a stenographer

to whom the letter is dictated. If the stenographer should, in violation of his or her duties, disclose such statement, there might be a liability because of the negligence of the person in employing an improper person as stenographer. However, it is unnecessary to decide this question, because the declaration here does not disclose such a state of case. Our court, in the case of *Hines v. Shumaker*, 97 Miss. 669, 52 South. 705, had this question presented, but decided the case on other grounds, pretermittting a decision upon this ground, probably because there was a conflict of authorities upon the proposition. We think that line of authorities which hold in accordance with this opinion is more in harmony with sound jurisprudence. The case is therefore reversed and remanded.

Reversed and remanded.

(113 Miss. 367)

**BRINKLEY v. SOUTHERN RY. CO.**  
(No. 18821.)

(Supreme Court of Mississippi, Division B.  
March 5, 1917.)

**RAILROADS** ⇨350(11) — **TAKING QUESTIONS FROM JURY—EVIDENCE.**

In an action for damages to an automobile left upon a railway right of way within corporate limits, whether injury would have occurred had railroad been operating at a lawful rate of speed *held*, under evidence, a question for jury, in view of Code 1906, § 4043, providing that a railroad company shall be liable for damages sustained by any one from locomotive or cars running at a greater speed than six miles per hour within corporate limits.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1164½.]

Appeal from Circuit Court, Tishomingo County; Claude Clayton, Judge.

Action by W. J. Brinkley against the Southern Railway Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

W. L. Elledge, of Iuka, for appellant. W. H. Kier, of Corinth, and Earl King, of Memphis, Tenn., for appellee.

**ETHRIDGE, J.** W. J. Brinkley filed a suit in the circuit court of Tishomingo county against the Southern Railway Company for damage done to an automobile owned by the plaintiff in the corporate limits of the city of Iuka in said county. The facts show that the plaintiff's automobile had been driven upon the right of way of the defendant along its depot and in front of a hotel situated to the south of the right of way of the railroad company, and from which hotel to the place of the injury was a driveway, which was used for many years by the public in going from the depot to the hotel and vice versa. The chauffeur left the automobile near enough to the track to be struck by one of its trains and went into the hotel for some purpose. On coming out of the ho-

tel he perceived the train of the defendant approaching from the east, and ran to the automobile and attempted to crank the automobile and get it moved out of the zone of danger. The automobile failed to fire at the first three cranks, and the train was so near that the chauffeur could not make another effort. The train approached from the east, entered the corporate limits some three-fourths of a mile from the place of the injury, and was running at a high rate of speed, variously estimated at 25 to 40 miles per hour, and was running at a rate of speed, at the time of the injury, of from 15 to 25 miles per hour, according to the testimony of witnesses. The chauffeur testified that if the train had been running at 6 miles an hour, as required by statute, from the time he discovered the approach of the train some 600 yards to the east of the place of the injury, he could have gotten the automobile out of the way and the injury would not have occurred. It was in testimony, by several witnesses, that if the automobile had been placed 3 or 4 feet further north than where it was, the injury would not have occurred regardless of the rate of speed at which the train was being operated. In this state of the record, and without the defendant putting its engineer on the stand at all or introducing any testimony, a peremptory instruction was granted for the defendant. Section 4043 of the Code of 1906 limits railroads to 6 miles an hour within incorporated limits of a city, town, or village, and prescribes that the company shall be liable for damages or injury which may be sustained by any one from such locomotive or cars while they are running at a greater rate of speed than 6 miles an hour through any city, town, or village. This statute was enacted for the purpose of public protection, and it was the duty of the railroad company to obey it. Whether the injury would have occurred or not had the railroad been operating at a lawful speed on the proof in this record was a question for the jury, there being positive testimony that it would not have occurred had the train been running at such speed. The peremptory instruction was unwarranted on this record, and the case is reversed and remanded.

Reversed and remanded.

(113 Miss. 364)

**PARODI et al. v. STATE SAVINGS BANK OF JACKSON.** (No. 18811.)

(Supreme Court of Mississippi, Division B.  
March 5, 1917.)

**BANKS AND BANKING** ⇨171(7)—**COLLECTING DRAFT—ACCEPTING WORTHLESS CHECK.**

A bank, remitting for a draft sent it for collection upon receiving in payment a defectively signed check on another bank which failed before the defect was corrected, cannot recover from the drawer of the draft, although the neg-

igent signer of the check was the drawer's agent, and was making a final accounting.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 609-612.]

Appeal from Chancery Court, Adams County; R. W. Cutrer, Chancellor.

Action by the State Savings Bank of Jackson against Silva G. Parodi, executrix of Ann T. Parodi, and others. From an order overruling a demurrer to the complaint, defendants appeal. Reversed, and bill dismissed.

A. H. Geisenberger, W. A. Geisenberger, and Truly & Truly, all of Natchez, for appellants. Richard F. Reed, of Natchez, and W. Calvin Wells, of Jackson, for appellee.

COOK, P. J. The appellants are the executrix and heirs of Mrs. Ann T. Parodi, deceased, who before her death was a resident of Genoa, Italy. The deceased owned real estate in Natchez, Miss., and selected E. B. Baker, a resident of that city, as her agent to collect her rents, pay taxes, keep her property in repair, and generally to look after her interests. Mr. Baker had collected rents, which, after deducting expenditures, amounted to about \$1,650. This amount had been deposited to the credit of "E. B. Baker, Agent," in the First Natchez Bank. Appellants drew on E. B. Baker for the amount due by him. The draft was made payable to the order of the Farmers' Loan & Trust Company of New York, and in due course reached the State Savings Bank of Jackson, Miss., and this bank, appellee here, presented same to E. B. Baker for payment. Attached to the draft was a receipt, signed by the executrix and all the heirs of the deceased, acquitting E. B. Baker of all of his indebtedness to the estate of the deceased. Mr. Baker paid the draft by his two personal checks, one on a Jackson bank and the other, for \$1,220, on the First Natchez Bank. The collecting bank accepted these checks, marked the draft paid, and delivered the attached receipt to E. B. Baker. The check on the Jackson bank was paid, but the check on the Natchez bank was not paid. Returns from the Natchez bank were that E. B. Baker had no funds, and the complainant alleges that E. B. Baker had inadvertently or negligently neglected to add "agent" after his name. It seems that this inadvertence was cured, and the check was again forwarded for collection to the drawee bank, but, in the meantime the Natchez bank had been placed in the hands of a receiver, and the check could not be collected. The complainant bank had, in the meantime, remitted to the drawers of the draft, and the bill of complaint seeks to recover the amount, and is based on the claim that Baker was the agent of the drawers, acting within the scope of his authority, when he signed the check, and neglecting to add "agent" to his signature was the cause of its failure to collect the check, for which

negligence Baker's principals were responsible. This we think, is about the case made by the bill of complaint, to which appellants demurred. The demurrer was overruled, hence this appeal.

It was insisted by complainant below, and it is insisted here, that Baker's omission of the word "agent" following his signature was the negligence of his principals, who were Baker's creditors, seeking to collect his indebtedness to them. This theory is worked out this way: Baker was appointed by appellants to collect their rents, etc., and to account to them for the balance in his hands as agent; Baker was accounting, and while accounting negligently failed to account, to the damage of complainant. We are unable to approve this line of reasoning. The agency of Baker is a mere incident—he is a debtor to his principals, not because he had collected the rents as their agent, but because he had failed to pay the amount collected to his creditors. As expressed by counsel for appellants, the drawers of the draft were dealing "at arm's length with Baker"—he was indebted to them, and the fact that he had deposited the money in bank collected as agent "cuts no ice." He might as well have put the good money collected in one pocket and a like amount in counterfelt money in another pocket, and by paying the counterfelt to the collecting bank, and thus impose a liability on his former principal, on the theory that the principal was responsible for the torts of its agent while acting within the scope of his employment. This is not a case of mere accounting, but it is a case where the collecting bank has chosen to accept in payment a worthless check, instead of the cash, and must accept the consequences of its departure from the terms of its employment. Bank of Shaw v. Ransom, 73 South. 280.

The above theory being the only possible theory upon which appellant could hope to recover, and this theory, in our opinion, being without merit, it follows that the judgment must be reversed and the bill dismissed.

Reversed and dismissed.

(113 Miss. 369)

LOVEJOY et al. v. McKIBBEN et al.  
(No. 18931.)

(Supreme Court of Mississippi, Division B.  
March 5, 1917.)

1. ADVERSE POSSESSION §—85(3)—SUFFICIENCY OF EVIDENCE.

In suits in ejectment, to recover the over-lapage of conflicting surveys, a fence having been erected by the parties in 1903 in reliance on the accuracy of a survey then made and which was discovered to be erroneous in 1911 when the new survey was made, evidence held insufficient to show adverse possession on the part of defendants claiming under the first survey.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 503, 688-690.]

## 2. EJECTMENT §64—PLEADING—DESCRIPTION OF LAND.

In a suit in ejectment for the possession of lands, the description in the declaration of so many acres off the north end of east half of southeast quarter of a given section is a good description.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 158-164.]

## 3. ADVERSE POSSESSION §110(2)—PLEADING.

Pleadings setting up statutes of adverse possession should specify the period of adverse possession relied upon, so that the opposite party may have notice of the exact period of time the adverse possession is alleged to have existed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 638, 639, 642.]

## 4. ADVERSE POSSESSION §110(4)—PLEADING—MAKING CASE.

Where defendant in ejectment elected to plead her ten-year adverse holding next preceding the filing of suit, not having alleged any other period during which there was any adverse possession, she was bound to make her case as alleged in her plea.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 644, 645.]

## 5. ADVERSE POSSESSION §112—PROOF—ACTS OF OWNERSHIP AND CONTROL.

A person relying upon adverse possession must prove such a possession and such acts of ownership and control by him as notified the world of his claim.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 651, 653, 654, 657-659, 661-663, 665, 668.]

Appeal from Circuit Court, Calhoun County; J. L. Bates, Judge.

Consolidated suits by J. A. McKibben and H. H. McKibben against Mrs. M. A. Lovejoy and Thomas Summers. From judgments for plaintiffs, defendants appeal. Affirmed.

R. F. Kimmons, of Water Valley, for appellants. Creekmore & Stone, of Water Valley, for appellees.

ETHRIDGE, J. J. A. McKibben and H. H. McKibben filed separate suits in the circuit court of Calhoun county against Mrs. M. A. Lovejoy and Thomas Summers in ejectment for possession of lands described in the declarations. The two cases were consolidated in the court below and tried together, and resulted in judgments in favor of plaintiffs. In cause No. 2720 in the court below the demand was for the possession of "a strip of land 66 yards wide off the north end of the south half of section 22, township 12, range 3 west, except the east half of the southeast quarter of said section." The demand in cause No. 2721 below was for the possession of a strip of land off of the north end of the east half of the southeast quarter of section 22, township 12, range 3 west, containing 24 acres more or less. The defendants below plead the general issue of not guilty, and further plead the statute of limitations, alleging in this plea that the plaintiff ought not to have a recovery in this cause for the reason that at and before the bringing of this suit defendant had been

in open, notorious, adverse possession of the lands described in plaintiffs' declaration for more than ten years next preceding the bringing of said suit, etc.

J. A. McKibben seems to have bought the entire tract of land involved in the suits from one Robinson, a brother-in-law of Mrs. Lovejoy, and, after buying, sold H. H. McKibben, a son, a portion known as the east half of the southeast quarter of section 22, township 12, range 3 west. The facts show that prior to the purchase by McKibben of the lands in question Mrs. Lovejoy had occupied one part and Robinson another part of the lands adjoining each other; and that after the McKibbens bought from Robinson that McKibben, desiring to know the exact line of his land, procured a survey thereof by one McGuire, and, according to the survey made by McGuire, the dividing fence between Mrs. Lovejoy and McKibben was north of McGuire's line. Thereupon McKibben, believing at the time that this was the correct line, moved the fence on the McGuire line. This occurred, according to the evidence of the surveyors and of McKibben, in the year 1903, and according to Mrs. Lovejoy about the year 1901, though she testifies she is not absolutely sure of the time, and that she paid McKibben her portion of the costs of the survey in the year 1903.

[1] McKibben, being advised that the line was incorrect in 1911, secured the services of the county surveyor and had the line retraced, starting from established corners of government surveys. This survey placed the line 66 yards north of the McGuire line, and McKibben in 1911 brought suit for possession of the strip between the two lines. It seems to be fully established from the evidence that the line run in 1911 was the correct line, and that the McGuire line run in 1903 was an incorrect line, which resulted from the fact that the land in question lies near the boundary line between Calhoun and Yalobusha counties, and that McGuire got his starting point from some point in Yalobusha county which did not correspond with the Calhoun county positions. In other words, McKibben shows a complete paper title to the land in controversy. We think the evidence falls satisfactorily to show adverse possession on the part of Mrs. Lovejoy and Mr. Summers.

[2] One of the chief points relied on by counsel for appellant for reversal is the void description, so claimed, in the declaration of H. H. McKibben versus the defendant, the appellant, which is described as "a strip of 24 acres, more or less, off the north end of the east half of the southeast quarter of section 22, township 12, range 3 west." The description of so many acres off the north end of a tract of land is a good description. *Henderson Harris v. Horrace Byers*, 73 South. 614, and authorities cited in that opin-

lon. Another point relied upon is instruction No. 6 for the plaintiff, which reads as follows:

"The court instructs the jury that if they believe from the evidence that the Byers survey is correct, and that defendant has not shown that she had adverse possession of the land in controversy for ten years next before bringing of the suit, then the jury should find for the plaintiff."

[3, 4] It is contended that this instruction prevented plaintiffs' recovery, even though she had been in possession for a ten-year period preceding the filing of the suit; in other words, that she was entitled to show possession for a ten-year period any time so long as ten years had not run against her in favor of the plaintiff, even though the period did not continue up to the date of the bringing of the suit. In pleadings setting up statutes of adverse possession they should specify the period of adverse possession relied upon so the adverse party might have notice of the exact period of time the adverse possession is alleged to have existed. Having elected to plead the ten years next preceding the filing of the suit, and not having alleged any other period during which there was any adverse possession, the defendant was bound to make her case as alleged in her plea. There does not appear, however, to have been satisfactory proof of adverse possession for any period of ten years.

[5] We do not think there is any error in the other instructions. A person relying upon adverse possession must prove such a possession and such acts of ownership and control by the claimant as would notify the world of his claim.

We find no reversible error in the record, and the cause is accordingly affirmed.

Affirmed.

(113 Miss. 373)

JOHNSTON, State Revenue Agent, v. LONG FURNITURE CO. (No. 18741.)

(Supreme Court of Mississippi, Division B.  
March 5, 1917.)

1. LICENSES  $\S$  7(3) — STATUTES  $\S$  64(8) — PARTIAL INVALIDITY—LICENSE TAXES.

Under Laws 1916, c. 90, imposing a license tax on dealers in coffins doing an undertaking business, but excepting merchants paying a tax on their stock, a furniture company paying a tax on its coffin stock, but also doing an undertaking business, is liable for the tax, since the proviso regarding merchants is void and separable.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig.  $\S$  9, 19; *Statutes*, Cent. Dig.  $\S$  65, 195.]

2. CONSTITUTIONAL LAW  $\S$  230(3)—LICENSES  $\S$  7(3) — EQUAL PROTECTION — LICENSE TAXES.

The exception of merchants paying a tax on their coffins from the license tax imposed by Laws 1916, c. 90, on dealers in coffins doing an undertaking business is void because denying

equal protection of the laws to persons not merchants.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig.  $\S$  687; *Licenses*, Cent. Dig.  $\S$  9, 19.]

Appeal from Circuit Court, Copiah County; J. B. Holden, Judge.

Action by J. C. Johnston, State Revenue Agent, against the Long Furniture Company. Judgment for defendant, and plaintiff appeals. Reversed, and judgment for plaintiff.

M. S. McNeil, of Hazlehurst, and Stokes V. Robertson, of Jackson, for appellant. H. J. Wilson, of Hazlehurst, for appellee.

ETHRIDGE, J. Plaintiff, J. C. Johnston, State Revenue Agent, filed suit against the Long Furniture Company, a corporation, doing business at Hazlehurst in Copiah county, Miss., for a privilege tax of \$100 per year for each of the years 1909, 1910, 1911, 1912, 1913, and 1914, and also for 100 per cent. damages for failure to pay said privilege tax within the time required by law. The testimony shows that the defendant was carrying a stock of coffins, and was, in connection with the coffin business, operating a hearse, and would, when a person applied therefor, prepare the body for the burial and bury it, charging extra compensation for this service. Also, that they kept embalming fluids, and would, when requested, have the body embalmed for burial, charging therefor. There was a judgment for the defendant below, from which judgment the revenue agent appeals.

[1, 2] This case is precisely like the case of W. Ed Smith, Tax Collector, v. O. B. Perkins, decided by this court December 23, 1916 (73 South. 797), in which it was held that persons so engaged are liable for undertakers' privilege tax. It is urged here in the present case that the case of W. Ed Smith, Tax Collector, v. O. B. Perkins, *supra*, was erroneous because the decision writes something into the statute that the Legislature had not written there, and that the result was that the Supreme Court had legislated in the matter. This is an erroneous view of the decision. The statute (Laws 1916, c. 90) imposing the privilege tax imposes a tax upon all persons engaged in the business, but undertakes to except out of the statute a certain class known as merchants who had paid a privilege tax as merchants, and this clause excepting merchants being a separable provision, and, being void because it denies the equal protection of the law to people not merchants, could be separated from the body of the act on the principle that where a part of a statute is unconstitutional and can be separated from the main statute without impairing the act as a whole, it may be done. This principle was distinctly recognized and decided in *Adams*, State Revenue Agent, v. Standard Oil Company, 97 Miss. 879, 53

South. 692. This case having been tried in the court below prior to the decision of the case of *W. Ed Smith v. C. B. Perkins*, and being decided contrary to the view there held, the case is reversed, and, as there is no dispute as to the facts, judgment will be entered here for the amount sued for.

Reversed, and judgment here.

(113 Miss. 378)

**EDWARDS v. HAYNES-WALKER LUMBER CO. (No. 18822.)**

(Supreme Court of Mississippi, Division B.  
March 5, 1917.)

**1. MASTER AND SERVANT §103(1)—INJURIES TO SERVANT—SAFE-PLACE DOCTRINE.**

It is the master's nondelegable duty to furnish a servant a safe place to work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 175.]

**2. MASTER AND SERVANT §164—INJURIES TO SERVANT—FELLOW SERVANT'S NEGLIGENCE—METHODS OF WORK.**

Where it was the servant's duty to oil the bit saw mandrel, while the mill was shut down at the noon hour, the master was not absolved from liability for injuries to the servant resulting from premature starting of the machinery by a fellow servant, since it was the master's duty to supervise the operation of the machinery, as well as to provide a safe place for work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 331.]

**3. MASTER AND SERVANT §208(1)—INJURIES TO SERVANT—SAFE-PLACE DOCTRINE.**

The servant does not assume the risk of the master's failure to furnish a safe place to work when he works in an unsafe place.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 551.]

**4. MASTER AND SERVANT §164—INJURIES TO SERVANT—SAFE-PLACE DOCTRINE.**

Where a servant required to oil a bit saw mandrel during the noon hour when the machinery was required to be shut down, who was injured when the foreman started the machinery before 1 o'clock and without sounding the whistle, as was the custom, the master was liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 331.]

Appeal from Circuit Court, Tishomingo County; Claude Clayton, Judge.

Action by J. W. Edwards against Haynes-Walker Lumber Company. Judgment on a directed verdict for defendant, and plaintiff appeals. Reversed and remanded.

J. A. Cunningham, of Booneville, for appellant. W. J. Lamb, of Corinth, for appellee.

**COOK, P. J.** This suit originated in and was tried in the circuit court of Tishomingo county. According to the testimony of witnesses for plaintiff, he was an employé of the defendant company and his duties were that of a block setter; and it was his duty, among other things, to oil the bit saw mandrel. In order to perform his duties, it was necessary for him to take a position between the top saw rig and the big saw. The rule

was that plaintiff's duties were to be performed at the noon hour, when the machinery was at rest. The regular custom was to put the machinery in motion at 1 o'clock. While the machinery was at rest, plaintiff's place to work was a perfectly safe place, but after the machinery was put in motion his place to work was a veritable death trap. In view of this fact, it was the custom to sound the whistle before the mill was started. On this occasion no whistle was sounded. While the plaintiff was in an extremely perilous position, and before the time to start the mill, and without giving the customary signal, the trap was sprung and plaintiff was injured; happily he was not killed. The court directed the jury to find for defendant.

It is earnestly argued by appellee that the company, a copartnership, is not liable, because the proof showed that appellant was injured by the negligence of a fellow servant.

[1] It will be observed from the statement of facts that the defendant had adopted a system designed to safeguard the lives and limbs of its employes. Some such system was necessary in order that the employé injured in this case might have a safe place to work. It was, of course, the duty of the master to furnish a safe place to work, and this duty was nondelegable. This is elementary law, and it would be a waste of time to cite authorities to support the rule.

[2] It would seem absurd to say that the master might escape liability, under the facts of this case, by merely saying that he had performed his duty in this case by directing the employé to oil the mandrel while the mill was shut down at the noon hour, and while the death-dealing apparatus was quiescent; that the premature starting of the machinery was the negligent act of a fellow servant for which the master was not liable. An employer "is no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself," or, in other words, that "a master is responsible, in point of law, not only for a defect on his part in providing for his failure to see that the apparatus was properly used." *Labatt's Master & Servant* (2d Ed.) § 1110. The quotation was taken by Mr. Labatt from an English case, and the principle is developed in the succeeding pages of his masterly work.

[3] It is the universal law that a master must furnish his servants a safe place to work; that this duty is nondelegable, and a servant does not assume the risk when he works in an unsafe place.

[4] Returning now to the proven facts of the present case, it will be observed that the position of appellant when he was injured was only dangerous while the saws were revolving; and, when this was not the case, there was no need of any precautions for his



safety. So he was not required to work in this place when the saws were in motion, but it was his job to oil the machinery while the mill was shut down. He was doing the work at the proper time and would have been entirely safe but for the foreman's disregard of the time. The custom was to do this work at recess while everything was safe. The custom was to start the mill at 1 o'clock. The mill was started before 1 o'clock. It was the nondelegable duty of the master to see that the custom was carried out, in order that the place to work be made safe.

Many cases decided by this and other courts upon the established rule of the non-liability of the master for the negligence of a fellow servant of the complaining party are cited, none of which are, in our opinion, applicable to the facts of the present case.

There is also much discussion of the vice principal or superior servant doctrine, but we do not think it is necessary to take either side of this controversy in the present case.

When it is kept in mind that the place where appellant was required to work was only safe while the machinery was not in motion, it will be perceived that appellee had not provided a safe place if he failed to adopt some system to insure that the machinery would not be started while appellant was at work. This failure of the system was the fault of the master, for the obvious reason that he could not hide behind the skirts of a fellow servant when it was his positive and nondelegable duty to keep the place safe, and see to it that his apparatus was properly used.

We think that the principle discussed is the principle which controlled this court in *Oil Co. v. Ellis*, 72 Miss. 191, 17 South. 214.

We have not discussed the fellow-servant rule, because we do not believe that this rule has any application to this case. There is no question about the fellow-servant doctrine in this state. It is in full flower, except in that class of cases which come within the exceptions prescribed by our Constitution or statutes.

Reversed and remanded.

STEVENS, J., took no part in this decision.

(113 Miss. 335)

**BOARD OF MAYOR AND ALDERMEN OF  
TOWN OF LOUISVILLE v. ARM-  
STRONG et al. (No. 18894.)**

(Supreme Court of Mississippi, Division B.  
Feb. 5, 1917.)

**1. ACTION  $\S$  50(3)—EQUITY  $\S$  149—JOINDER  
OF ACTIONS—RECOVERY OF ILLEGAL TAXES.**

Where several properties, not owned by joint owners, were once assessed, and later, when improved, were again assessed for the same year, the owners could not sue jointly for the taxes,

based on the increased assessment, paid by them under protest, either at law or in equity.

[Ed. Note.—For other cases, see Action, Cent. Dig.  $\S$  514-523; Equity, Cent. Dig.  $\S$  342, 368-370.]

**2. TAXATION  $\S$  543(1)—PAYMENT—PROTEST—RECOVERY OF ILLEGAL TAXES—JURISDICTION OF CHANCERY COURT.**

The chancery court does not have original jurisdiction of demands of owners of realty to recover alleged illegal taxes paid under protest.

[Ed. Note.—For other cases, see Taxation, Cent. Dig.  $\S$  1006.]

Appeal from Chancery Court, Winston County; H. H. Elmore, Special Chancellor.

Suit by J. K. Armstrong and others against the Board of Mayor and Aldermen of the Town of Louisville. Demurrer to the bill was overruled, and appeal granted to settle the principles of the case. Decree reversed, demurrer sustained, and bill dismissed without prejudice.

Appellees, as citizens and taxpayers of the municipality of Louisville, in Winston county, exhibited their bill of complaint in the chancery court of said county against the board of mayor and aldermen of the town of Louisville, seeking to recover various amounts of taxes alleged to have been paid for the year 1913, with the exception of appellee J. A. Chapman, who seeks to recover \$24 alleged to have been unlawfully paid for the year 1914, on different improvements constructed by complainants upon their separate and individual properties in said town. The bill charges that the complainants each owned unimproved real estate on the 1st day of February, 1913, the day upon which the liability of individual taxpayers for the fiscal year 1913 was by law determined; that after the 1st day of February each of the complainants made separate improvements, fully detailed in the bill, some of the complainants constructing dwelling houses, and others houses for business purposes; that during the year 1913, after the said improvements had been constructed, the board of mayor and aldermen increased the assessment of each of the complainants, so as to embrace the value of the improvements, and the tax collector had proceeded to collect ad valorem taxes for the year 1913 upon the value of these improvements; that the increase in the assessment, so far as it affected taxation for the year 1913, was without authority of law, and that the collection of this tax by the city tax collector was unlawful; that complainants had protested against the increase, but their objections had been overruled by the board; that each of the complainants had paid the amount of the tax exacted under protest. Similar allegations were made with reference to the increase of the assessment of J. A. Chapman for the year 1914, and also with reference to the exaction and payment of the increased tax for that year. It is charged that these separate improve-

ments of the complainants were not taxable for the year 1913, that the real estate of the complainants had already been lawfully assessed at its true value, and that there was no authority of law justifying the board in increasing the assessments then lawfully appearing against each of the complainants upon the regular assessment roll. The bill does not charge at what meeting of the board the assessments were increased, but does charge that some of the improvements were not constructed until the month of August, 1913, and it thereby necessarily shows that the increase was made during or subsequent to the month of August. The bill does not charge at what meeting complainants protested, or whether all of them in fact appeared before the board, or had notice of the increase, at or during the meeting at which an order increasing the assessment was entered. It inferentially appears from the bill that the board attempted to make this increase, not at the regular revenue session of the board, when the general assessments of the municipality were equalized and the roll approved, but that the board acted under authority of chapter 128, Laws of 1912.

A general demurrer was interposed to the bill, and this demurrer was by the court overruled, but an appeal granted to settle the principles of the case. Two of the grounds of demurrer challenge the right of the complainants to combine their separate demands in one suit. For the purposes of the opinion, it is unnecessary to set out the various grounds of demurrer.

L. H. Hopkins, of Louisville, for appellants. E. M. Livingston, of Louisville, for appellee.

STEVENS, J. (after stating the facts as above). [1] Appellees are not joint owners of the property, the assessment of which was increased. Each owns his separate and individual parcel of real estate upon which improvements were erected. The value of these improvements varies, according to the varying amounts of labor and material required for each house. Each complainant seeks to recover back a tax charged to have been demanded unlawfully, and in seeking this recovery every complainant is suing to recover back his own, and not another's, tax. The complainants, therefore, have no community of interest in the subject-matter of this litigation. This is not a case where taxpayers seek to recover back a uniform rate of taxation imposed by an unconstitutional law. Each of the complainants is here seeking to recover back a portion of ad valorem taxes paid upon his own property. The effort, therefore, to combine the claims in one bill, is condemned by more than one decision of this court. See *Newell et al. v. I. C. R. R. Co.*, 106 Miss. 182, 63 South.

351, and authorities there listed. For this reason, the demurrer to the bill should have been sustained, and the bill dismissed.

[2] In entering the proper decree here, we, of course, are not reversing the chancellor for assuming to take jurisdiction of what appellants contend to be common-law suits. Appellees could not combine their claims, either in one declaration at law or one bill in equity. It might be well to say, however, that in our judgment the chancery court does not have original jurisdiction of the separate demands here sued for.

The decree of the lower court will be reversed, the demurrer sustained, and the bill dismissed without prejudice to the rights of the complainants to institute new and separate actions.

(113 Miss. 388)

**GRENADA GROCERY CO. v. TATUM et al.**  
(No. 18942.)

(Supreme Court of Mississippi, Division B.  
March 5, 1917.)

**1. LANDLORD AND TENANT §217(1)—ACTION FOR RENT—EQUITABLE JURISDICTION.**

An action to collect rent is not a proper subject of equitable jurisdiction, and a chancery court should dismiss such a proceeding on its own motion.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 866-868.]

**2. APPEAL AND ERROR §1175(7)—DETERMINATION OF CAUSE—ENTRY OF JUDGMENT.**

Under Const. 1890, § 147, prohibiting reversals because the action was brought in the wrong court, with statutory power to enter the proper judgment when manifest from the record, the Supreme Court will enter judgment, where there is no material conflict of evidence, in a case erroneously tried in a chancery court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4581.]

**3. LANDLORD AND TENANT §208(1) — LESSEE'S LIABILITY FOR RENT — TRANSFER OF LEASE.**

A lessee is liable for accrued rent, although he attempted to transfer the lease without the lessor's consent.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 821, 830, 831.]

Appeal from Chancery Court, Grenada County; J. G. McGowen, Chancellor.

Suit by the Grenada Grocery Company against S. T. Tatum and another. Judgment for defendants, and plaintiff appeals. Reversed, and judgment entered for plaintiff.

Cowles Horton, of Grenada, for appellant. S. A. Morrison, of Grenada, for appellees.

ETHRIDGE, J. The Grenada Grocery Company, a corporation, filed suit in the chancery court of Grenada county against S. T. Tatum and M. E. Powell for the sum of \$100 and interest, claiming under a contract made between the Grenada Grocery Company and S. T. Tatum, which is in the following words:

"This agreement, entered into this the 14th day of September, 1908, by and between the

Grenada Grocery Company, of the first part, and S. T. Tatum, of the second part, all of the town of Grenada, Grenada county, and state of Mississippi, witnesseth that, for and in consideration of the said Grenada Grocery Company relinquishing claims as vested in lease by the Illinois Central Railroad Company to 24 feet of ground in the rear of their warehouse and allowing the said S. T. Tatum to erect a brick icehouse adjoining the Grenada Grocery Company's warehouse, the said S. T. Tatum agrees to pay the said Grenada Grocery Company the sum of twenty-five (\$25.00) dollars a year, and further agrees, should the said Grenada Grocery Company desire to erect for their own use and occupancy a warehouse on said 24 feet on the south end of the lot now occupied by them after the first year from February 1, 1909, then said S. T. Tatum agrees to relinquish his claim to said 24 feet in rear of Grenada Grocery Company's warehouse as vested in his lease by Illinois Central Railroad Company to him. The said Grenada Grocery Company agrees to purchase from S. T. Tatum the improvements he makes on said 24 feet at actual cost of construction, less damage or deterioration, should they require him under conditions above stipulated to vacate said 24 feet.

"[Signed] Grenada Grocery Company,  
"S. T. Tatum."

It appears that after Tatum made the above contract, and after he had erected the icehouse on the lands described in the contract, he assigned his business or transferred his claim in the house to Powell; but nothing was said, so far as the record shows, binding Powell to perform this agreement, nor was the consent of the Grenada Grocery Company procured to the contract between Tatum and Powell. Evidence was taken on the part of the complainant to show that it was agreed that Tatum was desirous of erecting an icehouse near the switch tracks of the railroad company, and could not procure any other lot in the city, and that he approached the Grenada Grocery Company to secure the lot in question, which the company had leased from the railroad company. The minutes of the corporation show an order made at a directors' meeting, authorizing the execution of the contract for the yearly sum of \$25. The contract was drawn up and signed by both parties; Tatum having a copy, but afterwards lost or mislaid it. The complainant put Tatum on the stand as a witness, after having fully proved its case by its own witnesses, and interrogated him about the matter. In this testimony he claims that the contract was that he was to pay only \$25 for the rights given under the contract. His answer does not set forth a mistake in the execution of the contract, but simply denies the contract declared on; but he admits signing the contract and having a copy of it given to him at the time. This was the substance of the evidence in the case, and on this evidence the chancellor found for the defendant.

[1] It is inconceivable to the writer upon what theory the bill in this case was filed in the chancery court. There is not a single allegation in the bill that makes it a proper

suit for the chancery court, and no facts are set forth that warrant the court in entertaining jurisdiction, and the court should have dismissed the bill on its own motion; the jurisdiction not being questioned by the defendant in any pleading.

[2] However, we are prevented by section 147 of the state Constitution from reversing a case solely because it was brought in the wrong court; and under the statutes of the state it is the duty of the Supreme Court, where the court below has reached the wrong conclusion or entered the wrong judgment, to enter a proper judgment here if it be manifest from the record. In other words, if there is no material conflict in the evidence, and one party clearly has the right under the evidence to a judgment, this court should enter judgment here and not remand the cause.

[3] On this record it is manifest that Tatum is liable to the complainant for the \$25 per year for the period sued for and until such time as he shall surrender to the Grenada Grocery Company his leasehold rights or remove his building from said lot. Therefore the judgment of the court below is reversed, and judgment will be entered here for \$100, with 6 per cent. interest from date of filing suit, and for all costs.

Reversed, and judgment here.

COOK, P. J., recused himself, and took no part in this decision.

(112 Miss. 392)

# CLEMENT v. KNIGHTS OF MACCABEES OF THE WORLD. (No. 18816.)

(Supreme Court of Mississippi, Division B.  
March 5, 1917.)

## 1. DEATH §2(2) — PRESUMPTIONS — SEVEN YEARS' ABSENCE.

The presumption of death arising from absence for seven years does not prove that death occurred at any particular time prior to the expiration of the seven years, and if it is essential to the case of any litigant to show that the absentee died at any particular time prior to the lapse of the seven years, the burden of proof is upon him.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 8.]

## 2. INSURANCE §817(2)—FRATERNAL BENEFIT INSURANCE—BURDEN OF PROOF.

Before the beneficiary of the certificate of a member of a fraternal insurance order could recover thereon, it was incumbent upon her to show not only that the insured died, but that he died while the certificate was in force.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2001.]

Appeal from Circuit Court, Lauderdale County; W. W. Venable, Judge.

Action by Mrs. Olive E. Clement against the Knights of the Maccabees of the World. From a judgment for defendant, plaintiff appeals. Affirmed.

Appellant, as the widow of Jeff L. Clement, now presumed to be deceased, brought

this action to recover the sum of \$2,000, the amount of the benefit certificate held by the deceased in the Order of Knights of the Macabees of the World, a fraternal insurance order. For the purposes of this opinion it is unnecessary to state the terms or provisions of the certificate. The declaration in part averred:

"Plaintiff avers that said Jeff L. Clement is dead, that he departed this life somewhere between the dates of August 13, 1906, and August 13, 1913, the exact time and place is unknown to plaintiff.

"Plaintiff alleges in this connection that the said Jeff L. Clement, while being her husband and the father of her children, left his home the 1st day of August, 1906, and has never returned; that the last time she heard from or of him was by letter on the day of August 13, 1906; that she has made repeated search and inquiry for him at various and divers times, but has been unable to get any track of him.

"Plaintiff alleges that under the laws of the state of Mississippi, Code 1906, the said Jeff L. Clement is presumed to be and is dead, he having absented himself from this state, or concealed himself in this state successfully, without being heard of in a period of seven years."

The case was tried upon an agreed statement of facts. From the pleadings and agreed statement it appears that Mr. Clement left his home in Mississippi August 1, 1906, and went to Texas. A few days thereafter his wife received a letter dated Bridgeport, Tex., August 13, 1906. This is the last message Mrs. Clement ever received from her husband. She continued to pay the monthly insurance dues until October, 1912, when she discontinued payment, and in November, 1912, Mr. Clement was suspended from the order for nonpayment of dues, and was never thereafter reinstated. Certain provisions of the benefit certificate are to the effect that if any member absconds, removes, or departs from his home or last place of residence, and remains away for a period of one year, and does not report to the record keeper of his tent, shall thereby forfeit his membership and certificate; that no one shall pay the monthly dues for a member who has departed; and section 289 of the policy expressly provides that absence shall raise no presumption of death. One of the contentions of appellee is that the policy was forfeited for nonpayment of dues. The court granted a peremptory charge in favor of appellee as defendant in the court below, and from the judgment entered thereon appellant prosecutes this appeal.

Jacobson & Brooks, of Meridian, for appellant. Baskin & Wilbourn, of Meridian, for appellee.

STEVENS, J. [1] The solution of one question will dispose of this appeal. There is no agreement or proof that Jeff L. Clement died at any particular time. It is only by virtue of a legal presumption that he can be regarded as dead. He was last heard

of August 13, 1906, and the seven-year period did not expire until August 13, 1913. Since the latter date the law presumes him dead, but the presumption does not prove that death occurred at any particular time prior to the expiration of the seven years. There are here no circumstances or testimony tending to establish death on any particular date. The presumption of life is strong, and in this case this presumption of the continuance of life is overcome not by any actual proof of death, but solely by the statutory presumption of death. The law found it necessary to fix some period of time at which one who had been continuously absent should be regarded as dead, an arbitrary time by which the rights of the living growing out of relationship to the deceased could be determined. The possession and devolution of property must be determined, statutes of limitations applied, and other rights adjudicated. There is a hopeless conflict of authority as to whether or not the presumption of death from absence raises any presumption of the precise time of death. We regard the great weight of American authority as holding that in the absence of evidence to the contrary the life of an individual of the common age of man would be regarded as continuing until overcome by the statutory presumption of death, or, in other words, if it is essential to the case of any litigant to show that the absentee died at any particular time prior to the lapse of the seven years, the burden of proof is upon him to establish this fact by competent testimony. Just what proof in this regard would be essential need not be here indicated. In the instant case there are no special circumstances of any kind from which death at any particular time could be inferred. So it is that in the instant case Mr. Clement was suspended in November, 1912, for nonpayment of dues and his policy thereby lapsed.

[2] Before appellant could recover, it was incumbent upon her to show not only that the insured was dead, but that he died while the policy was in force. This burden she failed to meet. The peremptory charge was therefore properly given. While the case of *New York Life Ins. Co. v. Mrs. Sue S. Brame*, 73 South. 806, recently decided by this court, presented different issues, many authorities on the point here discussed are referred to by Judge Sykes in the opinion in that case. Other authorities will be found listed in the note to *Butler v. Supreme Court, L. O. F. (Wash.) 101 Pac. 481, 26 L. R. A. (N. S.) 293*.

What we have said upon the question of forfeiture renders it unnecessary to discuss the other question argued—whether the by-law of appellee stipulating that absence shall raise no presumption of death is invalid because in contravention of our statute and the public policy expressed therein.

Affirmed.

(113 Miss. 401)

WELLS et al. v. McCOLLOUGH et al.  
(No. 18935.)(Supreme Court of Mississippi, Division B.  
March 5, 1917.)1. EXECUTORS AND ADMINISTRATORS § 221(9)  
—CLAIM AGAINST ESTATE—PRESENTATION—  
“WRITTEN EVIDENCE.”

Under Code 1906, § 2106, requiring one desiring to probate a claim to present the written evidence thereof, a joint and several note of claimant and her deceased husband to which was attached the payee's receipt of payment in full by claimant, was “written evidence” on its face of her claim for one-half of the payment as showing her payment of the debt of her husband.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 903½, 1874, 1876.]

For other definitions, see Words and Phrases, First and Second Series, Written Evidence.]

2. EXECUTORS AND ADMINISTRATORS § 221(9)  
CLAIMS—JOINT AND SEVERAL NOTE—EVIDENCE.

Evidence on exceptions filed by heirs to the allowance of the probated claim of the widow and administratrix to which was attached the payee's receipt in full from claimant, on a joint and several note of claimant and her deceased husband, wherein claimant contended that her husband had given her the land for which note was given to reimburse her for moneys constituting her separate estate, evidence held to show that the husband intended to execute the note as a comaker, and to become obligated with his wife for the full amount.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 903½, 1874, 1876.]

3. EXECUTORS AND ADMINISTRATORS § 221(3)  
—ALLOWANCE OF CLAIMS—EVIDENCE.

On exceptions by the heirs to the allowance of a probated claim of the widow and administratrix, testimony of the claimant on the issue as to whether decedent had given her the land purchased by the receipted note the basis of the claim, as reimbursement for moneys constituting her separate estate, was inadmissible.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 902, 1865, 1866, 1871.]

4. EXECUTORS AND ADMINISTRATORS § 227(2)  
—PRESENTATION OF CLAIM—STATUTE.

Where a husband and wife executed a joint and several purchase-money note, and the wife, after her husband's death, paid the note in full and took a receipt and presented it for probate and allowance, the one-half representing her primary obligation could not be probated by simply filing the canceled note, but the claim would necessitate an inquiry into the facts, so that there should have been a statement of the claim in writing signed by the creditor, as prescribed by Code 1906, § 2106.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 813.]

Appeal from Chancery Court, Calhoun County; J. G. McGowen, Chancellor.

Exceptions by W. B. Wells and others against T. P. McCollough and others, administrators, to the allowance of a probated claim of Mrs. C. G. Wells, widow and administratrix of J. C. Wells, deceased. Claim allowed, and exceptions appeal. Reversed and remanded.

Appellants are the heirs at law of J. C. Wells, deceased, and the present contest arises over exceptions filed by them to the allowance of the probated claim of Mrs. Canie G. Wells, the widow of J. C. Wells, deceased, and the administratrix of his estate. It appears that Mr. Wells in his lifetime negotiated for and purchased certain real estate from a Mr. Brooks. There was no cash consideration paid for the land, but the amount of the consideration, to wit, \$1,133, was furnished by Scott Hardin. Brooks, at the request of J. C. Wells, executed the deed to Mrs. C. G. Wells. Hardin, in furnishing the money, accepted the joint and several note of Mrs. C. G. and J. C. Wells in the sum of \$1,133 and took a deed of trust on the land to secure the note. The note was dated December, 1910, due one day after date, payable to the order of Scott Hardin or bearer, and stipulated upon its face that it was given for the purchase price of the lands therein properly described. In executing the note Mrs. Wells signed first and J. C. Wells then joined her as comaker. Before the note was paid Mr. Wells died. Thereupon Mrs. Wells was appointed administratrix in connection with her coadministrator, T. P. McCollough. Scott Hardin did not probate this note against the Wells estate, but on August 11, 1911, after the death of J. C. Wells, Mrs. C. G. Wells paid the full amount of the note and the payment was evidenced by the following receipt written upon the back of the paid note:

“\$1,133.00. Wardwell, Miss., Aug. 11, 1911.

“Received on the within note of Mrs. C. G. Wells, the sum of eleven hundred thirty-three and 00/100 dollars, in full payment of this note. Scott Hardin.”

She thereafter attached the canceled note, with the receipt indorsed on the back thereof, to the usual affidavit of probate, and presented her claim against the estate of J. C. Wells, deceased, for the full amount of the \$1,133, and the chancery clerk accepted and probated the claim for this amount. Appellants then objected to the allowance of this claim, and upon the hearing before the chancellor certain evidence was introduced pro and con. The written exceptions charged that the debt is not a just claim against the estate, but the individual debt of Mrs. Wells; that the only party who could have probated this note was Scott Hardin; that the note was never transferred by Scott Hardin to Mrs. Wells, was never probated by Scott Hardin, and the same now is not evidence of any claim of Mrs. Wells. On the hearing objections of appellants were directed both to the form of the probate and to the sufficiency of the testimony. Mrs. Wells was introduced as a witness in her own behalf, and testified briefly over the objections of appellants. Mr. T. L. Hollis, half-brother of Mrs. Wells, testified to certain declarations or admissions by Mr. Wells in his lifetime to the

effect that he bought the land to reimburse his wife for certain lands which she had owned and which Mr. Wells had sold, amounting in value to \$250, and also to reimburse her for rents which Mr. Wells had collected for his wife for five or six years or from 1902 to about 1907 or 1908. Mr. Hardin was also introduced, and testified that Mr. Wells negotiated for an made the agreement about executing the note and deed of trust, and also testified to a statement by Mr. Wells that he had some young stock he intended to sell and from the proceeds of the sale to pay the note. Mr. Hardin further testified that he had held an old mortgage on the place, which he surrendered when Mr. Brooks deeded the land to Mrs. Wells, and thereupon took a new note and mortgage. He also testified to Mrs. Wells' paying the note in accordance with the receipt executed on the back. The deed to the land was introduced, and shows a consideration of \$1,070.50 and the usual warranty provisions. This was all the evidence to support the claim of Mrs. Wells. There was evidence in defense which it is unnecessary to detail. The chancellor allowed the full amount of the claim, and from his decree appellants appeal.

Haman & Bates, of Pittsboro, for appellants. Creekmore & Stone, of Water Valley, for appellees.

STEVENS, J. (after stating the facts as above). This record presents a rather unique contest. Counsel do not direct our attention to any adjudicated case of our own court exactly similar. It is argued by counsel for appellants that the paid or canceled note here probated is not the written evidence of Mrs. C. G. Wells' claim, if any she has, and that therefore the probate is defective and not within the terms of our statute; section 2106 of the Code directing how claims shall be probated. It is contended that the canceled note is not the "written evidence," and that the claimant filed no itemized account or statement of the claim in writing signed by her, as required by the statute. What constitutes the written evidence of a claim was discussed by this court in *Lehman v. Powe*, 95 Miss. 446, 49 South. 622. In that case certain canceled checks were attempted to be probated as the written evidence of the claim. Judge Smith, in speaking for the court, said:

"The words 'written evidence,' as used in the statute, clearly mean such a writing as by its terms or on its face evidences the fact that a liability exists on the part of the estate in favor of the claimant."

In another part of the opinion it is said:

"These canceled checks disclose no liability at all on the part of the estate to any one. \* \* \* They could have been used, it is true, as evidence in a suit for money loaned, if in fact they related to such a transaction, but only as one link in the evidence necessary to maintain such a suit."

In the instant case the promissory note evidenced the joint and several obligation of Mr. and Mrs. Wells to Scott Hardin. The note upon its face discloses at best an obligation that presumably should be paid by the makers jointly; that is to say, one-half by Mrs. Wells and one-half by J. O. Wells. When Mrs. Wells then paid the note in full, as evidenced by the receipt on the back of the note, the entire document as then canceled, without evidence to the contrary, indicated that she had paid the full amount of the joint undertaking and, to the extent of one-half, had paid the debt of her husband. In making this payment Mrs. Wells was privileged to have the note transferred to her by Scott Hardin, the holder thereof. If the note had been transferred or assigned to Mrs. Wells, she could, so far as the face of the paper discloses, have maintained an action against her husband for his portion of the obligation. Instead of taking a written assignment she elects to have Scott Hardin execute a receipt in full on the back of the document itself, and we think, therefore, that when she presented the canceled note for probate the writing should, in equity, be regarded as evidencing on its face her claim for one-half of the payment, but no more. So far as the writing itself indicated, Mrs. Wells, as to one half, simply paid her own obligation. As to the other half it evidenced the fact that she had paid the obligation of her husband, and this under circumstances over which she did not have full control. As a comaker she could have been compelled to pay the full amount of the note. Without compulsion she elected to pay the full amount and then to demand reimbursement from her comaker. So much for one-half of the claim as evidenced by the writing itself.

[2, 3] But it was the theory of the claimant that her husband had given her the land which he purchased to reimburse her for moneys which constituted her separate estate and which her husband had appropriated. The rents which the witness Hollis says Mr. Wells received from the lands of his wife could not, under section 2520 of the Code, be recovered, and the representatives of Mr. Wells in this proceeding could not be made to account for these rents. The evidence shows that these rents were collected some years prior to the death of Mr. Wells. The evidence is insufficient to show that Mr. Wells in fact sold any lands of his wife and appropriated the proceeds. At best the evidence shows an intention to place the title of the land purchased in Mrs. Wells and the further possible intention of Mr. Wells himself to pay the full amount of the note in question. He succeeded in having the title fully placed in his wife, but his expressed intention of paying the note was never in fact executed, and for all the court knows Mr. Wells might have changed his opinion or purpose to pay the note. In fact the only ad-

mission shown to have been made by Mr. Wells was a declaration that he intended to sell some young stock and from this source to pay the note. It is not shown that he intended to pay the note absolutely regardless of whether he consummated the sale of his young stock. There is no evidence that he sold the stock referred to, or that he attempted to execute his declared purpose. If he intended to give his wife the proceeds of this note, he never in fact completed the gift, and there is no evidence sufficient to characterize Mrs. Wells as a mere surety on the note. On the contrary, the deed for which the note was given was made to her, her signature comes first upon the note, and the transaction as a whole comes nearer placing her as principal than as surety. At the same time there is no evidence that sufficiently places J. C. Wells as a mere surety on the note. It seems clear to us that he intended to execute the note as a comaker and to become obligated with his wife for the full amount. As stated, the parties are joint and several debtors. The testimony of Mrs. Wells was incompetent.

[4] We conclude that as to one-half of the amount of this paid note, the canceled note itself, with the receipt indorsed on the back thereof, is the written evidence of that much of her claim, and to that extent is a sufficient compliance with the statute; that under the facts it was not error to allow this one-half, but the allowance of the full amount was erroneous; that the one-half representing the primary obligation of Mrs. Wells could not be probated by simply filing the canceled note, but a demand for this additional one-half would necessitate an inquiry into facts, and therefore, as to this demand, there should have been a statement of the claim in writing signed by the creditor. We are further of the opinion that under the proof the claim should be reduced one-half. The decree of the lower court will be reversed, and the cause remanded, with directions to reduce the amount of the probated claim one-half.

Reversed and remanded.

ETHRIDGE, J. I concur in the conclusion that this case should be reversed and remanded, and concur in the conclusion that Mrs. C. G. Wells and her husband are jointly liable to Scott Hardin on the note, and that the relation of surety and principal did not exist as between them, and I concur in the conclusion that Mrs. Wells is entitled to have one-half of the sum allowed against her deceased husband, she having paid the entire note.

In my opinion, however, Scott Hardin should have made the affidavit and probated

the claim. At the time of the death of the decedent, Scott Hardin was the creditor, and at that time the husband did not owe the wife the money in question. Section 2106 prescribes how claims against the estate of deceased persons should be probated; and the decisions heretofore have required a strict compliance with this statute. See *McWhorter v. Donald*, 39 Miss. 779, 80 Am. Dec. 97; *Cheairs v. Cheairs*, 81 Miss. 662, 33 South. 414. I think the writing on the back of the note was a sufficient statement of the claim under the statute. But the statute requires that an affidavit shall be attached thereto to the following effect, viz.:

"That the claim is just, correct, and owing from the deceased; that it is not usurious, and that neither the affiant nor any other person has received payment in whole or in part thereof, except such as is credited thereon, if any, and that security has not been received therefor, except as stated, if any. Thereupon, if the clerk shall approve, he shall indorse upon the claim the words following," etc.

It is manifest, to my mind, that the purpose of this statute was to have the person who held the claim at the time of the death to make the affidavit because he alone would know whether it had been paid in whole or in part, and in most cases he alone would know whether it was usurious, etc.

It is suggested that a creditor whose claim was secured, as in the present case, might refuse to probate his claim and look to the other joint maker and property for payment. If such be the case, the surviving debtor could file a bill or petition in the court where the estate was administered, setting forth the facts, and asking for permission to pay off the claim because of the peculiar facts stated. It seems to me that the surviving joint debtor could tender payment and demand the creditor to make affidavit before paying the money, and demand that he probate the claim against the estate of the deceased joint maker, and if the creditor refused to take appropriate steps to protect his claim against the deceased, that the surviving joint debtor could maintain a proceeding in the chancery court to protect his rights under this condition. However that may be, I am of the opinion that the estate of the deceased cannot be charged except by pursuing the statute, and, in my judgment, the majority opinion will invite dealings with the estate of decedents which this court will repudiate when they arise. It will encourage executors and administrators to pay claims and get assignments to themselves and filing probate proceedings that will be subversive of the policy above referred to. The creditor who could not truthfully make the affidavit could circumvent the statute by the simple expedient of assigning the claim to some other person.

(113 Miss. 419)

**FOOTE-PATRICK CO. v. CALADONIA INS. CO. (No. 18900.)**

(Supreme Court of Mississippi, Division B. March 5, 1917.)

**1. TRIAL  $\Leftrightarrow$  11(2)—TRANSFER TO CHANCERY—JURISDICTION.**

When a cause is transferred from the circuit court to the chancery court, it is the order of transfer that invests the chancery court with jurisdiction, and not the filing of the bill within 30 days thereafter, as required by statute, as Code 1906, § 1013, expressly says that the cause "shall be proceeded with as if it had been originally begun in that court"; so that it is a pending cause all the while, and after the order of transfer is entered, the chancery court has jurisdiction and may proceed as prescribed by statute, irrespective of the filing of the bill.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 29.]

**2. TRIAL  $\Leftrightarrow$  11(2)—TRANSFER TO CHANCERY—FILING BILL—TIME.**

Code 1906, § 1013, providing that when the papers have been deposited in the chancery court to which a cause has been transferred a complainant shall file his bill therein within 30 days, unless the chancellor shall limit the time or grant further time, is not a statute of limitations; and complainant's failure to file a bill within the time prescribed would not be a jurisdictional omission or defect, and a bill filed within 30 days after the papers were actually deposited with the chancery clerk was sufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 29.]

**3. EQUITY  $\Leftrightarrow$  11—CHANCERY JURISDICTION—FRAUD.**

The chancery court has general jurisdiction of fraud.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 21, 23, 24.]

**4. GARNISHMENT  $\Leftrightarrow$  120—TRANSFER TO CHANCERY—TRIAL—FRAUD.**

On the transfer of a cause from the circuit court to the chancery court after default judgment against the defendant, upon the issue of the garnishee's liability raised by its answer attempting to set up the adjudication of the issue between the garnishee and certain parties made defendants to the bill in the chancery court, where plaintiff could only attack the judgment in an alleged collusive suit between such parties and the garnishee on the ground of fraud and collusion, it was error to dismiss the bill of complaint.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 241, 242.]

Appeal from Chancery Court, Jones County; G. C. Tann, Chancellor.

Action by the Foote-Patrick Company against Robert Logan; Caladonia Insurance Company, garnishee. Judgment by default against defendant Logan, and contest between plaintiff and garnishee transferred to the chancery court, wherein plaintiff in its bill joined other parties defendant. Decree for the garnishee dismissing the bill, and plaintiff appeals. Reversed and remanded.

Appellant is a corporation domiciled at Laurel, Miss., and doing a wholesale grocery business. Appellee is a foreign insurance company, lawfully doing business in this state. One Robert Logan was indebted to appellant in the sum of \$550, and was the

beneficiary in or owner of a fire insurance policy whereby appellee insured certain property belonging to the said debtor. This property was destroyed by fire, and thereafter appellant filed suit against Logan in the circuit court and attached and garnished the funds alleged to be due by appellee to Logan as the proceeds of this insurance. Appellant obtained a judgment by default against Logan upon the debt issue, but the answer of appellee, as garnishee, denied liability on the policy of insurance. The answer of the garnishee was contested by appellant, and the issue thus raised by this contest was, by agreement of the parties, continued for several terms of court. While the issue thus made on the answer of the garnishee was pending, appellant moved that this issue or controversy be transferred to the chancery court for final adjudication. The motion for transfer was sustained by the circuit court and an order therefor duly entered. There was considerable delay on the part of the circuit clerk in depositing the papers in the chancery court to which the case was transferred. The papers were not deposited in strict accordance with section 1012 of the Code; and appellant did not file its bill in the chancery court within the 30 days prescribed by section 1013. These two sections of the Code read as follows:

"1012. (936) *Certification of transferred causes.*—If a cause be transferred by order of the chancery court to the circuit court, or vice versa, the clerk of the court ordering the transfer shall forthwith deposit all the papers in the cause, together with his certificate of the fact of the transfer, in the court to which it was transferred, taking the receipt of the clerk therefor.

"1013. (937) *Proceedings in such causes.*—When the papers have been deposited in the court to which the cause was transferred, all the parties to the proceeding shall take notice of the fact of the transfer; and the complainant or plaintiff shall file his declaration or bill in the court to which the cause was transferred within thirty days, unless the court, judge, or chancellor shall restrict the time or grant further time; and the defendant shall plead within thirty days thereafter, unless the time, by like means, be restricted or extended. And the cause shall be proceeded with as if it had been originally begun in that court, as of the date on which the cause was originally instituted."

When appellant did present its bill in the chancery court, it not only made appellee a party defendant, but also sued W. F. Tibbetts and A. T. Whitney, alleged assignees of the policy of insurance. The issue here presented arises on a motion of appellee insurance company to dismiss the bill of complaint.

The bill sets out the proceedings had in the circuit court in the attachment suit, the formation of the issue on the answer of the garnishee, and the transferring of this issue to the chancery court. It further alleges that at the July, 1914, term of the circuit court of the second district of Jones county,



an order had been entered dismissing a certain suit filed by Tibbetts and Whitney as assignees of the policy of fire insurance and against the appellee; that this issue had been tried by a special judge; that a demurrer filed by the insurance company to the declaration had been sustained and the suit dismissed at plaintiffs' cost. The bill charges, in detail, that the suit of Tibbetts and Whitney, as assignees, had been filed without the knowledge and consent of appellant, and by collusion with the insurance company, appellee herein. It charges that when the declaration in said suit was filed, the insurance company, through its attorneys, waived service of process and entered the company's appearance; and that while the demurrer was interposed and sustained, yet, nevertheless, a settlement of the cause was had between the insurance company and Tibbetts and Whitney, whereby a substantial sum had been paid as the proceeds of the policy. It is charged that Tibbetts and Whitney conspired with appellee to defeat the garnishment of appellant; that service of garnishment was had prior to any assignment of the policy; and that the claim of appellant is prior and superior to that of the said assignees. It is also charged in the bill that Robert Logan, the judgment debtor, has no other property out of which appellant can satisfy its judgment; that the assignment of the policy was a pretended assignment and the whole proceeding a fraud on the rights of appellant. Attached to the bill were certain interrogatories propounded to the manager of appellee insurance company, as also to W. F. Tibbetts and A. T. Whitney, praying certain disclosures alleged to be necessary in the prosecution of complainant's cause. The material ground or charge of the motion is that the order of transfer "was made in the circuit court at the September, 1914, term, as shown by copy of same herewith filed, marked Exhibit A, and made a part of this motion, from which it will be seen that no time beyond the 30 days allowed by statute in which to file the bill of complaint in the chancery court, and the bill of complaint herein was not filed until the 28th day of September, 1915, more than 30 days after the order of transfer was made, and contrary to the provisions of section 1013 of the Code of 1906." This motion was by the court sustained, and from the decree dismissing the bill, appellant prosecutes this appeal.

Shannon & Schaubert, of Laurel, for appellant. McLaurin & Armistead, of Vicksburg, for appellee.

STEVENS, J. [1] The learned chancellor seems to have been of the opinion that after an order transferring the garnishment issue was entered, it was incumbent upon appellant to file its bill within the 30 days prescribed by statute; that this provision of the

statute, directing that the bill shall be filed within 30 days, is jurisdictional, and a failure to comply with the terms of the statute in this regard took away the jurisdiction of the chancery court. We do not interpret the statute so literally. When a cause is transferred from one court to the other, it is the order of transfer that invests the court to which the case is transferred with jurisdiction. The statute expressly says that the cause "shall be proceeded with as if it had been originally begun in that court, as of the date on which the cause was originally instituted." It is a pending cause all the while, and as soon as the order of transfer is entered, the court to which the case is transferred thereupon has jurisdiction of the case and may proceed in the manner outlined by the statute. In this instance the chancery court had jurisdiction of the garnishment issue by virtue of the order entered by the circuit court; and the requirement that a bill be filed within 30 days is for the purpose of reframing the pleadings to conform to the practice in the chancery court.

[2] The time within which this bill should be filed could have been extended by the chancellor of the court then having jurisdiction of the cause. The provision that the bill should be filed within 30 days is certainly not a statute of limitations, and the failure to file the bill within the time prescribed could not be said to be a jurisdictional omission or defect. It does appear that appellant filed its bill within 30 days after the papers had actually been deposited with the chancery clerk. There was considerable delay on the part of the circuit clerk in depositing the papers with the chancery clerk. In the disposition of this case it is really unnecessary for us to say whether appellant should have filed its bill within 30 days of the date of the order of transfer, or within 30 days from the date the papers were deposited in the chancery court. The statute appears to direct that the bill should be filed within 30 days after the papers have been deposited in the court to which the case was transferred. It expressly provides that all parties shall take notice of the fact of the transfer "when the papers have been deposited in the court to which the cause is transferred." This is followed by a provision that the complainant or plaintiff shall then file his declaration or bill within 30 days—presumptively, within the 30 days from time they are required to take notice of the transfer.

[3,4] There is here no question raised about the sufficiency of the bill. The ruling of the trial court was based upon a motion to dismiss, and not upon a demurrer. The bill appears to be sufficiently definite in its allegations of fraud, and directly attacks a judgment charged to have been rendered in a collusive suit filed by Tibbetts and Whitney against appellee. It is elementary that

the chancery court has general jurisdiction of fraud; and inasmuch as the charges of fraud are very sweeping, and that Tibbetts and Whitney are brought in as parties defendant, it would appear that the bill here dismissed could well be sustained as an original bill in equity, regardless of whether the garnishment had been properly or improperly transferred. We, however, see no objection to the transfer of the garnishment issue in this case. The answer of the garnishee is not incorporated in the record, but from a motion filed by appellant, asking for the transfer, it is stated that the amended answer of the garnishee attempts to set up the adjudication of issue between the garnishee and Tibbetts and Whitney, and in overcoming this judgment of the circuit court acquitting appellee of liability, appellant could only attack the judgment on the ground of fraud and collusion. It was error to dismiss the bill of complaint. Accordingly, the decree of the lower court will be reversed and the cause remanded, with directions to appellee to answer the bill within 30 days after receipt of mandate by the clerk of the court below.

Reversed and remanded.

(113 Miss. 413)

YAZOO & M. V. R. CO. v. FULGHAM.  
(No. 18908.)

(Supreme Court of Mississippi, Division B.  
March 5, 1917.)

RAILROADS §447(7)—INJURY TO ANIMALS ON  
TRACK—INSTRUCTIONS.

An instruction that if jury believed that if defendant's locomotive had been equipped with electric headlight required by Laws 1912, c. 153, plaintiff's cow would not have been struck and killed, plaintiff should recover reasonable market value of the cow, not to exceed amount claimed, was proper, there being evidence to support it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1649.]

Appeal from Circuit Court, Hinds County;  
W. H. Potter, Judge.

Suit by E. J. Fulgham against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. W. C. Wells, of Jackson, for appellee.

ETHRIDGE, J. The appellee sued the appellant in the justice of the peace court for the injury of cattle killed by the trains of the appellant. One of the killings occurred on the 29th of November, 1915, when a red heifer was killed by the south-bound train, and the other occurred on the 22d of February, 1915, in which one dun-colored cow, about 3½ years old, was killed by the north-bound train of the appellant. The injury to

one of the cattle, testified to by eyewitnesses, was that the heifer was on the track in plain view, in open daylight, and the train struck and killed her without checking its speed or making any effort, apparently, to stop, and without blowing the whistle or making proper effort to frighten the animal off the track. The cow killed by the north-bound train was killed at night, and appellant's train was being operated at about 25 miles an hour, and was using a coal oil headlight. It appears from the engineer's testimony that he first saw the cow about to go upon the track, and that under that situation he could not stop the train in time to prevent the injury, but that he slowed his train down, applied the brakes, etc. There was evidence for the plaintiff to sustain its case, and that the cow went some distance ahead of the train up the track, before being struck. It does not appear from the testimony of appellant that the engineer would not have seen the cow in time to stop if he had an electric headlight as required by chapter 153, Laws 1912. It may have been, and we think the jury could infer from the testimony, that the injury could have been prevented if there had been a stronger headlight on the train. The court gave for the plaintiff instruction E, as follows:

"The court instructs the jury for the plaintiff that if they believe from the evidence that on the occasion of the admitted killing of the cow on February 22, 1915, the defendant company failed to have its engine equipped with an electric headlight which would consume not less than 300 watts at the arc, and that as a proximate result of such failure said cow was killed by the defendant, then the jury must find for the plaintiff as to this item of his suit in such sum as the said cow was reasonably worth on the market in the neighborhood of the killing, not to exceed the sum claimed, to wit, \$100."

And this is complained of, among other things.

We think it was proper for the jury to have this instruction, and looking at the entire record we believe there was no error committed.

Affirmed.

(113 Miss. 422)

JOHNSTON, State Revenue Agent, v. HAZEL-  
HURST HARDWARE CO.  
(No. 18738.)

(Supreme Court of Mississippi, Division B.  
March 5, 1917.)

LICENSES §16(12)—SUBJECTS OF TAX—"TARGET RIFLES."

Under Gen. St. 1906, § 3887, imposing a privilege tax of \$25 on dealers selling "target rifles," sale of low-power 22 rifles, not principally used for target practice, does not subject dealer to tax; the legislative intent not being to impose a tax on dealers in useful rifles.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 36.]

Appeal from Circuit Court, Copiah County;  
J. B. Holden, Judge.

Action by J. C. Johnston, State Revenue

Agent, against Hazelhurst Hardware Company. Judgment for defendant, and plaintiff appeals. Affirmed.

M. S. McNeil, of Hazelhurst, for appellant.  
H. J. Wilson, of Hazelhurst, for appellee.

ETHRIDGE, J. In this case the appellant sued appellee for privilege tax and damages for selling target rifles in the years 1913 and 1914. The proof shows that the appellee carried in stock and sold 22-caliber rifles a part of the year 1914. It also shows that Flobert rifles have gone out of use and are no longer manufactured, but that a 22 rifle, with rifled barrel, is now used in shooting galleries, and that the Flobert rifle had a smooth bore. The proof does not show whether the rifles sold by appellee were such as carried a long cartridge or a short cartridge; whether high power or low power. We know there are two classes of 22 rifles, high power and low power. It was incumbent on the appellant to prove the class sold, and this was not properly proven. The tax is imposed on air guns, or Flobert or target rifles. The tax is now on target rifles, since Flobert rifles are no longer manufactured. What is a target rifle? All rifles are at times used for target practice, and all rifles are sometimes used for other purposes than target practice. Manifestly the statute meant to impose a privilege tax on such rifles as were principally used for target practice. We think it means such rifles as shoot 22 short cartridges, or, in other words, low-power 22 rifles. The plaintiff having failed to show the rifles sold are of this class, the judgment of the lower court is affirmed.

Affirmed.

STEVENS, J. (specially concurring). The statute (Code 1906, § 3887), a portion of which we are here called upon to construe, reads as follows:

*"Dealers in Deadly Weapons.*—On each person or firm dealing in pistols, dirk knives, sword canes, brass or metallic knuckles, or other deadly weapons (shotguns and rifles excepted), \$100.00.

"And which shall be in addition to all and any other taxes or privileges paid.

"On each firm or dealer selling air guns, target or Flobert rifles (and this shall apply even if the same has a license to sell merchandise, pistols or cartridges), \$25.00."

Under the last section of this statute demand was here made upon appellee company for a tax of \$25 for dealing in target rifles. It is puzzling to find the exact legislative intent from the words employed in the last section of this statute. It is certain that the first section imposes no tax whatever upon any one for dealing in shotguns and rifles. A rifle has a well-defined meaning. It is a matter of common knowledge, I take it, that prior to the enactment of the Code of 1906 what are termed as "Flobert rifles" were commonly used in shooting galleries and for innocent target practice of that kind. I am

inclined to think, therefore, that the Legislature meant to impose this tax on dealers in air guns, Flobert rifles, and other smooth-bore rifles that might be manufactured like Flobert rifles for target purposes. Under this view the statute would read, "air guns, target, that is to say, Flobert, or other like rifles." It certainly was not the legislative purpose to tax dealers in rifles adapted to useful purposes. I take it that it is a matter of common knowledge that many 22 rifles serve useful purposes. The statute is one that should be strictly construed and not enlarged by judicial interpretation. It is a matter then of no concern that Flobert rifles are no longer manufactured. It is possible to make use of a 32 Winchester rifle for target purposes, but the mere use of a 32 Winchester rifle for target purposes would not, in my judgment, subject the dealer in such a rifle to the payment of the tax here attempted to be imposed. I think the Legislature was here attempting to tax dealers in that class of instruments used by boys and sportsmen in and around shooting galleries and other like places of amusement, not only to collect a little additional revenue, but possibly to discourage the use of such weapons in our state.

SALMON & WILSON v. C. O. HARTWELL CO., Limited. (No. 18847.)

(Supreme Court of Mississippi. March 12, 1917.)

Appeal from Circuit Court, Pontotoc County; Claude Clayton, Judge.

Action between Salmon & Wilson and C. O. Hartwell Company, Limited. Judgment for the latter, and the former appeals. Affirmed.

Mitchell & Mitchell, of Pontotoc, for appellant. Mitchell & Roberson, of Pontotoc, for appellee.

PER CURIAM. Affirmed.

HEDGPETH v. STATE. (No. 19382.)

(Supreme Court of Mississippi. March 12, 1917.)

Appeal from Circuit Court, Lawrence County; A. E. Weathersby, Judge.

Clifton Hedgpeth was convicted of manslaughter, and he appeals. Affirmed.

G. Wood Magee, of Monticello, for appellant. Earle Floyd, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

YOUNG v. McMULLAN & SONS.

(No. 19672.)

(Supreme Court of Mississippi. March 12, 1917.)

Appeal from Chancery Court, Newton County. Suit between A. J. Young and McMullan & Sons. Decree for the latter, and the former appeals. Motion to docket and dismiss sustained.

G. O. Tann, of Hickory, for the motion.

PER CURIAM. Motion to docket and dismiss sustained.

**YAZOO & M. V. R. CO. v. HARVEY.**  
(No. 18841.)

(Supreme Court of Mississippi. March 5, 1917.)

Appeal from Circuit Court, Tallahatchie County; E. D. Dinkins, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and Claude Harvey. Judgment for the latter, and the former appeals. Appeal dismissed.

H. D. Minor and C. N. Burch, both of Memphis, Tenn., for appellant. J. B. Webb, of Memphis, Tenn., and J. W. Cassedy, of Brookhaven, for appellee.

**PER CURIAM.** Appeal dismissed.

**J. CROUCH & SON v. SALTER & HATHORN.** (No. 18940.)

(Supreme Court of Mississippi. March 5, 1917.)

Appeal from Circuit Court, Lamar County; A. E. Weathersby, Judge.

Action between J. Crouch & Son and Salter & Hathorn. Judgment for the latter, and the former appeals. Affirmed.

F. M. Hunt, of Hattiesburg, R. G. Robertson, of New Iberia, La., and J. J. Massey, of Purvis, for appellant. Salter & Hathorn, of Purvis, pro se.

**PER CURIAM.** Affirmed.

**BRITTON & KOONTZ BANK v. FOWLER et al.** (No. 18810.)

(Supreme Court of Mississippi. March 5, 1917.)

Appeal from Chancery Court, Adams County; R. W. Cutrer, Chancellor.

Suit between the Britton & Koontz Bank and Mrs. Elizabeth G. Fowler and others. Decree for the latter, and the former appeals. Affirmed.

Ernest E. Brown and Wm. C. Martin, both of Natchez, for appellant. Chas. F. Engle and B. W. Crawford, both of Natchez, for appellees.

**PER CURIAM.** Affirmed.

**PITMAN v. SOUTHERN RY. CO. IN MISSISSIPPI.** (No. 18839.)

(Supreme Court of Mississippi. March 5, 1917.)

Appeal from Circuit Court, Leflore County; F. E. Everett, Judge.

Action between Gilbert Pitman, a minor, by next friend, Sallie Pitman, and the Southern Railway Company in Mississippi. Judgment for the latter, and the former appeals. Affirmed.

J. W. Bradford, of Itta Bena, for appellant. Gardner, McBee & Gardner, of Greenwood, for appellee.

**PER CURIAM.** Affirmed.

**BUZARD v. FOX.** (No. 18905.)

(Supreme Court of Mississippi. March 5, 1917.)

Appeal from Circuit Court, Jones County; Paul B. Johnson, Judge.

Action between L. A. Buzard and D. B. Fox.

Judgment for the latter, and the former appeals. Affirmed.

Shannon & Schaubert, of Laurel, for appellant. Deavours & Hilbun, of Laurel, for appellee.

**PER CURIAM.** Affirmed.

**KING et al. v. STOWERS.** (No. 18947.)

(Supreme Court of Mississippi. March 5, 1917.)

Appeal from Circuit Court, Lafayette County; J. L. Bates, Judge.

Action between H. D. King and others and F. M. Stowers. Judgment for the latter, and the former appeal. Affirmed.

Stephens & Kenneday, of New Albany, for appellants.

**PER CURIAM.** Affirmed.

**EVANS v. McKISSACK.** (No. 18518.)

(Supreme Court of Mississippi. March 5, 1917.)

Appeal from Chancery Court, Marshall County; J. G. McGowen, Chancellor.

Action between J. J. Evans and E. H. McKissack. Judgment for the latter, and the former appeals. Appeal dismissed.

**PER CURIAM.** Appeal dismissed.

**YAZOO & M. V. R. CO. v. BARBER.**  
(No. 18786.)

(Supreme Court of Mississippi. Feb. 26, 1917.)

Appeal from Circuit Court, Warren County; E. L. Brien, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and F. T. Barber. Judgment for the latter, and the former appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. Jas. D. Thames and McLaurin & Armistead, all of Vicksburg, for appellee.

**PER CURIAM.** Affirmed.

**YAZOO & M. V. R. CO. v. J. B. & J. S. KERR.**  
(No. 18896.)

(Supreme Court of Mississippi. March 5, 1917.)

Appeal from Circuit Court, Tate County; E. D. Dinkins, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and J. B. & J. S. Kerr. Judgment for the latter, and the former appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. Holmes & Sledge, of Senatobia, for appellee.

**PER CURIAM.** Affirmed.

**KNIGHT v. PALMER & JACKSON.**  
(No. 18930.)

(Supreme Court of Mississippi. March 5, 1917.)

Appeal from Circuit Court, Kemper County; T. C. Kimbrough, Special Judge.

Action between J. L. Knight and Palmer &

Jackson. Judgment for the latter, and the former appeals. Affirmed.

S. M. Graham, of Meridian, for appellant. Jno. A. Clark, of De Kalb, for appellee.

PER CURIAM. Affirmed.

MAGEE v. GALE et al. (No. 17537.)

(Supreme Court of Mississippi. March 12, 1917.)

Appeal from Chancery Court, Lawrence County; R. E. Sheehy, Chancellor. Suit between G. Wood Magee and Inez Gale and others. Decree for the latter, and the former appeals. Appeal dismissed.

Luther E. Grice, of Monticello, for appellant. Jones & Tyler, of Brookhaven, for appellees.

PER CURIAM. Appeal dismissed.

BARBER v. BARBER. (No. 18861.)

(Supreme Court of Mississippi. Feb. 28, 1917.)

Appeal from Chancery Court, Newton County; Sam Whitman, Jr., Chancellor.

Suit between Mrs. S. E. Barber and F. M. Barber. Decree for the latter, and the former appeals. Affirmed.

Byrd & Byrd and Jesse D. Jones, all of Newton, for appellant. O. A. Luckett, of Kosciusko, for appellee.

PER CURIAM. Affirmed.

VERNER LUMBER CO. v. KING.

(No. 18815.)

(Supreme Court of Mississippi. March 5, 1917.)

Appeal from Circuit Court, Attala County; J. A. Teat, Judge.

Action between the Verner Lumber Company and J. C. King. Judgment for the latter, and the former appeals. Affirmed.

J. G. Smythe, of Kosciusko, for appellant. T. P. Guyton and O. A. Luckett, both of Kosciusko, for appellee.

PER CURIAM. Affirmed.

WELLS LUMBER CO. v. OCEAN ACCIDENT & GUARANTY CORP. OF LONDON. (No. 18938.)

(Supreme Court of Mississippi. March 5, 1917.)

Appeal from Circuit Court, Lamar County; A. E. Weathersby, Judge.

Action between the Wells Lumber Company and the Ocean Accident & Guaranty Corporation of London. Judgment for the latter, and the former appeals. Affirmed.

W. A. Shipman, of Poplarville, for appellant. T. M. Miller, of New Orleans, La., for appellee.

PER CURIAM. Affirmed.

SEARCY v. ANDERSON et al. (No. 17518.) (Supreme Court of Mississippi. March 5, 1917.)

Appeal from Circuit Court, Smith County; W. H. Hughes, Judge.

Action between J. F. Searcy and R. E. Anderson and others. Judgment for the latter, and the former appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.

(78 Fla. 146)

TAMPA & G. C. R. CO. v. MULHERN.

(Supreme Court of Florida. Jan. 31, 1917.)

(Syllabus by the Court.)

1. EMINENT DOMAIN  $\Leftrightarrow$  266—DAMAGES—ACTION—FORM.

Damages for injuries to abutting lands, caused by the operation of a steam railway on a street in front of the injured property, cannot be recovered in equity, there being an adequate remedy at law.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 694—696, 702, 703, 705.]

2. CASE DISTINGUISHED.

This case, being one for damages solely, bears no analogy to the doctrine in the case of Florida Southern R. Co. v. Hill, 40 Fla. 1, 23 South. 566, 74 Am. St. Rep. 124, because in that case the equity jurisdiction was predicated upon the theory that the taking of complainant's land created a claim in the nature of a vendor's lien for the purchase price.

3. EQUITY  $\Leftrightarrow$  46 — "ADEQUATE REMEDY" AT LAW—TEST.

The true test of the rule of "no adequate remedy at law" is whether a valid judgment could be obtained by a proceeding at law, and not whether such judgment would procure pecuniary compensation.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 151, 152, 157, 159—163.]

For other definitions see Words and Phrases, First and Second Series, Adequate Remedy.]

Appeal from Circuit Court, Pinellas County; O. K. Reaves, Judge.

Bill in equity by Mary A. Mulhern against the Tampa & Gulf Coast Railroad Company. Demurrer to bill overruled, and defendant appeals. Order reversed.

McKay, Withers & Phipps, of Tampa, for appellant. King & Spear, of St. Petersburg, for appellee.

BROWNE, C. J. On September 21, 1915, Mary A. Mulhern filed her bill in equity in the circuit court of Pinellas county, Fla., in which she alleges that she is seised in fee simple of certain lots in the city of St. Petersburg, Fla., which abut on Second Avenue South, a public street of said city, and also the grounds included in the bed of Second Avenue South, adjoining and abutting on said lots to the center line of said street; that the Tampa & Gulf Coast Railroad Company without authority or right, and without condemnation proceedings, and without compensating her therefor, entered into and upon said street and took possession thereof and constructed thereon and thereover a railroad

track down the center of said street, and is operating a railroad by cars and trains drawn by steam engines, at intervals each day and night; that she is entitled to have the street used only as a public street, and to free and uninterrupted passage along said street, and to be protected against any use of the street for any purpose detrimental to her quiet enjoyment and occupation thereof; that the railroad company had no authority or right to construct and operate a railroad on said street without compensating her "whose property abutting on said street is taken, destroyed, and interfered with and has depreciated in value by the construction, maintenance and operation of such railroad and defendant, at all times, neglected, failed and refused \* \* \* to compensate your oratrix for the injuries herein complained of"; that the operation of said railroad on said street imposes a new and additional burden and servitude upon said property not included in the easement of the public in said street; that thereby she has been damaged to the amount of \$1,000; that the offending railroad company is insolvent; and that a judgment at law against it would be uncollectable and of no value.

She prays that the amount due her from said railroad company be ascertained by the court and it be decreed to pay her said amount, and that the amount so found be decreed to be a superior lien on the property of the railroad wrongfully taken from her, and if the amount so found to be due her be not paid by the railroad within ——— days the property be sold and the proceeds applied to the satisfaction of her claim.

To this bill the appellant demurred on the grounds: First, that there is no equity in the bill; second, that there is a complete and adequate remedy at law; third, that the only relief prayed for is a money judgment which is recoverable at law, and not in equity; fourth, that a court of equity has no jurisdiction to grant the relief prayed for in the bill. The demurrer presents the question, whether or not a court of chancery is the proper forum to adjudicate the complainant's claim.

The chancellor overruled the demurrer, and stated in his order that he did so upon the authority of *Florida Southern R. Co. v. Hill*, 40 Fla. 1, 23 South. 566, 74 Am. St. Rep. 124. The case is before this court on appeal from this interlocutory order.

[2] The doctrine in the *Hill Case* does not support the ruling of the chancellor in the instant cause. In the former, the court reached its conclusion that complainant might have his remedy in equity upon the theory that the landowner stood towards the railroad company in the relation of a vendor who sells his land on credit, and that while he holds the title, equity will enforce his claim against the land as it would a vendor's lien, and Mr. Justice Carter, who rendered the opinion of the majority of the court,

said: "This view impresses us as being eminently [right and] just, and correct in principle. For the transaction is nothing more nor less than an implied sale of an easement in the land." To bring this case within the doctrine of the *Hill Case*, we would have to hold that there was an implied sale by the abutting owner of the easement in the street. This easement being in the public, the abutting owner cannot sell it, as it has already been dedicated for the purpose of a public highway, and as his fee in the street is appurtenant to the title to the abutting land, he cannot sell the fee in the street independent of the same.

The complainant prays that if the amount found by the court to be due her be not paid within a given time that it be decreed "a lien upon the property of the defendant wrongfully taken by the defendant from your oratrix," and upon default of payment "that said premises be sold." The prayer in this respect is substantially in the language of that in the *Hill Case*, where the complainant was the absolute owner in fee simple of the land occupied by the railroad, and in the instant case, the complainant has only her easements in the street, and what the Supreme Court of South Carolina calls, the empty and theoretical right of private ownership of the fee in a street. *South Bound R. R. v. Burton*, 67 S. C. 515, 46 S. E. 340. The defendant in this cause had taken no property from the complainant that could be sold separate from the abutting land, because her easements of light, air, and access were appurtenant to the land, and not capable of separate conveyance. The easements of an abutting owner cannot be reserved or conveyed, or exist separate from the property to which they pertain, so that land shall be owned by one, and the easements by another. They are appurtenant to the abutting land, and are indissolubly annexed thereto, until extinguished by release or otherwise. 1 *Lewis on Eminent Domain*, § 120. "The easements of an abutting owner, invaded, are appurtenant to his premises, and in the nature of things they are indissolubly annexed thereto until extinguished by release or otherwise. They are incapable of distinct and separate ownership." *Kernochan v. New York El. R. Co.*, 128 N. Y. 559, 29 N. E. 65.

In the case of *Garnett v. Jacksonville, St. A. & H. R. R. Co.*, 20 Fla. 889, this court said:

"The abutting proprietor here has the fee to the middle of the street, but his right, title and interest as against the public so long as it remains a street is a right of way in the street and a right to its continued use as a street."

In the same case this court held that an abutting proprietor has no equity to enjoin the use of a street by a steam railway. In the case of *Brown v. Florida Chautauqua Association*, 59 Fla. 447, 52 South. 802, this court said:

"If a public nuisance causes special or peculiar injury to an individual different in kind and not merely in degree from the injury to the public at large, and the injury is substantial in its nature, the individual may have his civil remedy. If the remedy at law is inadequate equity will afford appropriate relief. Where an unlawful obstruction of a public highway merely affects injuriously an individual's right in common with the public to pass over the highway, the individual suffers no injury different in kind from the public and has no private right of action."

[1] The rule in this state is that:

"The construction of a steam railroad track and the running of steam railroad trains thereon is an added burden upon a street not contemplated by a mere dedication of land for ordinary street purposes; and for such added burden the owner of the soil has appropriate remedies." Jarrett Lumber Corp. v. Christopher, 65 Fla. 379, 61 South. 831.

It is clear, therefore, that it is for the damage to his abutting land that he is entitled to compensation, and no question of an implied sale enters into the act complained of. His damage and injury arising from tort, the remedy is on the law side of the court.

[3] In order to maintain the contention that appellee, the complainant below, has no adequate remedy at law, the bill alleges on information and belief that appellant, the Tampa & Gulf Coast Railroad Company, is insolvent, and that a judgment at law against it would be uncollectable and of no value. The inadequacy of a remedy at law to produce money is not the test of the applicability of the rule. All remedies, whether at law or in equity, frequently fail to do that; and to make that the test of equity jurisdiction would be substituting the result of a proceeding for the proceeding which is invoked to produce the result. The true test is, could a judgment be obtained in a proceeding at law, and not, would the judgment procure pecuniary compensation.

Whatever damage the complainant below may have sustained by the operation of the steam railroad on the street abutting on her land, she may recover in a proper proceeding at law, and the chancellor erred in overruling the defendant's demurrer to the bill.

The order appealed from is reversed.

TAYLOR, SHACKLEFORD, WHITEFIELD, and ELLIS, JJ., concur.

(72 Fla. 537)

### ROBERTS v. SMITH.

(Supreme Court of Florida. Dec. 20, 1916.  
Rehearing Denied Feb. 20, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR §1177(1)—REVERSAL—  
NEW TRIAL—FAILURE OF JUSTICE.

Where the appellate court is impressed from the whole record in a cause that there is a strong probability that said cause has resulted in the court below in an injustice to the plaintiff in error, chiefly due to the probable loss or destruction of an original order of the county judge au-

thorizing a sale of the land in dispute on the application of the guardian for the defendant in error, then a minor, as well as an original order of such county judge confirming such sale, it may, in order that complete justice may be done in the premises, reverse such cause and award a new trial thereof, with leave to the plaintiff in error to establish, if he can, under the statute in such cases such lost orders for use as evidence at the new trial of the cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604, 4610.]

Error to Circuit Court, De Soto County; Jas. W. Perkins, Judge.

Ejectment by Firman Smith against John A. Roberts. Judgment for plaintiff, and defendant brings error. Reversed, and new trial awarded.

Treadwell & Treadwell, of Arcadia, for plaintiff in error. Dickenson & Dickenson, of Tampa, for defendant in error.

PER CURIAM. From the whole record in this case we are impressed with the strength of the probability that, owing to the inflexibility of the rules of the common law, the case has resulted in an injustice to the plaintiff in error, chiefly due to the probable loss or destruction of the original order of the county judge, authorizing a sale of the land in dispute on the application of the guardian for the defendant in error, then a minor, as well as the original order confirming such sale. In order that complete justice may be done in the premises, it is therefore hereby ordered and adjudged that the judgment of the court below in said cause be, and the same is hereby, reversed and a new trial awarded, with leave to the plaintiff in error to establish, if he can, by appropriate proceedings under the statute in such cases, the said lost or destroyed order for the sale of such land and the order confirming such sale, such re-established orders to be used as evidence at the next trial of the cause.

TAYLOR, C. J., and COCKRELL, WHITEFIELD, and ELLIS, JJ., concur.

SHACKLEFORD, J. (concurring). I concur in the conclusion reached by the other members of the court that the judgment should be reversed, but for the following reasons:

Firman Smith brought an action of ejectment against John A. Roberts for the recovery of the possession of the S. E. ¼ of the N. W. ¼ of section 29, in township 34 south, range 23 east, containing about 40 acres. The declaration is in the usual statutory form, to which the defendant filed a plea of not guilty. A trial was had before a jury, resulting in a verdict and judgment in favor of the plaintiff.

Numerous errors are assigned by the plaintiff in error, who was the defendant in the court below, but I shall confine my discussion to such of them as seem to be necessary for

a proper disposition of the case. The plaintiff undertook to trace his title back to the trustees of the internal improvement fund of the state of Florida, and introduced documentary evidence to that effect, consisting of several successive conveyances, to which the defendant unsuccessfully interposed various grounds of objection. I shall not discuss the assignments based upon the respective rulings upon this evidence, for the reason that it developed during the trial that the plaintiff and the defendant claimed the land through a common source of title. As we have several times held:

"Where plaintiffs and defendants in ejectment claim land through a common source of title, or where the defendant himself produces evidence recognizing the existence and validity of a deed through which both parties plaintiff and defendant claim rights and interests in the land in controversy, errors committed in allowing improper evidence of the title, or improper proof of the execution of such deed on the part of the plaintiff, are harmless." *Mansfield and Bishop v. Johnson*, 51 Fla. 239, 40 South. 196, 120 Am. St. Rep. 159.

It is sufficient to say that the evidence establishes the fact that the plaintiff derived his title to the land from a conveyance executed by William D. Payne and wife to the plaintiff, bearing date the 23d day of October, 1894, at which time the plaintiff was an infant about 5 years of age, having become 22 years of age on the 3d day of December, 1915. The defendant sought to establish his title to the land in controversy by offering the following instrument in evidence:

"This indenture, made and entered into this 13th day of September, A. D. one thousand eight hundred and ninety-eight, by and between E. F. Wilson, commissioner of De Soto county, state of Florida, party of the first part, and John A. Roberts, party of the second part:

"Witneseth, that whereas Noah Smith, guardian for Firman Smith, minor of Noah Smith, having applied to the county judge of said county for an order to sell certain real estate, the property of said estate, situate in De Soto county and state aforesaid, and the said county judge after due consideration of the same, being satisfied of the necessity of the sale thereof for the purposes of making other investments, did on the 13th day of September, A. D. one thousand eight hundred and ninety-eight, by his order of that said date, direct a sale of the real estate therein mentioned, belonging to said estate, and by said order appointed E. F. Wilson, commissioner to advertise and sell the same at private sale.

"And the said commissioner did on the 14th day of September, A. D. one thousand eight hundred and ninety-eight, bargain the property hereinafter described and sell the same to John A. Roberts, the said party of the second part herein, for the sum of two hundred dollars, that being the highest sum offered for the same.

"And the commissioner having made due report thereof to the county judge aforesaid, the said judge of his order dated the 14th day of September, A. D. one thousand eight hundred and ninety-eight did ratify and confirm said sale, and therein ordered a conveyance of said hereinafter described premises, to the said party of the second part hereto, by the said commissioner upon the payment of the purchase money aforesaid.

"Now therefore, in consideration of the premises and of the sum of two hundred dollars, lawful money of the United States of America, to

him in hand paid at or before the enrolling and delivery of these presents by the said party of the second part, the receipt whereof is hereby acknowledged, the said party of the first part hereto as commissioner aforesaid, hath granted, bargained, sold, aliened, remised, released, conveyed and confirmed unto the said party of the second part and to his heirs and assigns forever, all that certain lot, tract and parcel of land, situate and being in — in the county of De Soto and State of Florida, known and described as follows, to wit:

"The southeast quarter (¼) of the northwest quarter (¼) of section twenty-nine (29) township thirty-four (34) south of range twenty-three (23) east, containing forty acres more or less.

"Together with all and singular, tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining,

"To have and to hold the same, the above-described and hereby granted premises with appurtenances unto the said party of the second part and to his heirs and assigns, to his and their own proper use, benefit and behoof forever.

"And the said party of the first part, for himself, his heirs, executors and administrators, doth covenant to and with the said party of the second part, his heirs and assigns, that in all things in and about said sale and this conveyance he hath conformed to the orders of this court and the statute in such case made and provided.

"In witness whereof, the said party of the first part hath hereunto set his hand and seal the day and year first above written.

"E. F. Wilson, Commissioner. [Seal.]  
"Signed, sealed, and delivered in the presence of us:

"W. H. Seward,

"A. E. Pooser.

"State of Florida, County of De Soto.

"Personally appeared before me, county judge in and for said county, to me well known as the person described in and who executed the foregoing commissioner's deed, and acknowledged that he executed the same as such commissioner for the purpose therein expressed.

"Witness my hand and official seal this the 14th day of September, A. D. 1898.

"A. E. Pooser, County Judge. [Seal.]

To the introduction of which conveyance the plaintiff objected on the following grounds:

"First. Because the same appears to be a deed of E. F. Wilson, as commissioner, purporting to convey the interest of Firman Smith, a minor, through a certain proceeding in the probate court of De Soto county, Fla.

"Second. Because the defendant has not shown a valid proceeding in the probate court of said county, whereby the said E. F. Wilson, as commissioner, was authorized to make conveyance of the said property of said minor.

"Third. Because no valid judgment or decree of any court of competent jurisdiction has been shown to authorize the execution of said deed conveying the minor's interest.

"Fourth. Because the court of probate, being a court of limited jurisdiction, before the introduction of the commissioner's deed, the defendant must show compliance with the statutory proceedings and requirements of law, in order to authorize the execution and delivery of said deed.

"Fifth. Because until a compliance with the proceedings authorized by law for the conveyance of a minor's interest in land, a mere deed from a commissioner would be coram non judge, and could not convey any title.

"Sixth. Because the deed in question appears to be a deed from a commissioner, instead of guardian, as required by law.

"Seventh. Because before this deed can be in-



produced in evidence it must affirmatively appear that the court authorized the issuance of said deed, had jurisdiction of the parties and subject-matter.

"Eighth. Because it has not been shown that any guardian had made application by petition for the sale of such land as required by law, nor notice by publication in the manner required by law, nor that any order of sale was ever made by any court having jurisdiction to order the sale of such land, nor any report of such sale, nor order confirming such sale."

The trial judge sustained the objections and refused to admit such conveyance in evidence, one of the errors assigned being based upon this ruling. The defendant had previously testified that he had been in possession of the land since 1898, such possession having been delivered to him by Noah Smith, who was the father of the infant plaintiff. The defendant also introduced as a witness in his behalf W. D. Bell, who testified as follows:

"That he is county judge of De Soto county, Fla., and keeper of the probate records of said county, and that he had been unable to find the original papers in the guardianship matter of Firman Smith, and that he had made diligent search of his office for said papers.

"The witness then examined Book A, which is a book kept in the office of the probate judge, in which is recorded letters of guardianship, and testified that on page 38, it appeared that letters of guardianship were duly issued to Noah Smith, of the person and property of Firman Smith, but that he did not find that said guardian had qualified.

"Witness further testified that in said Book A there appeared to be letters of guardianship appointing said Noah Smith as such guardian of said infant, which said order or letters of guardianship is dated on the 8th of August, 1898; that said letters of guardianship were issued by A. E. Pooser, then county judge of said county, and that a guardianship bond appeared of record in said Book A at page 34, that said bond was signed by the principal, Noah Smith, and by William McLeod and A. McLeod, and that said bond was in due form, and that in Order Book B, at page 64, the oath of said Noah Smith, as such guardian, is properly recorded, as well as the petition signed by the said Noah Smith, and asking that he be appointed as guardian of the person and property of the said infant, Firman Smith.

"The witness further testified that on page 65 of said Book A appeared, properly recorded, a petition signed by the said Noah Smith, therein and thereby praying that he be authorized to sell the land in question, which petition was duly sworn to before A. E. Pooser, county judge of said county; that at page 66 of Book B of said records of the public records of said county, appeared notice of application to sell said minor's land, which notice was in due form, and provided that 30 days after the date thereof, said petitioner, Noah Smith, would apply to the county judge of said county for an order to sell the land in question, which notice appeared to have been published in the De Soto County News, said notice having been filed with the county judge of said county on September 2, 1898; that he had examined Order Book B as well as the records in his office, and was unable to find any other papers recorded or otherwise touching the guardianship matter of the application of said Noah Smith to sell the land in question; that he was unable to find any record in his office, made by the county judge of said county, confirming the sale of the land in question by Noah Smith, guardian

for Firman Smith, and that his records did not show that such an order was ever made, or, if made, was ever recorded; that he had examined the order book page by page.

"On cross-examination the witness testified that he found no order authorizing the sale of said premises by said guardian, either in the files, or recorded in the books in his office, nor did he find any order confirming said sale, or any order requiring further bond.

"In fact, that he found no papers other than those mentioned above."

The defendant also introduced as a witness in his behalf Noah Smith, and offered to prove by him that he, the said Noah Smith, as guardian of Firman Smith, at the time he made application to the county judge of De Soto county, for an order to sell the land in question, was present in the judge's office; that he knew, of his own knowledge, that the said judge granted him an order to sell at private sale the land in question. Whereupon the following proceedings took place:

"But the plaintiff did then and there object to said proffered testimony, on the grounds:

"First. That such testimony would not be the best evidence of an order and decree of the court for the sale of said land.

"Second. Because an order of sale and decree of the court for such purpose was required by law to be recorded in the county judge's office, where the land lies, and requires a confirmation of sale in order to convey any title of an infant in land.

"Third. Because it is not proper or competent to prove by parol testimony of this witness a decree of a court of record in this manner.

"And the said judge did then and there sustain the objections interposed by counsel for the plaintiff, and would not allow the defendant to make the proof so offered to be made by said witness, to which ruling of the court the defendant then and there excepted."

One of the assignments is predicated upon this ruling. The defendant was recalled as a witness in his own behalf, whereupon the following proceedings took place:

"Witness testified that he had been in possession of said property since 1898, and that previous to that time he lived near Lily, in said county, about 12 or 13 miles from the property in question; that he was familiar with the property in the neighborhood of this particular property prior to the time he purchased it; that he had lived in that neighborhood since 1881; and that he was familiar with the value of property in the neighborhood of the property here in question, in 1898, and that he did not believe the property was worth over \$150, and thinks he valued it at \$200.

"Whereupon counsel for the plaintiff did move the court to strike the testimony of the witness as to the value of the land at the time he testified about, because the same is immaterial and irrelevant to the issues in said cause.

"And the said judge did then and there sustain the said motion, and did strike said testimony and exclude the same from the jury, to which ruling and decision of the court the defendant did then and there except.

"Whereupon counsel for defendant propounded to the said witness the following question:

"Your answer was that you considered it worth \$150, but that you agreed on a valuation of \$200?" And the witness answered, "Yes, sir."

"Whereupon counsel for the plaintiff moved the court to strike the answer for the reason that the same is immaterial and irrelevant to the issues in the case.

"And the said judge did sustain the said motion, and did strike said answer and excluded the same from the consideration of the jury.

"To which ruling of the court the defendant then and there excepted.

"Whereupon, counsel for defendant propounded to said witness the following question:

"Examine that deed and state whether or not it was executed and delivered to you by E. F. Wilson, commissioner?"

"And the witness answered: 'It was.'

"Whereupon counsel for the defendant offered in evidence a deed signed by E. F. Wilson, commissioner, dated on the 13th day of September, A. D. 1898, conveying to the defendant the property in question, for the purpose of showing that the defendant purchased the property in question for full value and bona fide and free from any fraud, and that such purchase was made from the guardian of the infant Firman Smith.

"But to the reading of the same in evidence for the purpose aforesaid, the plaintiff then and there objected, on the following grounds:

"First. For the reason that it has not been first shown that any duly appointed, qualified, and constituted guardian of the infant Firman Smith, described in said deed, has applied to the county judge for leave to sell the said land by petition in the manner and form required by law.

"Second. Because it does not appear that any notice of application on the behalf of any guardian of the said minor or administrator or executor of the estate, embracing the land described in the deed offered in evidence, has been published for the period required by law.

"Third. Because it does not appear that any court of competent jurisdiction has made and entered any order of sale of the said land of the said infant or authorizing the sale thereof, or empowering, authorizing or appointing said E. F. Wilson as commissioner to make such sale or to execute and deliver the deed offered in evidence.

"Fourth. Because it has not been shown that any court of competent jurisdiction has confirmed the said sale.

"Fifth. Because a period of 5 years' possession under which defendant now offers this deed in evidence does not run against a minor.

"Sixth. It has not been shown that the proceeds of any commissioner's sale of this land have been applied bona fide to the object and purpose for which said sale has been made, nor that the money was received by the party entitled to the proceeds from the sale of this land under such procedure, to wit, Firman Smith.

"And the said judge then and there sustained the said objection, and would not admit the said deed in evidence for the purpose last above mentioned.

"To which ruling of the court the defendant then and there excepted.

"Whereupon counsel for the plaintiff renewed his motion to strike the testimony of the witness as to what he regarded the value of the land in 1898, as being irrelevant.

"But the said judge sustained the said motion, and did strike the testimony of the said witness in regard to the value of the land in question in 1898, and excluded the same from the jury.

"To which ruling of the court the defendant then and there excepted."

The defendant also recalled as a witness in his behalf Noah Smith, and the following proceedings were had:

"Mr. Smith, state whether or not you sold, in 1898, the S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 28, township 84 south, range 23 east, in De Soto county, Fla., to John A. Roberts.

"But to the propounding of said question, the

plaintiff, by counsel objected because it has not been shown that the witness had any right or authority to sell the land in question, or any right, title, or interest to the land described, and also because the deed will be best evidence.

"And the said judge sustained the said objection.

"To which ruling of the court the defendant then and there excepted.

"Witness further testified that he was guardian for Firman Smith, the plaintiff in said cause.

"Whereupon, counsel for the defendant propounded to the witness the following question:

"Did you receive any money from John A. Roberts for the land in question?"

"But to the propounding of the said question, the plaintiff objected on the following grounds:

"First. That it is immaterial and irrelevant whether the witness received money, because the receipt of money merely would not convey the interest of the minor in this land.

"Second. Because it does not appear that there was in fact any sale made under an order of the probate court for the said land in controversy.

"And the said judge did sustain the said objection.

"To which ruling of the court the defendant then and there excepted.

"Whereupon, counsel for the defendant propounded to said witness the following question, to wit:

"Please state if after the receipt of this money whether or not you, as such guardian, placed the said John A. Roberts in possession of said property."

"And the witness answered: 'Yes, sir.'

"Whereupon, the attorney for the defendant propounded to the said witness the following question:

"Please state whether or not you applied the money so received by you for the use and benefit of Firman Smith."

"And the witness answered: 'I did; by supporting and raising him and educating him; that was the reason why he sold said land.'

"Whereupon counsel for the plaintiff moved the court to strike the testimony of the witness relative to the selling of said property.

"And then said judge did sustain the said motion to strike said testimony and exclude the same from the jury.

"To which ruling of the court the defendant then and there excepted.

"Whereupon, counsel for the defendant propounded to the witness the following question:

"How long have you lived in that neighborhood?"

"And the witness answered, 'Twenty years.'

"Whereupon, counsel for the defendant propounded to the witness the following question:

"Were you familiar with the value of real estate in the neighborhood of this land during 1898?"

"And the witness answered he thought he was.

"Whereupon counsel for the defendant propounded to the witness the following question:

"What, in your opinion, was said land worth in 1898?"

"But to the propounding of said question, plaintiff objected on the ground that the same is immaterial and irrelevant to the issues in this case; and,

"Second, because the witness is not qualified to testify in this matter.

"And the said judge did then and there sustain the said objection.

"To which ruling of the court the defendant then and there excepted.

"Whereupon, the defendant propounded to the said witness the following question:

"Please state whether or not at the time you put Mr. Roberts in possession of that property there was any fraud in any way between you and him in relation to said property, or the said Firman Smith."

"Whereupon, counsel for the plaintiff objected

to the propounding of the said question upon the following grounds:

"First. That it is immaterial and irrelevant under the issues in said cause.

"Second. It has not been shown that there was in fact a sale made under an order of the probate court.

"And the said judge did sustain the said objection.

"To which ruling of the court the defendant then and there excepted.

"Whereupon the jury, at the direction of the judge, was withdrawn from the courtroom, and, while the said witness Noah Smith was upon the witness stand, the defendant, by counsel, stated to the court that he offered then and there to prove by said witness that he, the witness, in September, 1908, as guardian of Firman Smith, in good faith sold to the defendant, John A. Roberts, the land in question, and for a valuable consideration; that in fact, he sold it for \$50 more than he had been offered by any one in the neighborhood, and that the sale of said land was made by him as such guardian to the said Roberts in good faith, free from fraud, and was, in all respects, a bond fide transaction; that he, as such guardian, received the proceeds of such sale and applied such proceeds to the object and purpose for which said sale was made.

"As to the matters so offered to be proved by said witness the plaintiff did then and there object on the grounds:

"First. That the same is immaterial and irrelevant.

"Second. Because there has not been shown any sale of this land in controversy made under an order of the probate court.

"And the said judge did then and there sustain the said objection, and would not permit the testimony of said witness to be offered.

"To which ruling of the court the defendant then and there excepted."

The defendant also sought to prove the value of the land in controversy at the time the conveyance was executed by E. F. Wilson, commissioner, to the defendant by several other witnesses, who testified that they were acquainted with its value at the time, but the plaintiff objected to such witnesses testifying as to what such value was, and the court sustained the objections and refused to let the witnesses so testify.

The defendant also sought to prove or to strengthen his title by the introduction of conveyances based upon certain tax deeds to the land, and also introduced such tax deeds, all of which were subsequently stricken out on motion of the defendant. The plaintiff also made the following motion at the close of all the evidence:

"Whereupon counsel for the plaintiff did move the court to instruct the jury to bring in a verdict in favor of the plaintiff in said cause in regard to the title and right of possession of the land in controversy in said suit, upon the ground that the defendant had not shown any title or right of possession to the land.

"Second. That the defendant had not traced his title to the sovereign or to a grantor in possession at or near the time of his grant.

"Third. Because the defendant has not shown any title, but only a naked possession for a period less than the statutory period required to ripen into a title by adverse possession, either under a claim of right or under a color of title.

"And in support of this motion, plaintiff, by counsel, hereby waives the right to have the jury assess damages for the uses and occupation of the said described premises and mesne profits therefor."

This motion was granted by the trial judge, who instructed the jury to bring in a verdict in favor of the plaintiff, to which ruling the defendant excepted, and upon which he bases one of his assignments.

I have copied from the transcript such of the proceedings at the trial as I thought necessary or desirable to make this opinion intelligible, but, as I have previously stated, I shall treat only such of the assignments as I deem necessary for a proper disposition of the case. Undoubtedly, the proceedings during the trial were more or less irregular, and neither the plaintiff nor the defendant exercised the proper care either in offering evidence or seeking to have the same excluded. The bill of exceptions is also in a state of confusion.

The defendant relies upon the following statute, which is section 1724 of the General Statutes of 1906, Compiled Laws of 1914:

"The title of any purchaser or his assigns who shall have held possession for five years of any real estate purchased for full value at any sale, free from fraud, made by an executor, administrator or guardian, shall not be questioned by any heir, distributee or ward upon the ground of any irregularity in the proceedings or conveyances, if it appear that the proceeds of such sale have been applied bona fide to the object and purpose for which said sale shall have been made; nor shall such title be questioned by any one else who has received the money to which he was entitled, arising from said sale."

This section originally formed chapter 3134 of the Laws of 1879 and was brought forward, with some slight changes, by the revisors as section 1293 of the Revised Statutes. The only case in which it would seem to have been cited or discussed is *Deans v. Wilcoxon*, 25 Fla. 980, 7 South. 163, wherein we held that such act "does not apply to land of which there was in fact no sale made under an order of the probate court." This holding is of practically no service to us in the instant case. The bill of complaint in the cited case alleged that a certain described parcel of land was, as a matter of fact, "never sold by the administratrix, or advertised or offered by her for sale, or reported by her as having been sold, advertised or offered for sale, notwithstanding the recitals to the contrary in the deed." By demurring to the bill the defendants admitted that such allegation was true; consequently the statute which we have copied above had no applicability, as this court properly held. In the instant case the defendant offered to prove as a matter of fact that the land in controversy was sold by a commissioner under the order of the probate court as the property of the plaintiff, and that the commissioner executed a deed therefor to the defendant, which deed the defendant produced and proffered in evidence, all of which evidence was excluded by the trial court on the objections interposed by the plaintiff. The deed so produced, which we have copied above, together with the acknowledgment, presumably was the original,

though as to that the bill of exceptions is not entirely clear. It does not appear that the same was ever recorded in the public records so as to render the same admissible without requiring proof of the execution, in accordance with the provisions of section 21 of article 16 of our state Constitution. If such deed had not been recorded according to law, it was incumbent upon the defendant to prove the execution thereof by competent testimony, that is by one of the subscribing witnesses thereto, or, when such subscribing witnesses are dead or without the jurisdiction of the court, by the introduction of evidence that the signatures of such witnesses are genuine. *Groover v. Coffee*, 19 Fla. 61. I would call attention to the fact that the acknowledgment of the deed by the commissioner to the defendant was taken by A. E. Pooser, the county judge at the time such sale was made. Such acknowledgment would seem to be incomplete in some respects, but since no such point was made, we do not feel called upon to make any comments thereon. Of course, such acknowledgment is not evidence of all the recitals in the deed, but simply may be considered in connection with the deed.

The defendant further offered to prove by Noah Smith, the father of the plaintiff, to whom the evidence had previously shown letters of guardianship had been duly issued of the person and property of the plaintiff, that as such guardian he had made application to A. E. Pooser, then county judge of De Soto county, but who was dead at the time of the trial of the instant case, for the sale of the land in controversy as the property of the plaintiff, who was then an infant; that the county judge made an order for the sale of such land at private sale; that such witness had in good faith sold such land to the defendant for the sum of \$200, which was a fair market price for the land, had received the proceeds of such sale and had applied the same in "supporting and raising him and educating him," referring to the plaintiff, all of which evidence was excluded by the trial court. The defendant further offered to prove by other witnesses that they were familiar with the market value of the parcel of land at the time of the execution of the deed by Wilson as commissioner to the defendant, and that \$200 was a fair price therefor, but the trial court excluded such proffered testimony. I have given in a very condensed form the substance of the evidence proffered by the defendant, and which was excluded by the trial court. A fuller statement appears in the proceedings of the trial which I have copied above.

I am of the opinion that section 1724 of the General Statutes, which we have copied

above, is a most salutary one, being of a curative nature, and should receive a liberal construction. If as a matter of fact the guardian of the infant plaintiff did, under an order made by the county judge, sell the land in controversy to the defendant for the sum of \$200, which was an adequate price for the same at the time, being its reasonable market value, and such sale was free from any fraud, and the proceeds arising therefrom had been applied bona fide to the object and purpose for which such sale was made, the defendant should be permitted to establish such facts by competent testimony. To hold otherwise would be in effect to defeat the very object of the statute. If the order of sale was actually made by the county judge and the sale was made by a commissioner appointed by him and such sale was confirmed, the fact that the county judge failed to record such order, as it was his duty to do, ought not to be held to be sufficient to avoid such sale. That the defendant had been in the actual possession of the land for a period of time considerably more than 5 years is clearly established by the evidence.

As I have previously stated, the bill of exceptions is in a confused state, and I have had great difficulty in determining just what was done at the trial. Certain tax deeds to the land in question, together with other deeds based thereon, were introduced by the defendant and excluded on the motion of the plaintiff. I do not feel called upon to closely consider these various rulings or to discuss the same. Suffice it to say that no reversible error has been made to appear to us in such rulings. If as a matter of fact the defendant had the title to the land under the deed executed to him by the commissioner, it was his duty to pay the taxes thereon, and, as we have held, a tax deed can give no valid title to a party whose duty it was to pay the taxes. *Petty v. Mays*, 19 Fla. 652.

I would add that, as the trial judge did not certify that the bill of exceptions contains all the evidence adduced at the trial, I am precluded from considering the sufficiency of the evidence to sustain the verdict, even if I felt inclined to do so. See *Webb v. Brown*, 63 Fla. 306, 58 South. 27, which cites prior decisions of this court.

I am of the opinion that the trial court erred in excluding some of the proffered evidence of the defendant. What I have said is sufficient to indicate my views. See *Williams v. Richardson*, 66 Fla. 234, 63 South. 446, Ann. Cas. 1916D, 245, and *Rhodus v. Hefferman*, 47 Fla. 206, 36 South. 572. I would also call special attention to the note on page 254 of Ann. Cas. 1916D and the authorities there cited. For these reasons I think that the judgment should be reversed.

(73 Fla. 253)

**FINANCE & GUARANTY CO. v. CRYSTAL RIVER ROCK CO.**

(Supreme Court of Florida. Feb. 6, 1917. Re-hearing Denied March 8, 1917.)

*(Syllabus by the Court.)***INTERPLEADER —33—PROCEEDINGS—DECREE.**

When the proceedings in an interpleader suit are not in accord with appropriate procedure in such cases, and the specific finding made is not as a matter of law supported by the evidence, the decree will be reversed.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 68-71, 74.]

Appeal from Circuit Court, Hillsborough County; F. M. Robles, Judge.

Bill of interpleader by Charles F. Aulick and others, copartners as Aulick-Bates & Hudnall, against the Finance & Guaranty Company and the Crystal River Rock Company. Decree for payment of claim of the Crystal River Rock Company, and the Finance & Guaranty Company appeals. Reversed.

Frazier & Hilburn and Wm. Hunter, all of Tampa, for appellant. J. T. Watson, Jr., of Tampa, for appellee.

WHITFIELD, J. Charles F. Aulick and others, copartners as Aulick-Bates & Hudnall, filed a bill of interpleader alleging in effect that the copartnership is indebted to E. N. Jelks in a stated amount which is tendered to the court; that they have received from the Finance & Guaranty Company notice that stated sums due to E. N. Jelks had been assigned to the Finance & Guaranty Company and that on March 2, 1915, complainants were served with summons in a suit instituted by the Finance & Guaranty Company against complainants on the indebtedness as set forth in an exhibit; that on October 23, 1914, complainants were served with a writ of garnishment in a suit of Crystal River Rock Co. v. E. N. Jelks; that complainants answered the garnishment admitting an indebtedness to E. N. Jelks; that the money due by complainant to E. N. Jelks is paid into court to be disbursed according to law in interpleader proceedings.

It is prayed that complainants be discharged from all further responsibility in the premises. By separate answer the Finance & Guaranty Company aver that for a present valuable consideration it purchased from E. N. Jelks certain accounts then due from Aulick-Bates & Hudnall to E. N. Jelks, and had brought suit thereon against Aulick-Bates & Hudnall; that prior to the garnishment proceedings against Aulick-Bates & Hudnall, E. N. Jelks had filed a petition in bankruptcy in which E. N. Jelks was duly adjudged a bankrupt and a receiver appointed and qualified to take charge of all the assets and estate of E. N. Jelks, all of which proceedings were had prior to the bringing

of the suit in which the garnishment was issued against Aulick-Bates & Hudnall; that the claim of the Crystal River Rock Company was a provable debt in the bankruptcy proceedings; that the transfer of the accounts to it is good against E. N. Jelks and his trustee in bankruptcy; that if the assignment of the accounts is not valid, then the trustee in bankruptcy of E. N. Jelks has the right to collect said accounts; that Aulick-Bates & Hudnall had due notice of the transfer of said accounts by E. N. Jelks to it, and of the bankruptcy proceedings against E. N. Jelks, and had notice that the trustee in bankruptcy had renounced all claims he might have against said accounts in favor of defendant; that complainant is not entitled to a bill of interpleader.

Testimony was taken, and the court, finding specifically "that the alleged assignment or assignments of open accounts under which the defendant Finance & Guaranty Company claims its right of collecting the amount of money filed in the registry of the court in these proceedings are, as against the Crystal River Rock Company, a creditor of the alleged assignor thereof, invalid and void," decreed that payment be made of the claim of the Crystal River Rock Company. The defendant Finance & Guaranty Company appealed.

It does not appear that appropriate procedure was had in the cause as is pointed out in *Wainwright v. Connecticut Fire Ins. Co.*, 74 South. 8, decided at this term, whereby the complainants would be dismissed with their costs if interpleader is proper. Besides this, the evidence does not show that the assignments of accounts under which the appellant claims are "invalid and void" as against the appellee.

The decree is reversed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and ELLIS, JJ., concur.

(73 Fla. 99)

**HOPKINS v. LEON COUNTY.**

(Supreme Court of Florida. Jan. 26, 1917. Re-hearing Denied March 2, 1917.)

*(Syllabus by the Court.)***COUNTIES —121—CONSTRUCTION OF BRIDGE—MINUTES OF COMMISSIONERS' MEETING—INSTRUCTION.**

In an action at law brought by H., as surviving partner, etc., against Leon county, for the recovery of the contract price for the building of a bridge, wherein the following minutes of a meeting of the board of county commissioners of Leon county were introduced in evidence by the plaintiff, which were admitted to be correct:

"County Clerk's Office,

"Tallahassee, Fla., May 7th, 1907.

"The board met pursuant to adjournment, there being present E. C. Smith, chairman, R. G. Johnson, J. W. Collins, W. D. Stoutamire, and W. A. Register.

"Hon. A. L. Wilson, member of the board of

county Commissioners of Gadsden county, met with this board to consider the building of a bridge across the Ocklockonee river at McCall's Landing.

"The following bids were received for building a bridge across the Ocklockonee river at McCall's Landing, to wit: E. G. Richards, \$1,850; C. W. Blount, \$1,900; H. L. McElvy & H. L. Hopkins, \$2,448; H. L. Hopkins, \$4.90 per foot, length 612 feet, \$2,998.

"Contract to build bridge across the Ocklockonee river at what is known as McCall's Landing was awarded to H. L. McElvy & H. L. Hopkins, and for which this board becomes responsible and promises to pay as Leon county's part in the construction of said bridge \$1,224 when said bridge is completed, inspected, and accepted by the boards of county commissioners of Leon and Gadsden counties. This board promises to pay \$1,224 and no more for its part of the cost in the construction of said bridge. E. C. Smith, Chairman.

"Approved June 4, 1907."

Held, that such minutes show upon their face that a valid contract had been made and entered into by such county with H. L. McElvy & H. L. Hopkins to construct such bridge for the sum of \$2,448, of which amount such county became responsible for and promised to pay as its part in the construction thereof the sum of \$1,224 when such bridge was completed, inspected, and accepted by the boards of county commissioners of Leon and Gadsden counties, and, when the evidence adduced establishes the construction of such bridge in accordance with the provisions of the contract, the plaintiff is entitled to recover from Leon county the amount for which such county became liable by such contract.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 183.]

Error to Circuit Court, Leon County; E. C. Love, Judge.

Action by Henry L. Hopkins, as surviving partner, against the County of Leon. Judgment for defendant, and plaintiff brings error. Reversed.

Jos. A. Edmondson and W. C. Hodges, both of Tallahassee, for plaintiff in error. Fred T. Myers, of Tallahassee, for defendant in error.

SHACKLEFORD, J. Henry L. Hopkins, as surviving partner of the firm lately doing business under the name of H. L. McElvy & H. L. Hopkins, instituted an action at law against the county of Leon, in the state of Florida, for the recovery of the contract price for building a bridge across the Ocklockonee river. The first count of the amended declaration is as follows:

"Henry L. Hopkins, as surviving partner of the firm lately doing business under the firm name of H. L. McElvy & H. L. Hopkins, by W. C. Hodges, and Joseph A. Edmondson, his attorneys, says:

"For that by an agreement made between the said H. L. McElvy and the said Henry L. Hopkins and the said defendant, the said H. L. McElvy and the said Henry L. Hopkins agreed to build for the defendant a bridge across the Ocklockonee river at what is known as McCall's Landing. In consideration thereof the defendant promised to pay to the said firm, twelve hundred and twenty-four (\$1,224.00) dollars, when said bridge was completed, inspected, and accepted by the board of county commissioners of said county of Leon and the board of county commissioners of Gadsden county, Fla., that after said firm undertook the building of said

bridge, and before the same was completed, the said H. L. McElvy died, and the said Henry L. Hopkins completed the building of said bridge; and although the said bridge has been built in accordance with the terms of said agreement, and due notice thereof has been given to the county commissioners of said county of Leon and the county commissioners of said county of Gadsden, and the plaintiff has requested the said commissioners of both of said counties to inspect and accept said bridge, the said commissioners of both of said counties have unreasonably and arbitrarily failed and neglected to inspect and accept said bridge, and the said defendant has not paid to plaintiff the said sum of twelve hundred and twenty-four (\$1,224.00) dollars, though payment thereof has been demanded."

The second count differs from the first only in that it alleges that the commissioners of both counties (Leon and Gadsden) "have unreasonably and arbitrarily refused to inspect and accept said bridge." The declaration also has the common counts, but they were abandoned.

The defendant filed the following pleas:

"(1) For a first plea to the first and second counts of said declaration, and to each thereof, the defendant says that it did not promise as alleged.

"(2) And for a second plea to the first and second counts of the said declaration, and to each thereof, the defendant says that the board of county commissioners of Leon county, Fla., on, to wit, April 2, 1907, advertised that sealed bids would be received at the county clerk's office until 10 o'clock a. m. Tuesday, the 6th day of May, A. D. 1907, for the construction of a wooden bridge across the Ocklockonee river at what is known as McCall's Landing, the bridge to be of sufficient length to cover the first slough on the Gadsden county side of the river, according to plans and specifications at the office of the county clerk, the said board reserving the right to reject any and all bids; and the said H. L. McElvy & H. L. Hopkins pursuant to said notice submitted to the said board of county commissioners a bid to build such bridge for the sum of \$2,448, which bid was accepted, but with the understanding, however, between the said board of county commissioners and the said H. L. McElvy & H. L. Hopkins that the county of Leon would pay half of the amount of said bid if the county of Gadsden through its board of county commissioners would agree to pay the other half thereof; but the board of county commissioners of Gadsden county refused to enter into said agreement, and would not agree to pay one-half of the amount bid as aforesaid by the said McElvy and Hopkins for the construction of said bridge, and because of such refusal no contract was ever made or entered into between the said McElvy and Hopkins and the county of Leon for the building and construction of said bridge.

"(3) And for a third plea to the first and second counts of the said declaration the defendant says that the defendant accepted a bid of the said H. L. McElvy & H. L. Hopkins to build the bridge mentioned in the declaration for the sum of \$2,448, and agreed to pay one half of said amount on condition that the county of Gadsden would pay the other half, the said sum to be paid when said bridge was completed, inspected, and accepted by the boards of county commissioners of Leon and Gadsden counties; and the defendant having waited a long time, to wit, until January 11, 1908, for the county of Gadsden to enter into said agreement to pay one-half of the amount bid for the construction of said bridge, and the said county of Gadsden having refused to enter into such agreement, and having failed and refused to pay one-half of the amount so bid for the construction of said bridge, the defendant then and there, and before

the commencement of said work, notified the said H. L. McElvy & H. L. Hopkins not to proceed with the construction of said bridge, and that the defendant would not be bound by said agreement; and while the said McElvy recognized the right of the defendant to revoke said agreement, the said Hopkins, notwithstanding the said notice and over the objection of the defendant, proceeded with the work of constructing said bridge, and the said bridge has never been accepted by the boards of county commissioners of the counties of Leon and Gadsden as a public bridge for the reasons aforesaid, and not unreasonably and arbitrarily as alleged by the plaintiff.

"(4) And for a fourth plea to the first and second counts of the said declaration, and to each thereof, the defendant says that the alleged agreement and promise of defendant to pay the said H. L. McElvy & H. L. Hopkins the sum of \$1,224 for the construction of the bridge mentioned in the declaration was conditioned on the county of Gadsden agreeing to pay a like sum, which the said county of Gadsden refused to do, and the defendant before the commencement of the work on said bridge notified the plaintiff not to proceed therewith."

Issue was joined upon these pleas, and a trial was had before a jury, which resulted in a verdict and judgment in favor of the defendant, which judgment the plaintiff has brought here for review. The only assignment of error is based upon the overruling of the motion for a new trial. The grounds of this motion are as follows:

"First. That the verdict was contrary to the evidence.

"Second. That the verdict was contrary to law.

"Third. That the verdict was contrary to law and the evidence.

"Fourth. That the court erred in charging the jury as follows: 'If you believe from the evidence that H. L. McElvy & H. L. Hopkins, in response to an advertisement by the county commissioners of defendant county for bids to construct a bridge over the Ocklockonee river at McCall's Landing, filed with the said board of county commissioners a bid to construct said bridge for a named sum according to certain plans and specifications on file with the clerk of said board, and that said bid was accepted by the said board, they agreeing by the resolution of acceptance to pay one half of the amount for which the said McElvy & Hopkins offered to build said bridge, the share of said county, and that it was understood by said board of county commissioners and the said McElvy & Hopkins that the county of Gadsden was to pay the other half of the amount so bid, and that a contract would subsequently be entered into between the said McElvy & Hopkins, on the one part, and the counties of Leon and Gadsden, on the other part, whereby each of said counties would bind itself to pay one-half the amount for which the said McElvy & Hopkins offered to build the proposed bridge, and the said McElvy & Hopkins would bind themselves to build said proposed bridge according to plans and specifications for the price bid by them, and that, after the county of Leon accepted said bid and agreed to pay one-half of the amount so bid, the county of Gadsden through its board of county commissioners refused to agree to pay one-half of the amount so bid by the said McElvy & Hopkins as its part of the cost of constructing said bridge, and that no contract was entered into between the said McElvy & Hopkins on the one part to build the said bridge according to the plans and specifications, and on the part of the said counties of Leon and Gadsden to pay each one-half of the amount for which the said McElvy & Hopkins agreed to build the pro-

posed bridge, then you should find for the defendant, Leon county.'

"Fifth: That the court erred in charging the jury as follows: 'If you find from the evidence that H. L. McElvy & H. L. Hopkins, in response to an advertisement by the county commissioners of Leon county for bids to build a bridge over the Ocklockonee river at or near McCall's Landing, submitted a bid proposing to build such bridge for the sum of \$2,448, and said bid was accepted by the said board of county commissioners, they in their resolution accepting said bid agreeing to pay \$1,224 as Leon county's share of the amount for which the said McElvy & Hopkins offered to build said bridge, and no further or other agreement was ever made with respect to the proposed bridge between this said board of county commissioners and the said McElvy & Hopkins, then I charge you that there was no express contract between the said McElvy & Hopkins and the said county of Leon for the construction of said bridge, and you should find for the defendant, Leon county, on the first and second counts of declaration.'

"Sixth. That the court erred in charging the jury as follows: 'I further charge you that, if you believe from the evidence that H. L. McElvy & H. L. Hopkins, in response to an advertisement by the county commissioners of Leon county for bids to build a bridge over the Ocklockonee river at or near McCall's Landing, submitted a bid proposing to build such bridge for the sum of \$2,448, and such bid was accepted by the said board of county commissioners, they in their resolution accepting said bid agreeing to pay \$1,224 as Leon county's share of the amount for which the said McElvy & Hopkins offered to build said bridge, and no further or other agreement was ever made with respect to the construction of the proposed bridge between the said McElvy & Hopkins and the said board of county commissioners, and the said McElvy & Hopkins began the construction of said bridge under such circumstances and continued it to completion without the consent or approval of the board of county commissioners otherwise than as expressed in the said resolution accepting said bid, and since the completion of the said bridge it has never been accepted by the said board, then you should find for the defendant, the county of Leon.'

All of these grounds are argued, the first three being grouped together. It becomes necessary for us to examine the evidence adduced in connection with the pleadings in order that we may determine whether or not these grounds are well urged.

The plaintiff first introduced in evidence the minutes of the meeting of the board of county commissioners of Leon county held on the 7th day of May, 1907, which were admitted by the defendant to be such minutes, and which read as follows:

"County Clerk's Office,

"Tallahassee, Fla., May 7th, 1907.

"The board met pursuant to adjournment, there being present E. C. Smith, chairman, R. G. Johnson, J. W. Collins, W. D. Stoutamire, and W. A. Register.

"Hon. A. L. Wilson, member of the board of county commissioners of Gadsden county met with this board to consider the building of a bridge across the Ocklockonee river at McCall's Landing.

"The following bids were received for building a bridge across the Ocklockonee river at McCall's Landing, to wit: E. G. Richards, \$1,850; O. W. Blount, \$1,900; H. L. McElvy & Hopkins, \$2,448; H. L. Hopkins \$4.90 per foot, length 612 feet, \$2,998.

"Contract to build bridge across the Ocklockonee river at what is known as McCall's Land-



ing was awarded to H. L. McElvy & H. L. Hopkins, and for which this board becomes responsible and promises to pay as Leon county's part in the construction of said bridge \$1,224 when said bridge is completed, inspected, and accepted by the boards of county commissioners of Leon and Gadsden counties. This board promises to pay \$1,224 and no more for its part of the cost in the construction of said bridge.

"E. C. Smith, Chairman.

"Approved June 4, 1907."

The plaintiff was then introduced as a witness in his own behalf and proceeded to testify as follows:

"My name is Henry L. Hopkins. I knew H. L. McElvy in his lifetime. He is dead now. I am Henry L. Hopkins, and the McElvy I just mentioned was the McElvy mentioned in that record you have just read. I offered to construct, and did construct, a bridge at McCall's Landing. The length of the bridge as I agreed to build it, and as the record will show, was 612 feet. I built 634 feet. The width of the bridge was to be the width of the roadway, which is 14 feet. That is what it called for, and that is what I built. Mr. McElvy was in partnership with me when the bridge was being built, but before the bridge was completed he had died."

The witness then goes on at length to testify as to the building of the bridge, giving in detail the facts and circumstances in connection therewith and explaining the causes of his delay in completing the work. He stated that he "completed the bridge and turned it over to the county for inspection July 15, 1911," adding that he "notified them." He further testified that he did not receive any notice from the board of county commissioners before he began putting material on the ground that they had attempted to vacate that contract; that he had been at work on that bridge for eight months before the county commissioners attempted to rescind the contract and notified him that they were not going to pay for it, and that there was then something over \$500 worth of work there. The witness further testified as follows:

"When it come to the paying part the county commissioners of Leon county would not inspect that bridge, and never have inspected it, but I requested that they do so. I come right here before the board and requested it. On the completion of the bridge I made that request by written notice. I then come to town and told them in person. Their excuse for not inspecting it was that they wanted a little time; that they had no money nohow, and wanted me to give them a chance; that was Leon county. Immediately after the completion of the bridge I sent them the written notice to inspect my bridge. And the very next month after I sent the written notice to inspect the bridge I come to town and asked them why they didn't come down and inspect it. I had an attorney to appear at the meeting of the board of county commissioners and request them to go down there and inspect and accept or reject that bridge. His name was Mr. Worth Trammell. He made that request for the inspection of the bridge at my request, and I was present when he requested them to do so. About July 14, 1911, the bridge was completed and turned over for inspection as completed and it had been put off for inspection. The county commissioners didn't come down and look over that bridge. I also wrote the commissioners of Gadsden county and requested them to come down and inspect the

bridge, and afterwards went to them. That is the letter I wrote to the board of county commissioners of Gadsden county. I addressed it to the clerk of the court. That is the original letter I sent to them."

And thereupon the plaintiff produced and offered in evidence the said letter in words and figures following, to wit:

"Holland, Fla., June 29, 1911.

"Hon. Board of County Commissioners for Leon and Gadsden County, Fla.:

"You are hereby cordially invited to fish fry picnic at McCall bridge on the Ocklockonee river on July 15 next at which time I will ask you to inspect the bridge built by me.

"Respectfully, Henry L. Hopkins."

"The county commissioners of Leon county and the county commissioners of Gadsden county didn't show up after I got the bridge over McCall's Landing completed. I went before the county commissioners of Gadsden county and asked for an inspection personally. They said the bids were advertised in this county, and the specifications filed in this county, and that they knew practically nothing about the plans, and they were ready and willing to pay their part when they had a chance to do it, and for me to get a settlement from this county first. I didn't understand it that the \$1,224 this county agreed to pay had anything to do with Gadsden county. That was all this county agreed to pay and all I ever asked them for, and I haven't got a cent."

On cross-examination the witness testified as follows:

"The only agreement which I have with them, or claimed agreement, is the resolution of the board of county commissioners of Leon county which you [Mr. F. T. Myers] have just read here, except some verbal talk. There is no other written agreement between them and myself. So far as any contract between me and the county commissioners of Leon county is concerned, it rests upon this resolution of the board of May 7, 1907. That is all signed by the chairman of the board. I took a copy of it that day, and I have it now. That resolution shows a bid by H. L. McElvy & H. L. Hopkins to build this bridge for \$2,448, and this bid was made in response to an advertisement by the county of Leon. \$1,224 is all the board of county commissioners have ever promised to pay me for their part in the construction of said bridge, and all I ask from Leon county. I was present at the meeting when this bid was accepted. I didn't expect them to pay me any more than \$1,224. I agreed to build the bridge for \$2,448, and Gadsden county was to pay the other \$1,224. Mr. A. L. Wilson, a county commissioner of Gadsden county, was present at a meeting of this board, and I knew the object of his presence. I contemplated the building of a bridge for which I was to be paid \$2,448, and I expected Leon county to pay me \$1,224 of that amount, and Gadsden county the other half, and I have an agreement with them, you know, I think it is on file there, and the maximum amount that they offered to pay me in consideration of the construction of the bridge at McCall's Landing was \$750, which they never refused to pay. I never entered into a written agreement with them more than they agreed to pay it. The resolution is on their minutes. The advertisement said that the clerk of the court had the plans and specifications for the building of that bridge. I did not see them before I bid on the work. I had them when I was constructing the work. My bid was based on the plans and figured on by me and my partner as to what it would cost us. We bid according to those plans."

The witness then proceeded to testify as to certain matters connected with the building of the bridge and as to the delay, which are



not material here. On his redirect examination the witness stated that:

"The county is using the bridge now, but won't pay for it."

Other witnesses were introduced on behalf of the plaintiff, whose testimony we have carefully examined, but do not consider it necessary to set it out or discuss it. Several witnesses were also introduced by the defendant, as well as certain documentary evidence, consisting of copies of the minutes of certain meetings of the respective boards of county commissioners of the counties of Leon and Gadsden, and also a letter to Mr. W. D. Stoutamire, a county commissioner of Leon county, from Mr. A. L. Wilson, a county commissioner of Gadsden county, all of which evidence we have examined, but are of the opinion that such evidence throws very little light upon the controversy between the litigants. The defendant also introduced the following letter, which presumably is the letter by the plaintiff in his testimony, though this is not made entirely clear:

"Tallahassee, Fla., Jan. 11, 1908.

"H. T. Felkel, Clerk Circuit Court, Leon County, Fla.

"To H. L. McElvy & H. L. Hopkins—Gentlemen: At a meeting of the board of the county commissioners of Leon county, Florida, held on Tuesday the 7th day of January, 1908, it was ordered by the board that the contract or agreement to build the bridge across the Ocklockonee river at McCall Landing be canceled and annulled, and said agreement hereafter to be without force or effect, for the reason that ample time has been given in which to construct said bridge, and it has not been built.

"Yours truly, Henry T. Felkel,  
"Clerk Board County Commissioners,  
"Leon County, Fla."

No testimony was introduced as to the county commissioners of Leon county ever authorizing their clerk to write this letter, and the minutes of the meeting of such commissioners for the 7th day of January, 1908, were not offered in evidence.

It is earnestly contended by the defendant that the evidence adduced fails to establish the fact that any contract was ever made or entered into by and between the plaintiff and the defendant; therefore there could be no recovery. It is argued that the resolution adopted by the county commissioners of Leon county on the 7th day of May, 1907, which was introduced by the plaintiff, and which we have copied above, "did not in terms create a contract between McElvy & Hopkins on the one part and the county of Leon on the other for the construction of said bridge." It is further argued by the defendant:

"That at the time of the passage of the resolution of May 7, 1907, it was contemplated by all parties that Gadsden county should be a party to the contract, and should agree to pay \$1,224 as its part, being one-half of the amount of the bid made by McElvy & Hopkins for the construction of the bridge.

"This being the case, it necessarily contemplated that the making and acceptance of the bid did not constitute the contract, but that a subsequent contract between the three parties was to be entered into in which the details of construction would form a part."

Undoubtedly it is true, as the defendant contends:

"If the facts and circumstances show that the parties intended subsequently to reduce their understanding to a written contract covering all its terms and conditions, then the original negotiations did not constitute a contract."

We fully approve of the principles of law enunciated in *Strong & Trowbridge Co. v. Baars & Co.*, 60 Fla. 253, 54 South. 92, and *Ocala Cooperage Co. v. Florida Cooperage Co.*, 59 Fla. 390, 52 South. 13, which are cited us by the defendant. The question which we are called upon to determine is as to whether or not the evidence adduced supports this contention of the defendant. We do not think so. It seems to us that the resolution adopted by the board of county commissioners of Leon county plainly shows upon its face that McElvy & Hopkins submitted a bid to such commissioners to build a bridge across the Ocklockonee river for the sum of \$2,448, that such bid was accepted and the contract awarded to such bidders, and as such resolution explicitly states:

"For which this board becomes responsible and promises to pay as Leon county's part in the construction of said bridge \$1,224.00 when said bridge is completed, inspected, and accepted by the boards of county commissioners of Leon and Gadsden counties. This board promises to pay \$1,224.00 and no more for its part of the cost in the construction of said bridge."

There would really seem to be no room for construction here. There is no proviso to the effect that a contract must be made and entered into by such successful bidders with the county commissioners of Gadsden county, and, if the bidders to whom such contract was awarded failed to make a satisfactory contract with the commissioners of Gadsden county, that was their lookout, and the failure so to do would not justify the commissioners of Leon county in failing and refusing to pay as Leon county's part the sum of \$1,224 in accordance with their agreement. No time is stated in such resolution as to when the bridge was to be completed. That the plaintiff went ahead, treating such resolution as a contract, and constructed the bridge, the testimony indisputably establishes. The testimony further establishes that the defendant considered the resolution to be a binding contract, as W. D. Stoutamire, a member of the board of county commissioners of Leon county, was introduced as a witness by the defendant, and testified that as such commissioner he was directed to look after the bridge when its construction was begun, after the contract had been let, and that he went there "as much as once a week for eight months," and that he "received \$4 a day of ten hours when he made these trips." H. T. Felkel, the clerk of such board, in the letter which he wrote to the plaintiff on the 11th day of January, 1908, which we have copied above, refers to "the contract or agreement to build the bridge across the Ocklockonee river," and states that the same

had been ordered by such board to "be canceled and annulled."

In fine, we are of the opinion that the evidence established the right of the plaintiff to recover, and that the errors are well assigned for the reasons which we have set forth.

The judgment is reversed.

BROWNE, C. J., and TAYLOR, WHITFIELD, and ELLIS, JJ., concur.

**HOPKINS v. SPECIAL ROAD & BRIDGE DIST. NO. 4, in BREVARD COUNTY.**

(Supreme Court of Florida. Feb. 6, 1917.)

(Syllabus by the Court.)

**1. CONSTITUTIONAL LAW §26—LEGISLATIVE POWER.**

The lawmaking power may provide any legislative regulation that does not conflict with organic law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 30.]

**2. CONSTITUTIONAL LAW §291 — EMINENT DOMAIN §70—TAXATION §44—UNIFORMITY—COMPENSATION—DUE PROCESS OF LAW.**

Chapters 6208 and 6879, Laws of Florida, are general laws authorizing the establishment of special road and bridge districts in any county of the state for the governmental purpose of constructing and maintaining permanent roads and bridges in such districts, and such statutes do not violate the provisions of the Constitution that require uniformity and equality in taxation, and that forbid the taking of property without compensation or due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 870-876; Eminent Domain, Cent. Dig. §§ 174, 175.]

**3. COUNTIES §47—POWERS OF COUNTY COMMISSIONERS.**

County commissioners can exercise such authority only as is "prescribed by law"; and where there is doubt as to the existence of authority, it should not be assumed.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 55.]

**4. HIGHWAYS §90—ROAD DISTRICTS—ISSUANCE OF BOND—STATUTE.**

Chapters 6208 and 6879, Laws of Florida, do not contemplate successive issues of bonds in the special road and bridge districts to construct roads and bridges except when the first issue is insufficient and the construction is not completed in the first instance.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302.]

Appeal from Circuit Court, Brevard County; Jas. W. Perkins, Judge.

Statutory proceeding by Special Road and Bridge District No. 4, in Brevard County, State of Florida, by S. A. Osteen and others, Commissioners of Brevard County, to validate bonds issued by the district, in which George W. Hopkins intervenes, presenting objections to validation of bonds. Decree confirming the bonds, and intervenor appeals. Decree reversed.

Landis, Fish & Hull, of De Land, for appellant. G. C. Edwards, of Cocoa, and Axtell & Rhinehart, of Jacksonville, for appellee.

WHITFIELD, J. This is a proceeding had under the statute (chapter 6868, Acts of 1915) to have validated bonds issued by special road and bridge district, No. 4, in Brevard county, Fla. George W. Hopkins, a taxpayer in said district, intervened, as permitted by the statute and presented objections to the validation of the bonds. The court rendered a decree, validating and confirming the bonds, and the intervening taxpayer Hopkins appealed.

The constitutional validity of the statutes (chapter 6208, Acts of 1911, as amended by chapter 6879, Acts of 1915) under which the bonds are issued is questioned. Under section 840, General Statutes of 1906, each county commissioner's district is a road district. Chapter 6208 is

"An act to authorize the counties of the state of Florida to create and constitute special road and bridge districts, within said counties; and to issue bonds and levy and collect a special road and bridge tax with which to pay for the construction, repair and maintenance of the roads and bridges within \* \* \* special roads and bridge districts."

In the body of the act and in the amendatory act, chapter 6879, Acts of 1915, are provisions that whenever residents of any territory embraced wholly or in part in one or more road districts, as at that time constituted in any county of the state, desire to have such territory constituted into a "special road and bridge district" and to have constructed within said special district, "permanent roads and bridges," they may proceed in a stated manner. An election in the district is provided for "to determine whether or not such territory shall be constituted into a special road and bridge district." When established such district is given a designated name or number with definite boundaries, "and thereafter such territory shall constitute a special road and bridge district" and taxes are collected upon all of the taxable property therein for the construction, repair, and maintenance of the roads and bridges within said district or for the interest and sinking fund of bonds that may be issued for the construction of roads and bridges. Each special road and bridge district is entitled to receive for the repair and maintenance of the roads and bridges in said district its due proportion of the county tax levied and collected upon the taxable property in the county for general road purposes. The residents of each special road and bridge district may, at any future time, provide for the construction of additional roads and bridges by the prescribed method. All special taxes for the roads and bridges of the district "shall be assessed, equalized and collected upon the taxable property within the special road and bridge district, by the same officers and in the same manner as is provided by law for the assessment, equalization and collection of other county taxes." The

construction, repair and maintenance of the roads and bridges in the districts "shall at all times be subject to the supervision and control of the board of county commissioners," such board being given the right of eminent domain to carry out the purposes of the act.

These and other provisions clearly indicate a legislative intent to provide for the establishment of permanent territorial subdivisions of counties and to make the "construction, repair and maintenance" of "permanent roads and bridges" in such subdivisions, a governmental purpose and function. This being so, the taxes levied under the acts are for a governmental purpose within the power of the Legislature, and no question of special assessments for local benefits is presented.

[1, 2] In this view, the acts are an exercise of the taxing power in a manner and for a purpose not forbidden by the Constitution, and the limitations as to notice and benefits that may be incident to local assessments for special benefits to property are not applicable. The statutes do not violate the limitations of the organic law of the state upon the taxing power of the Legislature; and other limitations suggested do not control. The statutes are in aid of the general policy of the road and bridge laws of the state.

The cost of constructing and maintaining the roads and bridges are not borne by "assessments upon the lands benefited," but the expense is met by a tax levy upon all the taxable property in the district.

In authorizing the formation of special road and bridge districts in the county, the Legislature may adopt any method it chooses; no constitutional limitation being thereby violated.

The decision in *Stewart v. De Land-Lake Helen Special Road and Bridge District* in Volusia County, 71 Fla. 158, 71 South. 42, is in harmony with the holding in this case. The mandate of the Constitution that "The Legislature shall provide for a uniform and equal rate of taxation" \* \* \* has reference to "uniformity and 'equality of tax rates and burdens on all property subject to the particular tax.'" *Ellis v. Atlantic Coast Line R. Co.*, 68 Fla. 160, text 163, 66 South. 1005, 1006.

The fact that the Constitution expressly provides for subdivisions of the state into counties and also provides for municipalities, and for special tax school districts, which counties and municipalities and school districts may each be a separate unit for uniformity and equality of rates of taxation, does not affect the power of the Legislature to provide for the establishment of districts in a county for the purpose of constructing and maintaining permanent roads and bridges therein under governmental authority and

control; and such districts may be made separate units for taxation to accomplish the governmental purpose of providing permanent highways. The Legislature may provide any legislative regulation that does not conflict with organic law. *City of Jacksonville v. Bowden*, 67 Fla. 181, 64 South. 769, L. R. A. 1916D, 913, Ann. Cas. 1915D, 99.

Chapters 6208 and 6879 are general acts applicable to every county of the state and are in no sense "special or local laws for assessment and collection of taxes for state and county purposes," forbidden by the Constitution. Section 20, art. 3, Constitution.

It is contended that this bond issue is illegal because it is for the purpose of constructing roads that were for the most part constructed by a former bond issue for that purpose.

[3] County commissioners can exercise such authority only as is "prescribed by law"; and, where there are doubts as to the existence of authority, it should not be assumed.

[4] The statute provides for the issue and sale of bonds for any special road and bridge district for the construction of permanent roads and bridges, and also provides for the subsequent issue of other bonds "for the construction of additional roads and bridges."

An amendment to section 8 of chapter 6208 as contained in section 3 of chapter 6879 provides that where upon prescribed procedure it appears that a further sum of money is necessary to pay for the construction of either roads or bridges within the district, bonds may be issued to pay for such work of construction in addition to warrants or bonds of the district that may then have been already issued. This amendment manifestly applies where a bond issue is insufficient to construct the roads and bridges as contemplated when the issue was authorized; and the amendment does not authorize an issue of bonds to reconstruct roads and bridges that had already been constructed as authorized.

Express provision is made in the statute for the repair and maintenance of such roads and bridges by a tax levy upon all taxable property within the special district. The statute does not contemplate successive issues of bonds to construct roads and bridges except when the first issue is insufficient and the construction is not completed in the first instance.

As the statute gives no authority to issue bonds to reconstruct roads and bridges that had already been constructed by a bond issue under the statute, the court erred in validating the bonds involved herein, and the judgment or decree is reversed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and ELLIS, JJ., concur.

(73 Fla. 308)

**MAY et al. v. BRAMLETT.**

(Supreme Court of Florida. Feb. 9, 1917.)

*(Syllabus by the Court.)***APPEAL AND ERROR 31010(1)—AFFIRMANCE—EVIDENCE.**

Where there is ample evidence to sustain a decree for the cancellation of a deed of conveyance on the ground of fraud and violation of a trust, the decree will be affirmed, no errors of law or procedure appearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981.]

Appeal from Circuit Court, Hillsborough County; F. M. Robles, Judge.

Bill by Virginia V. Bramlett, revived after her death in the name of M. C. Bramlett, her sole heir at law, against Loretta May and others. Decree for complainant, and defendants appeal. Affirmed.

Binford & Reed, of Tampa, for appellants. Fletcher & O'Neill, of Tampa, for appellee.

**PER CURIAM.** Virginia V. Bramlett brought a bill against Loretta May and others for the cancellation of a deed of conveyance of land alleged to have been obtained by fraud and used in violation of a trust, and for incidental relief. The complainant died, and the cause was properly revived in the name of her sole heir at law. By answer the defendants took issue on the material allegations of the bill of complaint. Evidence was taken, and decree for the complainant was rendered, from which the defendants appealed.

There is ample evidence to sustain the decree, and it is affirmed.

**BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITEFIELD, and ELLIS, JJ., concur.**

(73 Fla. 309)

**WILLIAMS et al. v. BLACK.**

(Supreme Court of Florida. Feb. 9, 1917.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR 339(2)—INTERLOCUTORY DECREE—REVIEW.**

An appeal from interlocutory decrees, some of which were entered more than six months prior to the entry of appeal, will entitle the appellant to have reviewed the propriety of the decrees entered within six months prior to the entry of appeal, but not those entered more than six months prior to the entry of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1884.]

**2. EQUITY 232—PLEADING—DEMURRER.**

A demurrer to the whole bill should be overruled, if the bill makes any case for equitable relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 508.]

**3. APPEAL AND ERROR 874(4)—INTERLOCUTORY ORDERS—PRAYER OF BILL.**

Upon an appeal from an interlocutory order, the court will not consider whether the prayers of the bill are too broad, provided only

it prays for something that is proper and germane.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3535, 3537-3540.]

Appeal from Circuit Court, Alachua County; J. T. Wills, Judge.

Bill by H. M. Black against John R. Williams and others. From interlocutory orders overruling demurrers to the bill and the amended bill, defendants appeal. Order affirmed.

Anderson & Anderson, of Ocala, for appellants. Hampton & Hampton, of Gainesville, for appellee.

**PER CURIAM.** On the 8th day of May, 1914, H. M. Black filed his bill in chancery against John R. Williams and Pineapple Orange Company, a corporation. To this bill the defendants interposed a demurrer on the 4th day of July, 1914, upon which the court made an order on the 26th day of February, 1915, overruling the same and granting the defendants until the rule day in April in which to file such other and further pleadings as they may be advised. On the 13th day of July, 1915, the complainant, by leave of court, filed his amended bill, to which on the 6th day of September, 1915, the defendants again interposed a demurrer, which was overruled by the court in an order dated the 14th day of April, 1916, in which the defendants were allowed until the rule day in May to file plea or answer. On the 8th day of May, 1916, the defendants entered their appeal from each of these interlocutory orders, the first of such orders being entered the 26th day of February, 1915, and the second being entered the 14th day of April, 1916.

[1] As we have several times held:

"An appeal from interlocutory decrees, some of which were entered more than six months prior to the entry of appeal, will entitle the appellant to have reviewed the propriety of the decrees entered within six months prior to the entry of appeal, but not those entered more than six months prior to the entry of appeal." Futch v. Adams, 47 Fla. 257, 36 South. 575.

Also see Mitchell v. Mason, 61 Fla. 692, 55 South. 387, and Charlotte Harbor & Northern Ry. Co. v. Lancaster, 70 Fla. 200, 69 South. 720. Under the holding in these cited cases, we cannot review the propriety of the first of such interlocutory orders, as more than six months had elapsed since the entry thereof when the appeal was taken.

[2, 3] We have carefully read the amended bill, with the several exhibits attached thereto, also the demurrer, with its numerous grounds, which the defendants interposed, as well as the briefs filed by the counsel for the respective parties. We do not consider it necessary or advisable to set out either the amended bill or the grounds of the demurrer. It is sufficient to say that no reversible error has been made to appear to us in this interlocutory order from

which the appeal is entered. As we held in Tampa and Jacksonville Ry. Co. v. Harrison, 55 Fla. 810, 46 South. 592:

"Upon an appeal from an interlocutory order, the court will not consider whether the prayers of the bill are too broad, provided only it prays for something that is proper and consequent."

The order appealed from will be affirmed, with leave to defendants to file a plea or answer, within a period to be fixed by the circuit judge.

Order affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

(73 Fla. 246)

**GARDNER LUMBER CO. v. BANK OF COMMERCE**

(Supreme Court of Florida. Feb. 2, 1917. Rehearing Denied March 12, 1917.)

*(Syllabus by the Court.)*

**BILLS AND NOTES**  $\S$  537(3)—**TRIAL**  $\S$  25(4) **RIGHT TO OPEN AND CLOSE—DIRECTED VERDICT—FAILURE OF CONSIDERATION.**

On an issue of failure of consideration in an action on promissory notes, the plaintiff, having the general affirmative, is entitled to open and conclude; and where there is some substantial evidence tending to prove the issue of failure of consideration, a verdict for the plaintiff should not be directed by the court.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig.  $\S$  1861, 1866-1870; Trial, Cent. Dig.  $\S$  47, 60-75.]

Error to Circuit Court, Hillsborough County; F. M. Robles, Judge.

Action by the Bank of Commerce against the Gardner Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed.

Henry N. Sandler and T. Paine Kelly, both of Tampa, for plaintiff in error. Shackelford & Shackelford, of Tampa, for defendant in error.

**PER CURIAM.** The Bank of Commerce brought an action against the Gardner Lumber Company, a copartnership, on two promissory notes executed by the latter, payable to the bank. Issue was joined on a plea of failure of consideration. At the trial the court directed a verdict for the plaintiff, on which judgment was rendered, and the defendant took writ of error.

On the issue the plaintiff having the general affirmative was entitled to open and conclude the presentation of the cause. As there was some substantial evidence tending to prove the issue of failure of consideration, the cause should have been submitted to the jury for their consideration; therefore it was error to direct a verdict for the

plaintiff, for which error the judgment is reversed.

BROWNE, C. J., and TAYLOR, WHITFIELD, and ELLIS, JJ., concur. SHACKLEFORD, J., took no part.

(73 Fla. 322)

**BYRD v. BYRD et al.**

(Supreme Court of Florida. Feb. 9, 1917.)

*(Syllabus by the Court.)*

**HOMESTEAD**  $\S$  113—**CONVEYANCE—VALIDITY.**

A conveyance of the homestead real estate to the wife executed by the husband alone is void.

[Ed. Note.—For other cases, see Homestead, Cent. Dig.  $\S$  182.]

Appeal from Circuit Court, Calhoun County; Cephas L. Wilson, Judge.

Suit for partition by George Byrd and others against Rilla Byrd. Decree for plaintiffs, and defendant appeals. Affirmed.

Paul Carter, of Marianna, for appellant. J. M. Calhoun and Moses Guyton, both of Marianna, for appellees.

WHITFIELD, J. George Byrd and others, children and heirs of O. B. Byrd, deceased, brought suit for partition against Rilla Byrd, widow of the decedent. Partition was decreed, and the defendant appealed.

It appears that in 1906 O. B. Byrd executed a deed, conveying his homestead real estate to his wife, it being stated in the deed that the grantor "may have the use and occupancy of the said premises, free of rent, during the period of her natural life." O. B. Byrd died in 1912, while living on the premises.

If the deed executed to his wife was ineffectual as a conveyance of O. B. Byrd's homestead real estate, the widow had no exclusive title against the children of the decedent.

The Constitution (art. 10,  $\S$  4) in effect provides that:

"The holder of a homestead" may alienate it "by deed or mortgage duly executed by himself or herself, and by husband and wife, if such relation exists."

In Thomas v. Craft, 55 Fla. 842, 46 South. 594, 15 Ann. Cas. 1118, it is said:

"The constitutional exemptions apply only to property owned by the head of the family. The exemptions are for the benefit of the family, and inure to the widow and heirs of the party entitled to the exemption. The methods prescribed for the alienation of the exempted real estate are restrictions designed for the protection of all the beneficiaries of the exemption. Therefore the prescribed methods of alienation are as essential when the homestead real estate is alienated to members of the family as to others.

"The right of the owner to voluntarily alienate the property real or personal, to which the constitutional exemption attaches is not given by the Constitution. This right is inherent as an incident to or an attribute of the ownership of the property. But the Constitution provides that the real estate shall not be alienable with-

out the joint consent of husband and wife, when that relation exists,' and that 'nothing in this article shall be construed to prevent the holder of a homestead from alienating his or her homestead so exempted by deed or mortgage duly executed by himself or herself, and by husband and wife if such relation exists.' The law prescribes how deeds of conveyance and mortgages of real estate shall be duly executed by husband and wife.

"The words 'alienable' and 'alienating' are used in the quoted sections of the Constitution in the sense of conveying or transferring the legal title, or any beneficial interest in, the exempt homestead real estate during the life of its owner. The method by which the homestead shall be alienated, i. e., conveyed or transferred, being expressly and specifically prescribed and defined in the Constitution to be by joint consent and by deed or mortgage duly executed by husband and wife when that relation exists, all other methods of alienation are inhibited. Therefore no instrument is effectual as an alienation of or a conveyance or transfer of title to or any interest in the homestead real estate, without the joint consent of husband and wife when that relation exists, which joint consent shall be evidenced by a deed or mortgage duly executed and acknowledged by the husband and wife with the formalities prescribed by law for conveyances by husband and wife."

Even though the wife of "the holder of a homestead" is the grantee in and accepts a deed of conveyance of a homestead, executed by the husband alone, this does not dispense with the organic provision requiring such deed to be "duly executed by \* \* \* husband and wife if such relation exists."

The attempted conveyance being void, and the husband being in possession of the homestead at his death in 1912, no question of title by adverse possession appears for decision.

Partition proceedings being appropriate, the decree is affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and ELLIS, JJ., concur.

Ex parte TURNER et al.

(Supreme Court of Florida. Feb. 14, 1917.)

(Syllabus by the Court.)

1. HABEAS CORPUS — 27 — REMEDY — JURISDICTION TO PUNISH FOR CONTEMPT.

Habeas corpus is an appropriate remedy to test the jurisdiction of a circuit court in a stated case to punish as for a contempt.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 22.]

2. CONTEMPT — 17 — INTERFERENCE WITH CUSTODY OF PRISONER.

The custody of a prisoner who is serving under sentence of a court is regulated by statute, not by judicial orders, and an interference with such custody or a violation of statutory regulations is not a contempt of the court, though such interference or violation may be redressed by due course of law.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 48-50.]

Petition for habeas corpus by R. W. Turner and others against the Sheriff of Columbia County. Petitioners discharged.

R. W. Farnell, of Lake City, for petitioners. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., opposed.

WHITFIELD, J. The petitioners applied to this court for a writ of habeas corpus, alleging in effect that they are illegally deprived of their liberty by the sheriff of Columbia county in this: That the circuit judge issued a rule against them, stating that one Dick Marshall had been by the court adjudged guilty of aggravated assault and sentenced to pay a fine and in default thereof to be imprisoned in the county jail for nine months; that it was reported to the court that the petitioners as county commissioners of the county had directed and caused the release of the said Dick Marshall from jail "contrary to law, and in defiance of the order, sentence and judgment of this court." The command was to show cause why they "should not be considered held and adjudged to be guilty of contempt of this court." The return in effect averred that Dick Marshall was in good faith directed to be discharged from jail for reasons stated, but immaterial here, which the commissioners thought sufficient to justify their action. The court adjudged them in contempt and imposed a fine on each, a default in payment to be followed by custody of the persons by the sheriff until fines and costs are paid.

A writ of habeas corpus was issued returnable before this court. The return of the sheriff stated the custody of the petitioners to be based on the proceedings as above set out.

[1] Habeas corpus is an appropriate remedy to test the jurisdiction of a circuit court in a stated case to punish as for a contempt. See Florida Cent. & P. R. Co. v. Williams, 45 Fla. 295, text 298, 33 South. 991; Ex parte Senior, 37 Fla. 1, 19 South. 652, 32 L. R. A. 133; Ex parte Edwards, 11 Fla. 174; 21 Cyc. 295. See, also, Ex parte Edmondson, 68 Fla. 53, 66 South. 292; Junius Hart Plano House v. Ingman, 119 La. 1017, 44 South. 850; Merrimack River Savings Bank v. City of Clay Center, 219 U. S. 527, 31 Sup. Ct. 295, 55 L. Ed. 320, Ann. Cas. 1912A, 513; Harlan v. McGourin, 218 U. S. 442, 31 Sup. Ct. 44, 54 L. Ed. 1101, 21 Ann. Cas. 849.

[2] The custody of a prisoner who is serving under sentence of a court is regulated by statute, not by judicial orders; and an interference with such custody or a violation of statutory regulations is not a contempt of the court, though such interference or violation may be redressed by due course of law.

As the action of the petitioners in directing the discharge of the prisoner while serving a sentence of imprisonment was not a contempt of the court that imposed the sentence, the circuit judge was without jurisdiction to

detain the petitioners in punishment as for a contempt.

The petitioners will be discharged.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and ELLIS, JJ., concur.

(73 Fla. 316)

NAIL et al. v. BROWNING.

(Supreme Court of Florida. Feb. 9, 1917. Rehearing Denied March 12, 1917.)

(Syllabus by the Court.)

1. TAXATION  $\S$  417—RETURN—ASSESSMENT—STATUTE.

Where no return for taxation is made to the tax assessor on or before April 1st of each year, the lands must be assessed as "unknown," and an assessment made in the name of a person who made no return, and who acquired no interest in the property until after April 1st, is not authorized by the statute.

[Ed. Note.—For other cases, see Taxation, Cent. Dig.  $\S$  699.]

2. TAXATION  $\S$  318—ASSESSMENT—NAME OF OWNER—STATUTES.

The statute gives the assessor until the first Monday in July to complete the clerical work on the assessment roll, but fixes April 1st as the last date when the owner may require property to be assessed in his name.

[Ed. Note.—For other cases, see Taxation, Cent. Dig.  $\S$  530, 531.]

3. TAXATION  $\S$  750—TAX DEEDS—NOTICE OF APPLICATION—STATUTE.

The duty of mailing the notices of applications for tax deeds is mandatory, and the official charged with that duty must make diligent effort to ascertain the proper address of the party or parties to whom the notices must be sent, and mailing such notices to the wrong person, or to an improper address, is not such a compliance with the provisions of sections 574 and 575 of the General Statutes of Florida of 1906 as will give the holder of a tax deed issued by virtue of such notice a valid title.

[Ed. Note.—For other cases, see Taxation, Cent. Dig.  $\S$  1497.]

4. OFFICERS  $\S$  110—OFFICIAL DUTIES—PERFORMANCE.

Diligence in the discharge of their duties is required of public servants, particularly where the rights of owners of property may be jeopardized by their neglect, and their obligation to the public is not discharged by a mere perfunctory performance of official acts.

[Ed. Note.—For other cases, Officers, Cent. Dig.  $\S$  176-179, 182-184.]

Error to Circuit Court, Putnam County; J. T. Wills, Judge.

Action of ejectment by Frank S. Browning against P. O. Nail and another, individually and as partners doing business under the firm name of P. O. Nail & Co., and others. Judgment for plaintiff, and certain defendants bring error. Reversed.

Hilburn & Merryday and A. H. Odom, all of Palatka, for plaintiffs in error. A. V. Long and J. E. Futch, both of Starke, for defendant in error.

BROWNE, C. J. The defendant in error, plaintiff below, brought an action of ejectment in Putnam county against P. O. Nail &

Co., and P. O. Nail, L. C. Braswell, A. J. Melson, and D. W. Currie, to recover certain lands described in the declaration. The defendants pleaded "not guilty," except A. J. Melson, as to whom an order of dismissal was made on request of plaintiff.

On the completion of the testimony the circuit judge gave the following charge:

"The court, having determined the question of title and right of possession in this case, instructs you that you have nothing to determine except the amount of damages which the plaintiff should recover for the detention of the lands in question. The court has prepared a form of verdict for you to sign after filling in the space provided for the amount of damages."

Whereupon the jury found for the plaintiff and awarded \$467 as mesne profits.

Writ of error was sued out, and the following errors are assigned:

"(1) That the court erred in refusing to charge the jury to find a verdict for the defendants.

"(2) That the court erred in charging the jury to find a verdict for the plaintiff.

"(3) That the court erred in denying the defendants' motion for a new trial.

"(4) That the court erred in adjudging the right of possession and title to the property to be in the plaintiff, when the defendant A. J. Melson, a party alleged by the plaintiff to be in possession of said property, was never served with process and was not before the court."

Plaintiff introduced in evidence tax deeds for the land described in the declaration, based upon tax sales made July 1, 1912, and certain tax sale certificates. He also introduced evidence to prove the rental value of the lands.

To meet the prima facie case thus made out, the defendants offered evidence to prove that the tax deeds were void, because the property was sold by virtue of illegal assessments, and for failure of the clerk of the circuit court to give notice to proper parties of the application by plaintiff for tax deeds.

It is undisputed: That R. L. Campbell was the owner of the lands in controversy on January 1, 1911, and had been such owner for a number of years prior thereto. That he conveyed the lands to P. O. Nail on March 7, 1911. On May 23, 1911, Nail conveyed to D. W. Currie an undivided half interest in the premises, and on March 30, 1912, he conveyed the other undivided half interest to the same party. On November 27, 1911, Currie deeded all the land to A. J. Melson, of New York City. Currie testified that the first interest he ever had in the property was such as he acquired under the deed from Nail to him on May 23, 1911; that when he conveyed it to Melson on March 27, 1911, he had purchased from Nail the other half interest, but the deed was not made to him until March 30, 1912. That the lands for which the plaintiff, Frank S. Browning, held tax deeds were assessed in 1911 as the property of D. W. Currie, and in 1913 were assessed to A. J. Melson, and the assessment rolls for that year had come into the clerk's office when the application for a deed was made by Brown-

ing, and that they continued to be assessed to him until he sold them in 1915. Defendants further proved by the deputy clerk of Putnam county that he sent out all the notices that were mailed in relation to the issuance of these two deeds; that he sent notices of the application to R. L. Campbell, who was the last man paying taxes on the land, and to A. J. Melson, at Yelvington, Fla.; that from notations made at the time the deeds were issued, and from the method he employed, he does not think he sent notices to D. W. Currie or to P. O. Nail & Co., or to any member of that firm. A. J. Melson never lived in Yelvington, or in the state of Florida, never received any mail at Yelvington, and was never in Yelvington, or in the state of Florida, but twice in his life.

R. L. Campbell died May 27, 1914. Application for tax deeds were made July 10, 1914.

The questions involved in this case are:

(1) Was the assessment of the lands in controversy to D. W. Currie a valid assessment?

(2) Were the notices which were sent to D. W. Currie and A. J. Melson a compliance with the law governing the issuance of tax deeds?

(3) If not, are they such violations of the law as will overcome the prima facies "of the regularity of the proceedings from the valuation of the land \* \* \* to the date of the deed"?

[1, 2] Section 16, chapter 5596, Acts 1907, makes it "the duty of every person owning or having the control, management, custody, direction, supervision or agency of property \* \* \* subject to taxation \* \* \* to return the same for taxation \* \* \* on or before the first day of April"; and section 20 of same act provides that "when the land has not been returned for assessment on or before the first day of April in each year, by the owner or legal representative of the owner, the county assessor of taxes shall enter the word 'unknown' in the column of the assessment roll provided for the name of the owner, or his or her legal representative." It is very clear that, where no return has been made to the assessor, he must assess it as "Unknown"; and if he does otherwise, and, as in this case, assesses it to a person who made no return, and who owned no interest therein until May 23, 1911, such assessment is void. While the law gives the assessor until the first Monday in July in which to complete the assessment rolls, it places April 1st as the last date when the owner of property may require it to be assessed in his name. Currie, to whom this property was assessed, could not make return of it between January 1st and April 1st, for he did not own any interest in it until May 23d of that year. Notwithstanding this, the tax assessor entered his name in the column provided for the name of the owner, in clear violation of the requirements of the statute.

It is settled in this state that "a valid as-

essment of lands in accordance with the laws regulating assessments is necessary and indispensable to make good the title of a purchaser at a tax sale" (L'Engle v. Wilson, 21 Fla. 461; McKeown v. Collins, 38 Fla. 276, 21 South. 103; Stackpole v. Hancock, 40 Fla. 362, 24 South. 914, 45 L. R. A. 814), and the prima facies of the regularity of the proceedings from the valuation of the land to the date of the deed is overcome by proof of a tax roll showing a void assessment of the land. Daniel v. Taylor, 33 Fla. 636, 15 South. 313.

[3, 4] The second point relied on by plaintiffs in error is that the notice of application for a tax deed required by sections 574, 575, General Statutes of 1906, was not given. Section 575 contains this mandatory requirement:

"The clerk shall also mail a copy of said notice of application for tax deed to the owner of the lands for which a tax deed is applied for. If the owner is unknown, then such notice shall be delivered or mailed to the person last paying taxes on said property."

A. J. Melson was the owner of the land at the time application for tax deed was made. R. L. Campbell was the person last paying the taxes.

On December 29, 1911, there was recorded in the clerk's office of Putnam county a deed to Melson, in which he was described as "of the city of New York, county of New York, and state of New York," yet the clerk mailed the statutory notice to him at Yelvington, Fla. He also sent a notice to a dead man, R. L. Campbell, who was the person last paying the taxes on the property. The duty of mailing the notices provided for by the statute is not perfunctory, and the official charged with that duty should make diligent effort to ascertain the address of parties to whom the notices are to be sent. Melson was a large landowner in Putnam county, and his address could have been readily ascertained by the clerk from the archives of his own office, or by personal inquiry, and he should have exhausted all means to ascertain it. Diligence in the discharge of their duties is required of public servants, particularly where the rights of owners of property can be jeopardized by their neglect, and their obligation to the public is not discharged by a mere perfunctory performance of official acts.

In the case of Montgomery v. Marydale Land & Lumber Co., 46 La. Ann. 403, 15 South. 63, the court held that "mailing notice required by law to another post office than that of the person's residence, was not a compliance with the law." To hold otherwise would destroy the purpose of the law requiring the giving of notice by mail. This court has held in a number of cases that the failure to give the notice required by the statute renders the tax deed void. Starks v. Sawyer, 56 Fla. 596, 47 South. 513; Clark-Ray-Johnson Co. v. Williford, 62 Fla. 453, 56 South. 938; Johnson v. Du Pont, 63 Fla. 200, 57 South. 670.



As the assessment of these lands to D. W. Currie was void as against the owner, A. J. Melson, the tax deeds issued by virtue thereof to Frank S. Browning conveyed no title to him, and the court erred in refusing the motion to direct a verdict for the defendants, and in directing a verdict for the plaintiff.

The judgment of the court below is reversed.

TAYLOR, SHACKLEFORD, WHITFIELD,  
and ELLIS, JJ., concur.

(73 Fla. 255)

WATSON v. BAIR et ux.

(Supreme Court of Florida. Feb. 7, 1917.)

(Syllabus by the Court.)

1. EQUITY  $\Leftrightarrow$  324, 325 — REPLICATION — ANSWER — PROOF.

When replication is filed to an answer in equity, it puts in issue all the matters alleged in the bill of complaint that are not admitted by the answer, as well as those matters contained in the answer that are not responsive to the bill of complaint. Matters set up in the answer that are not responsive to the bill, as new matters in opposition to or in avoidance of the allegations of the bill, must be proved by the defendant.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 635-647.]

2. EQUITY  $\Leftrightarrow$  325 — ADMISSION BY ANSWER — PROOF.

Allegations of a bill of complaint in equity that are admitted by the answer are taken as true and require no proof. The material allegations of the bill of complaint that are denied by the answer are to be proved by the complainant. The averments in the answer of new matter not responsive to the allegations of the bill of complaint are to be proved by the defendant.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 641-647.]

3. EQUITY  $\Leftrightarrow$  325 — PLEADINGS — PROOF.

Where an equity cause is heard upon bill, answer, and replication, after the time for taking testimony had expired, no testimony having been taken by either party, all the allegations of the bill of complaint that are admitted in the answer are taken as true and require no proof. Any material allegations of the bill that are denied by the defendant and are not proved cannot avail the complainant. The averments in the answer of new matter not responsive to the bill that are not proven cannot avail the defendant.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 641-647.]

4. EQUITY  $\Leftrightarrow$  325 — REPLICATION — PROOF.

When a general replication is filed to an answer in chancery, it thereby puts in issue all the matters alleged in the bill and denied in the answer, and it is incumbent upon the complainant to prove all such matters by at least a preponderance of the evidence; the oath to the answer being waived.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 641-647.]

5. EQUITY  $\Leftrightarrow$  325 — RESPONSIVE AVERMENTS OF ANSWER — TRUTH.

On a final hearing of a cause in equity upon bill, answer, and replication, after the time for taking testimony has expired, every aver-

ment in the answer responsive to the bill is taken as true.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 641-647.]

6. EQUITY  $\Leftrightarrow$  325 — ANSWER — NEW MATTER — PROOF.

Affirmative statements in an answer that are not required by the bill of complaint, that do not grow out of any transaction or facts alleged in the bill or admitted in the answer, and that are not inseparably connected therewith constitute new matter not responsive to the bill of complaint, and, if not proved, cannot avail the defendant.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 641-647.]

7. EQUITY  $\Leftrightarrow$  325 — ANSWER — AFFIRMATIVE MATTER — PROOF.

Where the answer in an equity cause sets up affirmative averments of new matter not stated or enquired of and not inseparably connected with matter stated or enquired of in the bill of complaint, and such new matter is in opposition to, or in avoidance of, the plaintiff's demand or claim of right, and a general replication is filed, such affirmative averments are of no avail to the defendant unless proven by independent testimony.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 641-647.]

8. EQUITY  $\Leftrightarrow$  190 — ANSWER — RESPONSIVENESS.

Where an answer is confined to such facts as are necessarily required by the bill, and those inseparably connected with them, forming a part of one and the same transaction, the answer is responsive to the bill as well when it discharges, as when it charges, the defendant.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 433.]

9. EQUITY  $\Leftrightarrow$  388 — BURDEN OF PROOF — DECREE.

Where a complainant in an equity suit fails to sustain the burden of proof cast upon him by the law, a decree is properly rendered in favor of the defendants and the bill ordered dismissed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 827-829.]

Appeal from Circuit Court, Alachua County; Jas. T. Wills, Judge.

Bill by E. L. Watson against J. A. Bair and Frances A. Bair. Decree for defendants dismissing the bill, and complainant appeals. Affirmed.

E. L. Watson filed his bill in chancery against J. A. Bair and Frances A. Bair, which, omitting the caption, is as follows:

"Your orator, E. L. Watson, of Alachua county, Fla., brings this his bill of complaint against J. A. Bair and Frances A. Bair, his wife, of Alachua and Putnam counties, respectively, Fla., and thereupon your orator complains and says:

"That on the 4th day of December, 1913, your orator recovered a judgment against the American Pecan Company, a Delaware corporation, in the sum of \$1,250, and costs taxed at \$14.43, which said judgment was so recovered upon a certain promissory note given by said American Pecan Company to your orator for the sum of \$1,000, due and payable 60 days after the 5th day of July, 1912, the date said note was given, with interest after maturity at 10 per cent. per annum until paid; that your orator is now and has been all the while the owner of said judgment, and the same remains entirely unsatisfied; that execution was duly and regularly issued on said judgment and plac-

ed in the hands of the sheriff of Alachua county to make levy on and satisfy same out of the properties of the said American Pecan Company, defendant therein, but that said execution was returned by the said sheriff wholly unsatisfied, the said sheriff certifying on said execution that he could find no property of the American Pecan Company whereon to levy to make any part of the amount of said judgment and execution.

"Your orator further represents unto your honor that J. A. Bair, defendant herein, was president of the said American Pecan Company, and the owner of all of its capital stock; that the capital stock of said corporation is \$100,000, and the said J. A. Bair is the owner of same; that the said J. A. Bair has not paid in to the treasury of said corporation the full amount of said capital stock, and that the amount now due said corporation by the said J. A. Bair is an amount far in excess of the sum necessary to satisfy your orator's said judgment and execution; that under the laws of this state your orator has a right to proceed against the said J. A. Bair by his said execution and satisfy same out of any property belonging to said J. A. Bair to an amount sufficient to satisfy said judgment and execution from the sum remaining unpaid on the capital stock of said corporation owned by said J. A. Bair, but the said J. A. Bair has no property in his own name which can be reached by said execution; that the sheriff of Alachua county has made return on said execution that no property of said J. A. Bair can be found in Alachua county, Fla., whereon to levy and make sale thereunder to satisfy same.

"Your orator further sheweth that on the 9th day of October, 1914, there was filed in the office of the clerk of circuit court of Alachua county, Fla., a deed of conveyance from one J. R. Liddell and Mary H. Liddell, his wife, of Wilcox county, Ala., purporting to convey to Frances A. Bair, defendant herein, and wife of J. A. Bair, defendant, upon a consideration of \$7,000, the following described lands:

"Being in the city of Gainesville, Alachua county, Fla., particularly described as being situate in southern part of Sec. 31, T. 9, S., R. 20 E., and in northern part of Sec. 6, T. 10 S., R. 20 E., bounded by a line commencing at a stake at southwest corner of lot 24 of Hill's subdivision of the north half of Sec. 6, T. 10 S., R. 20 E., map of which is recorded on page 500 of Deed Book P, Public Records of Alachua County, Fla., and running thence north 19.68 chs. to a stake at northwest corner of lot 41 and on township line dividing townships 9 and 10; thence north into Sec. 31, T. 9 S., R. 20 E., 5.50 chs. to a stake in the middle of Rattlesnake branch; thence eastward of the run of said branch following meander of same to a stake where it strikes the township line between townships 9 and 10; thence west along said township line 1.70 chs. to a stake at the northeast corner of lot 44 of above-mentioned subdivision; thence south 19.68 chs. to a stake at southeast corner of lot 49; thence west 24.86 chs. to place of beginning—containing 53 acres more or less, being the same lands described in Deed Book 69 at page 309, Public Records of Alachua County, Fla.; said deed being recorded in Deed Book 95 at page 49, Public Records of Alachua County, Fla.

"That said deed is a fraudulent conveyance to Frances A. Bair, wife of the said J. A. Bair, for the purpose of preventing your orator from making levy on the lands described therein to satisfy his said execution and judgment; that said Frances A. Bair paid no part of the consideration for said lands so conveyed, and that same does not in truth and in fact belong to her, but same are the lands of J. A. Bair, but held in her name for the purpose of hindering, delaying, and defrauding the creditors of the said J. A. Bair, and particularly your orator; that J. A. Bair is the rightful owner of said

lands; that it was his money which paid for same, and not that of Frances A. Bair; that at the time of said conveyance the said J. A. Bair was in embarrassed circumstances.

"Your orator further sheweth unto your honor that said property ought in equity and good conscience be applied to the satisfaction of your orator's said judgment and execution under the laws of Florida, but the defendants refuse to so apply the same, and your orator is without remedy save in a court of equity where matters of this sort are cognizable, and it would so appear that said property ought to be applied to the satisfaction of your orator's said execution and judgment and if the defendants herein would set forth and discover fully and particularly all the facts, circumstances, agreements, and understandings in regard to same, which your orator prays this court to compel them to do.

"Wherefore your orator prays that the said Frances A. Bair be decreed to hold said property in trust as the property of the said J. A. Bair, and that a master in chancery be appointed by your honor to sell said property and apply the proceeds of said sale in the satisfaction of your orator's said execution and judgment as sales of real estate are conducted in chancery proceedings under the laws of this state; that said defendants be enjoined from making further or other transfers of said property.

"And may your orator have subpoena in chancery issuing out of and under the seal of this honorable court, directed to the defendants, J. A. Bair and Frances A. Bair, his wife, commanding them and each of them by a day certain and under a certain penalty therein prescribed to appear before this honorable court and then and there full, true, direct, and perfect answer make to this bill of complaint, but not under oath, such oath to answers being hereby specifically waived.

"And may your orator have such other and further relief in the premises as in equity may seem meet and to your Honor shall seem proper. And your orator will ever pray."

To this bill the defendants filed the following answer:

"The defendants now and at all times hereafter reserving all manner of benefit and advantage to themselves of exception to the many errors and insufficiencies in the bill of complaint filed herein contained, for answer thereto, or to so much or such parts thereof as the defendants are advised is material for them to make answer unto, they answer and say:

"The defendants admit that the complainant recovered a judgment against the American Pecan Company, a Delaware corporation, in the sum of \$1,000 or more, the exact amount being unknown; that said judgment, in so far as the defendants are advised, has not been satisfied. The defendants further admit that J. A. Bair was president of the American Pecan Company and owner of the larger portion of the capital stock.

"These defendants admit that on the 9th day of October, 1914, a deed was filed in the office of the clerk of circuit court of Alachua county, Fla., showing a conveyance of certain lands hereinafter described from J. R. Liddell and wife, Mary H. Liddell, and that said deed conveyed all interest in said lands to Frances A. Bair, one of the defendants herein; that said consideration for the following described conveyance was \$7,000; that said land described in said conveyance is particularly described in deed from J. R. Liddell and wife, Mary H. Liddell, to Frances A. Bair, and recorded October 9, 1914, in Deed Book 95, at page 49 of the Public Records of Alachua County, Fla.; that said land is described more particularly as follows, to wit:

"Being in the city of Gainesville, in the county of Alachua, and state of Florida, and par-

ticularly described as being situated in the southern part of Sec. 31, T. 9 S., R. 20 E., and in the northern part of Sec. 6, T. 10 S., R. 20 E., and bounded by a line commencing at a stake at the southwest corner of lot 24 of Hill's subdivision of the north half of Sec. 6, T. 10 S., R. 20 E., map of which is recorded on page 500 of Deed Book P in the office of clerk of circuit court, Alachua county, Fla., and running thence north 19.68 chs. to a stake at the northwest corner of lot 41 and on the township line dividing townships 9 and 10; thence north into Sec. 31, T. 9 S., R. 20 E., 5.50 chs. to a stake in the middle of Rattlesnake branch; thence eastward of the run of said branch following the meanderings of the same to a point where it strikes the township line between townships 9 and 10; thence west along said township line 1.70 chs. to a stake at the northeast corner of lot 44 of the above-mentioned subdivision; thence south 19.68 chs. to a stake at the southeast corner of lot 49; thence west 24.86 chs. to the place of beginning—containing 58 acres of land, being same land described in deed recorded in Deed Book 69 at page 309 in the office of the clerk of circuit court of Alachua county, Fla.

"These defendants and each of them positively deny that said deed is a fraudulent conveyance to Frances A. Bair for the purpose of preventing the complainant, E. L. Watson, from making levy on the land described herein to satisfy his said execution and judgment. These defendants further state that the consideration paid for said land as described herein was made by Frances A. Bair out of her own separate estate; that James A. Bair had no interest in the money which was paid as the consideration for said conveyance from J. R. Liddell and wife, Mary H. Liddell, to Frances A. Bair. These defendants further deny that said lands conveyed as aforesaid are the lands of James A. Bair, and they further deny that the same is held in the name of Frances A. Bair for the purpose of hindering, delaying, and defrauding the creditors of the said J. A. Bair. These defendants further aver that Frances A. Bair is the rightful owner of said land; that it was her money which paid for the same, and not the money of James A. Bair; that the defendant Frances A. Bair refuses to apply her separate estate to the payment of the judgment of the complainant herein as the same does not affect her separate estate; and that she is in no way liable for any debt or judgment secured against the American Pecan Company.

"These defendants further aver that the property conveyed from J. R. Liddell and wife Mary H. Liddell to Frances A. Bair was bought and paid for by money belonging to the said Frances A. Bair, and that the said James A. Bair did not have at that time, nor does he now have, any interest in and to the same; that the said Frances A. Bair bought certain lands in the city of Palatka, county of Putnam, and state of Florida, from the Trustees of the Methodist Church, and also bought certain lands from the heirs of William Boyd; that said lands were bought by the said Frances A. Bair a long time prior to this suit, to wit, the deed from the trustees of the Methodist Church, described as deed dated the 29th day of March, A. D. 1910, the deed from the Boyd heirs, described as deed dated the 16th day of November, A. D. 1911, and the 10th day of August, A. D. 1911; that the purchase price paid to the said J. R. Liddell and wife, Mary H. Liddell, for the lands herein described was made through a mortgage given by the said Frances A. Bair on her separate estate described in the above-mentioned deeds; that said moneys derived from said mortgage were applied on the purchase price of said lands from J. R. Liddell and wife to the said Frances A. Bair; that the said James A. Bair has no interest in the lands upon which said mortgage was given or any interest in the moneys derived therefrom;

that the said J. A. Bair has acted solely as the agent of Frances A. Bair in reference to any and all transactions pertaining to the Riddell conveyance.

"These defendants and each of them further deny that any fraud has been perpetrated or attempted to be perpetrated upon the complainant, E. L. Watson, herein; that said conveyance from said J. R. Liddell and wife, Mary H. Liddell, to Frances A. Bair, was made in good faith and with absolutely no intention to defraud the complainant herein; that said conveyance was made for a valid consideration paid by the said Frances A. Bair to the said J. R. Liddell and wife; and that the said J. A. Bair had no interest in the consideration aforesaid, nor has he any interest in the lands described in the said conveyance, but that said lands are the separate estate and property of the defendant Frances A. Bair.

"That the deed from the trustees of the Methodist Church to Frances A. Bair herein mentioned was recorded in the public records of Putnam county, Fla., on the 6th day of April, 1910, in Book of Deeds 53 at pages 429, 430; that the deed from the Boyd heirs was recorded, deed from Mary E. Boyd as attorney in fact, on November 18, 1911, in the Book of Conveyances 56, at page 255 of the said Public Records of Putnam County, Fla.; that the said deed from Mary E. Boyd to Frances A. Bair was recorded on the 12th day of August, A. D. 1911, in Book of Conveyances 56, at page 95 of the Public Records of Putnam County, Fla.; that this property, which forms one lot, was bought by the said Frances A. Bair as shown by said deed, and that the money paid therefor was her own separate property; that the said James A. Bair had absolutely no interest in said money; that the property described in the deeds aforesaid is the property which this defendant, Frances A. Bair, mortgaged to the Putnam National Bank, of the city of Palatka, for the purpose of raising the consideration which was paid to the said J. R. Liddell and wife for the conveyance by them to the said Frances A. Bair, and that the said James A. Bair had no interest in the said property nor the consideration thereof. All of which matters and things these defendants are ready to aver and prove as this honorable court shall direct, and pray to hence be dismissed with their reasonable costs and charges in this behalf most wrongfully sustained."

The answer was not under oath.

The usual general replication was filed, and the complainant, after the time for taking testimony had expired, no testimony having been taken either by the complainant or the defendants, set the cause down for a final hearing upon bill, answer, and replication, which resulted in the rendering of a final decree in favor of the defendants and the dismissal of the bill. From this decree the complainant has entered his appeal; the sole assignment of error being that the court erred in rendering such final decree.

E. G. Baxter, of Alachua, and Thos. W. Fielding, of Gainesville, for appellant. J. C. Calhoun and J. V. Walton, both of Palatka, for appellees.

SHACKLEFORD, J. (after stating the facts as above). The following contention is made by the appellant in his brief:

"Appellees answered the bill of complaint and confessed every material allegation therein, either expressly or by failure to deny, and appellees, by their answer, then proceeded to state matters by way of avoiding the allegations of

the bill; that is, the appellees' answer is by way of confession and avoidance; and therefore it was incumbent upon the appellees to establish the matters set up by way of avoidance by a preponderance of the evidence."

[1-3] Of course, if this contention is supported by the pleadings, as copied in the transcript of the record, the decree must be reversed. As we held in *Griffith v. Henderson*, 55 Fla. 625, 45 South. 1003:

"When a replication is filed to an answer in equity, it puts in issue all the matters alleged in the bill of complaint that are not admitted by the answer, as well as those matters contained in the answer that are not responsive to the bill of complaint. Matters set up in the answer that are not responsive to the bill, as new matters in opposition to or in avoidance of the allegations of the bill, must be proved by the defendant.

"Allegations of a bill of complaint in equity that are admitted by the answer are taken as true and require no proof. The material allegations of the bill of complaint that are denied by the answer are to be proved by the complainant. The averments in the answer of new matter not responsive to the allegations of the bill of complaint are to be proved by the defendant.

"Where an equity cause is heard upon bill, answer, and replication, after the time for taking testimony had expired, no testimony having been taken by either party, all the allegations of the bill of complaint that are admitted in the answer are taken as true and require no proof. Any material allegations of the bill that are denied by the defendant and are not proved cannot avail the complainant. The averments in the answer of new matter not responsive to the bill that are not proven cannot avail the defendant."

[4, 5] As we read the answer of the defendants, we do not understand it as admitting all the material allegations of the bill, either expressly or by failure to deny, as the appellant contends, but construe it as a denial of material allegations, which therefore made it incumbent upon the complainant to prove the same by at least a preponderance of the evidence, in order to entitle him to a decree; the bill having expressly waived the oath to the answer. See *Lykes v. Beauchamp*, 49 Fla. 333, 38 South. 603, wherein we held:

"When a general replication is filed to an answer in chancery, it thereby puts in issue all the matters alleged in the bill and denied in the answer, and it is incumbent upon the complainant to prove all such matters by at least a preponderance of the evidence, the oath to the answer being waived.

"On a final hearing of a cause in equity upon bill, answer, and replication, after the time for taking testimony has expired, every averment in the answer responsive to the bill is taken as true."

Also see *Indian River Mfg. Co. v. Wooten*, 55 Fla. 745, 46 South. 185, and *Langford v. Read*, 69 Fla. 198, 68 South. 723.

[6, 7] It is true, as we held in *Griffith v. Henderson*, *supra*:

"Affirmative averments in an answer that are not required by the bill of complaint, that do not grow out of any transaction or facts alleged in the bill or admitted in the answer, and that are not inseparably connected therewith constitute new matter not responsive to the bill of complaint and if not proved, cannot avail the defendant.

"Where the answer in an equity cause sets up affirmative averments of new matter not stated or inquired of, and not inseparably connected with matter stated or inquired of, in the bill of complaint, and such new matter is in opposition to, or in avoidance of, the plaintiff's demand or claim of right, and a general replication is filed, such affirmative averments are of no avail to the defendant unless proven by independent testimony."

[8] It is likewise true, as we held in *Maxwell v. Jacksonville Loan & Imp. Co.*, 45 Fla. 425, 34 South. 255:

"Where an answer is confined to such facts as are necessarily required by the bill, and those inseparably connected with them, forming a part of one and the same transaction, the answer is responsive to the bill, as well when it discharges, as when it charges, the defendant."

Also see *Southern Lumber & Supply Co. v. Verdier*, 51 Fla. 570, 40 South. 676.

[9] We are of the opinion that the complainant has failed to sustain the burden so cast by the law upon him; therefore the decree must be affirmed. See *Pierce v. Brunswick & Balk Co.*, 23 Fla. 288, 2 South. 366; *Ropes v. Jenson*, 45 Fla. 556, 34 South. 955, 110 Am. St. Rep. 79; *Lykes v. Beauchamp*, 49 Fla. 333, 38 South. 603.

Decree affirmed.

BROWNE, C. J., and TAYLOR, WHITEFIELD, and ELLIS, JJ., concur.

(73 Fla. 289)

LAKEVIEW PROPERTY CO. v. WILLIAMS et al.

(Supreme Court of Florida. Feb. 7, 1917.)

Appeal from Circuit Court, Escambia County; A. G. Campbell, Judge.

Suit between the Lakeview Property Company, a corporation, and Janet O. Williams and husband. Decree for the latter, and the former appeals. Affirmed.

F. W. Marsh, of Pensacola, for appellant. Watson & Pasco, of Pensacola, for appellees.

PER CURIAM. This cause having been submitted to the court at a former term thereof, upon the transcript of the record of the decree aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decree. It is therefore considered, ordered, and adjudged by the court that the said decree of the circuit court be, and the same is hereby, affirmed.

(113 Miss. 435)

**JOHNSON et al. v. BOARD OF SUP'RS OF YAZOO COUNTY et al. (No. 19587.)**

(Supreme Court of Mississippi, Division B. March 5, 1917. On Suggestion of Error, March 19, 1917.)

**1. APPEAL AND ERROR — 1006(3)—REVIEW OF FINDINGS—CONFLICTING EVIDENCE.**

Where from conflicting evidence offered in suit for injunction against issuance of highway construction bonds under Laws 1914, c. 176, chancellor's findings against claimant cannot be said to be manifestly wrong, they will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3972.]

**2. COUNTIES — 183(2)—HIGHWAY CONSTRUCTION BONDS—AMOUNT OF—POWER OF BOARD OF SUPERVISORS.**

The board of supervisors having plenary jurisdiction over roads may, under Laws 1914, c. 176, authorize issuance of any amount of road construction bonds within statutory limit, although electors may have indorsed issuance for the maximum amount.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 277-281.]

**2. COUNTIES — 183(1)—HIGHWAY CONSTRUCTION BONDS—QUALIFICATION OF ELECTION COMMISSIONER.**

In election to authorize board of supervisors to issue highway construction bonds under Laws 1914, c. 176, the fact that one commissioner was not a freeholder did not invalidate an otherwise legal election.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 275, 276.]

**4. COUNTIES — 183(1) — HIGHWAY BONDS — VALIDITY OF PROCEEDINGS TO ISSUE.**

Record of proceedings of board of supervisors in issuing highway construction bonds, under Laws 1914, c. 176, held to show a strict compliance with statute.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 275, 276.]

**5. COUNTIES — 178—PROCEEDINGS TO ISSUE HIGHWAY BONDS—WAIVER OF IRREGULARITY.**

A vote of the people, authorizing board of supervisors to issue highway construction bonds under Laws 1914, c. 176, may cure irregular precedent steps.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 269-273.]

**6. COUNTIES — 177 — PROCEEDINGS TO ISSUE HIGHWAY BONDS—STATUTE—CONSTRUCTION.**

Laws 1914, c. 176, providing procedure for authorizing board of supervisors to issue highway construction bonds, is to be strictly construed, and whether this has been complied with is a mere matter of proof.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 268.]

**7. COUNTIES — 183(1)—HIGHWAY CONSTRUCTION BONDS—ORDER AUTHORIZING ELECTION—CONCLUSIVENESS.**

Where board of supervisors' order of election for issuance of highway construction bonds stated jurisdictional facts on its face, reciting that 20 per cent. of electors had petitioned, it had the effect of a valid court judgment, and could only be questioned on appeal or certiorari to the circuit court, and not in an injunction suit in a chancery court, which does not have jurisdiction of inferior tribunals, as does the circuit court.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 275, 276.]

**8. COUNTIES — 177 — "CHANCERY CLERK'S OFFICE."**

Although the "chancery clerk's office" proper was not in the courthouse, but his work in attending board of supervisors was done in a courthouse office, the latter was legally his office for that purpose.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 268.]

Appeal from Chancery Court, Yazoo County; O. B. Taylor, Chancellor.

Bill for injunction by Clint Johnson and others against the Board of Supervisors of Yazoo County and others, to prevent the issuance and sale of highway construction bonds. Decree for defendants, and complainants appeal. Affirmed. On suggestion of error, former opinion sustained, and suggestion overruled.

M. B. Montgomery, of Yazoo City, for appellants. R. R. Norquist, of Yazoo City, for appellees.

COOK, P. J. This appeal presents a case wherein the appellant asked the chancery court to review the proceedings of the board of supervisors of Yazoo county antecedent to the final order, authorizing the issuance and selling of bonds for the construction of public roads in supervisors district No. 1 of said county. All of the proceedings purported to have been under the provisions of chapter 176, Laws of 1914. The bill of complaint prays for an injunction against the issuance and sale of the bonds. The bill attacks all of the steps taken by the electors and all of the orders made by the board of supervisors in response to the original petition asking for the issuance of the bonds. It seems that an appeal was taken by the appellants from the final orders of the board, upon bills of exceptions, but these appeals were abandoned and were voluntarily dismissed. This is a collateral attack upon the proceedings in toto and in detail. The board of supervisors, by an order entered on its minutes, announced that it would, on a given date, issue the bonds, unless a partition should be filed asking that an election be held in accordance with the statute. Whereupon a petition was filed against the bonds, purporting to contain 20 per centum of the qualified electors of the supervisor's district. The board thereupon ordered an election—the election was held, the commissioners of the election canvassed the returns and certified that the election had resulted in favor of the issuance of the bonds; the board of supervisors appointed road commissioners provided for by the statute, received their recommendation as to the amount of bonds to be issued, and entered an order for the amount recommended, which was \$133,000. Thus far no one appealed from any of the orders of the board of supervisors.

[1] Afterwards the road commissioners,

after canvassing the assessed values of the property located in the district, reported to the board of supervisors that the maximum amount of bonded indebtedness permitted to the district by the statute was between \$133,000 and \$132,000. Acting upon this suggestion, the board of supervisors reduced the bond issue to the latter sum. At the hearing evidence was introduced tending to support the complainants' theory that the original petition asked that supervisor's district No. 1 be permitted to "come under the provisions" of chapter 176, Laws of 1914. On the other hand, evidence to the contrary was offered, and the conflict was, by the chancellor, determined against appellant, and we see no reason to doubt the correctness of the chancellor's finding.

Again, it is the contention that the proposed bond issue did not receive the approval of a majority of the qualified electors voting at the election. This disputed question of fact was decided against appellant, and if we interpret the record correctly we are inclined to indorse the chancellor's solution. At any rate, we are totally unable to say that he was manifestly wrong.

[2] The contention that the board of supervisors were not authorized to issue bonds for a less sum than the sum indorsed by the electorate is unsound. We think the board of supervisors, under its plenary powers and jurisdiction over roads, may order the issuance of any sum within the limits of the statutory amount, although the electors may ask for the maximum amount.

[3] There is no merit in the point that one of the election commissioners appointed to hold the election was not a freeholder. If the fact be assumed that the commissioner was not a freeholder, this would not invalidate the election, if the same was conducted fairly, and every qualified elector was given the opportunity to record his approval or disapproval of the proposed bond issue.

One other point is made, which, if true, would probably invalidate the bond issue. It was contended below that the bond issue authorized exceeded the statutory limit. We do not believe that this contention is supported by the evidence. This, like many other points, was a question of fact to be determined by the chancellor, and we do not see that he was wrong; it appears to us that he was right.

[4] Taking the record as a whole, we believe that the road district was established, the election held, the bonds authorized, and the bonds issued strictly in accordance with the requirements of the statute.

[5] If the vote of the people to tax themselves did not cure all of the alleged irregular precedent steps, it came very near doing so.

[6] We have not deemed it necessary to discuss the many judicial pronouncements upon similar questions. Counsel on both

sides have displayed unusual industry and discrimination in the presentation of their respective sides of this controversy; but believing, as we do, that the statute is the guide, we have chosen to confine ourselves to an examination of the issues presented—by the statutory yardstick. The law is simple and provides an easy method to pursue, and whether that method is actually pursued is merely a matter of proof.

Affirmed.

#### On Suggestion of Error.

ETHRIDGE, J. [7] In this case the appellants contend that the court erred in holding that the chancellor found against them on the facts, stating that the chancellor refused to give them a finding of the facts. While no special finding was put in the records, the judgment rendered had the effect of finding against the appellant on the facts. The order of the board of supervisors shows the jurisdictional facts on its face, expressly reciting that 20 per cent. of the qualified electors had petitioned for the board to adopt the law. This being true, its judgment has all the effect of a valid judgment of a court of general jurisdiction, and can only be questioned by a direct proceeding by appeal or certiorari. The circuit court has supervisory jurisdiction of all inferior tribunals, and the chancery court has no such jurisdiction, and when the records show jurisdiction in the board to pass the order chancery cannot question the validity of the proceedings. In the case of *Hinton v. Perry County*, 84 Miss. at page 546, 36 South. at page 567, this court said:

"Actions of the board not involving jurisdictional power are conclusively right in this collateral litigation. Its jurisdiction being, in this matter, limited, the minutes must show that the jurisdictional facts were found to exist. This being done, there is no need ever to set forth the evidence in the judgment, and it is not *controvertible, except on direct appeal.*"

In that case the board was exercising a statutory power, while in this case it was invested by the Constitution with full jurisdiction. See, also, *Wolford v. Williams*, 110 Miss. 637, 70 South. 823, where this court held that an appeal from the board was the exclusive remedy.

[8] There is no merit in the contention in the suggestion of error that place where the board met was not in the chancery clerk's office. The office in the courthouse, while not physically attached to or situated in the clerk's office, was nevertheless a part of the clerk's office. The office where the clerk kept the records and did most of the clerk's work, while not physically attached to the courthouse, was on the courthouse square and within a few feet of the courthouse. The clerk was required to attend the board and keep its minutes, and the office in which this work is done is a part of his office within the meaning of the statute.

The suggestion is therefore overruled.

(113 Miss. 457)

**HARRIS v. STATE.** (No. 19520.)(Supreme Court of Mississippi, Division A.  
March 12, 1917.)**1. INTOXICATING LIQUORS**  $\S$  236(11)—PROSECUTION—EVIDENCE—SUFFICIENCY.

In a prosecution for the illegal sale of intoxicating liquors, evidence *held* insufficient to sustain a conviction.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 313-315.]

**2. INTOXICATING LIQUORS**  $\S$  167 — OFFENSES — AIDING PURCHASE.

It being no violation of law for a person to purchase intoxicating liquor, it was not a violation of law for accused to aid the purchaser in buying liquor at his instance; it not appearing that accused was in any wise agent for the seller.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 182, 183.]

Appeal from Circuit Court, Tishomingo County; Claude Clayton, Judge.

Charles Harris was convicted of selling intoxicating liquors, and he appeals. Reversed, and defendant discharged.

Cunningham & Cunningham, of Booneville, for appellant. Ross A. Collins, Atty. Gen., for the State.

**HOLDEN, J.** The appellant, Charles Harris, was indicted and convicted in the circuit court of Tishomingo county on the charge of selling intoxicating liquors. He appeals here, and contends that the lower court erred in not excluding the testimony offered by the state and discharging him, because, he contends, the testimony was insufficient to establish his guilt as charged in the indictment.

The testimony introduced by the state at the trial shows that three young white men, Allie Brown, W. H. Clay, and Dalton Harris, went to the appellant's house in a buggy one afternoon about dark for the purpose of purchasing some whisky. They stopped a little distance down the road from appellant's house, and Allie Brown went in quest of the liquor. He went up to the appellant's house and gave him the money for the whisky which he desired to purchase, and appellant walked off a few steps, but returned and handed back the money to Brown, stating that "he did not have any whisky, but there was another fellow up there who had some whisky and he would tell him to bring the whisky to us." Allie Brown then returned to the road about 30 yards behind the buggy and waited there until some man unknown to him came with a quart of whisky, which he received and paid for.

With this testimony before the jury, the court instructed the jury that, if they believed from the evidence beyond a reasonable doubt that Charley Harris aided or abetted or assisted in the unlawful sale of liquor at the time and place alleged in the indictment, then they would find him guilty as

charged. The jury found the defendant "guilty of aiding and assisting in the unlawful sale of intoxicating liquor."

[1, 2] It will be observed that the charge here is not that the appellant was acting as "agent" in the sale of the liquor, but he is charged with selling the liquor. The proof offered by the state does not sustain the charge in the indictment, as the testimony does not show that the appellant did anything in aid of the sale of the liquor. All that the appellant did, if he did anything at all after leaving Witness Brown, was to aid the purchaser in buying the whisky. And it being no violation of law for a person to purchase liquor, there can be no violation of the law by the appellant here in merely aiding the purchaser in buying the liquor at his instance. Such a state of facts may at some time in the future constitute a violation of law, should the Legislature see proper to enact a law penalizing the purchaser as well as the seller of liquor.

In view of the above conclusions, we are compelled to hold that the proof offered by the state in the lower court was insufficient to sustain the indictment, and therefore the lower court erred in refusing to exclude the testimony of the state and discharging the appellant.

The judgment of the lower court is reversed, and the appellant discharged.

(113 Miss. 450)

**CATLETT v. DRUMMOND et al.** (No. 18788.)(Supreme Court of Mississippi. In Banc.  
March 12, 1917.)**1. JUSTICES OF THE PEACE**  $\S$  122(3) — DEFAULT JUDGMENT—VALIDITY.

Code 1906, § 2724, fixing the venue of actions before a justice of the peace against a freeholder or householder in the district of such freeholder's or householder's residence, confers a mere personal privilege, which may be waived by failure to claim it in the proper manner and at the proper time by objecting at the trial to the cause being proceeded with and proving the existence of the facts upon which such a claim must rest; hence, in an action in a justice of the peace court on an open account, where the defendant who was a freeholder in another district failed to appear pursuant to summons, a default judgment rendered against him was valid.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 384.]

**2. JUSTICES OF THE PEACE**  $\S$  128(3) — RESTRAINING ENFORCEMENT OF JUDGMENT — PROCEDURE.

In an action to enjoin the collection of a judgment rendered by a justice of the peace, plaintiff must aver and prove that he has a meritorious defense to the claim in such action before he can obtain relief in equity, although the judgment of the justice is void.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 406, 407.]

Appeal from Chancery Court, Hinds County; O. B. Taylor, Chancellor.

Suit for injunction by N. W. Drummond

and another against Margaret Catlett. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Vardaman & Vardaman, of Jackson, and H. B. Greaves, of Canton, for appellant. V. J. Stricker, of Jackson, for appellees.

SMITH, C. J. In January, 1914, appellant instituted suit upon an open account against Drummond, in the court of F. M. Featherstone, a justice of the peace in district No. 1, Hinds county. Drummond was personally served with summons more than five days before the return day thereof, and, failing to appear pursuant to this summons, judgment by default was rendered against him. About a year after the rendition of this judgment, appellant sued out a writ of garnishment against T. E. Lewis, alleging that he was indebted to or had in his hands effects of the said Drummond. Lewis failed to answer this garnishment, and a judgment by default was rendered against him. Afterwards Drummond and Lewis exhibited their bill in the court below, alleging the foregoing facts, and that the judgment against Drummond by the justice of the peace is void for the reason that the debt upon which he was sued by appellant was contracted in Madison county, and that at the time of service of process upon him and of the rendition of the judgment he was a resident freeholder of justice's district No. 5 in Hinds county, and that there was at the time an acting justice of the peace in district No. 5, qualified to try the suit, which allegations were not denied, and were found by the chancellor to be true. The bill did not allege, nor was any evidence introduced by appellees to show, that Drummond had a meritorious defense to appellant's claim. The prayer of the bill was that the collection of the judgments rendered against appellees be perpetually enjoined; and the appeal is from a decree in accordance therewith.

[1] The cause of action upon which Drummond was sued by appellant in the justice of the peace court was transitory in character and within the general jurisdiction of such a court, and the fact that Drummond may have been at that time a freeholder or householder of another district cannot now be availed of by him, for the reason that the provision of section 2724, Mississippi Code of 1906, fixing the venue of actions before a justice of the peace against a freeholder or householder in the district of such freeholder's or householder's residence, confers "a mere, personal privilege, which may be waived by failure to claim it in the proper manner and at the proper time"; that is, by objecting at the trial to the cause being proceeded with, and proving the existence of the facts upon which such a claim must rest; from which it follows that the judgment rendered against him

by the justice of the peace is valid. 40 Cyc. 111; 22 Ency. Plead. & Prac. 815.

[2] In so far as appellee Drummond is concerned, the decree of the court below must be reversed, for the further reason that he neither averred nor proved that he has a meritorious defense to appellant's claim. This must be done before he can obtain relief in a court of equity, even should it be conceded that the judgment rendered by the justice of the peace against him is void. *Stewart v. Brooks*, 62 Miss. 492; *Newman v. Taylor*, 69 Miss. 670, 13 South. 831; *Walker-Durr Co. v. Mitchell*, 97 Miss. 231, 52 South. 583; *Welch v. Hannie*, 72 South. 861. Whether this last reason for reversing the decree can be availed of against appellee Lewis we do not now decide. The case of *Hilliard v. Chew*, 76 Miss. 763, 25 South. 439, which was followed by and fully supports the court below, was erroneously decided, is in conflict with the cases hereinbefore cited, and is hereby overruled. In the case of *Comenitz v. Bank*, 85 Miss. 662, 38 South. 35, it does not appear, either from the statement of the case by the reporter or from the opinion rendered by the court, whether or not appellants had a meritorious defense to the judgment sought to be enjoined, so it may be that that case is not in conflict herewith.

Reversed and remanded.

(113 Miss. 460)

TATUM v. GARRETT. (No. 18461.)

(Supreme Court of Mississippi, Division B.

March 5, 1917.)

1. APPEAL AND ERROR  $\S$  1131—AFFIRMANCE—STAY OF EXECUTION.

On affirming a judgment for plaintiff the Supreme Court cannot stay execution thereon until defendant is discharged from attachment and garnishment proceedings against him in another suit in which plaintiff is the principal defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig.  $\S$  4445.]

2. APPEAL AND ERROR  $\S$  1145—AFFIRMANCE—EFFECT ON GARNISHMENT PROCEEDINGS.

Affirming a judgment for plaintiff does not affect garnishment proceedings instituted against defendant in another action in which plaintiff is the principal defendant, but such proceedings take their ordinary course pursuant to the garnishment statutes.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig.  $\S$  4444, 4657.]

Appeal from Circuit Court, Forrest County; Paul B. Johnson, Judge.

On motion to modify judgment of affirmance. Overruled. For former opinion, see 73 South. 786.

S. E. Travis, of Hattiesburg, for appellant. Sharborough & Bullard, of Laurel, for appellee.

STEVENS, J. [1] When the suggestion of error was filed in this case there was filed simultaneously therewith this motion to modify the judgment of affirmance, hereto-



fore rendered, so as to direct that execution be stayed until the case of W. O. Tatum v. Appellee, pending in the chancery court of Forrest county, should be finally determined, or until appellant shall have been discharged from the attachment and garnishment in the said suit of W. O. Tatum. We have no right to direct in this cause a stay of execution.

[2] The affirmance of this case, however, and the overruling of this motion, does not necessarily mean that appellant, as garnishee in the suit of W. O. Tatum, could not hold the funds impounded in that suit until final adjudication. Appellant would have a right to pay the fund into the court having jurisdiction of the W. O. Tatum suit, and thereby receive an acquittance of the judgment here rendered. The final determination of the present cause simply adjudicates the ultimate liability of appellant. Now that he has been adjudged to owe appellee the money sued for in the instant case, the application of this fund must be controlled in accordance with the general law in reference to garnishment. Certainly the affirmance of this cause would not relieve appellant of his duty and obligation as garnishee.

Overruled.

(113 Miss. 461)

STATE v. KELLY. (No. 19446.)

(Supreme Court of Mississippi, Division B.

March 5, 1917.)

1. PERJURY  $\S$ 19(2) — INDICTMENT — SUFFICIENCY.

Under Code 1906,  $\S$  1318, providing that every person who shall swear falsely to any material matter lawfully required by any executive or administrative officer shall be guilty of perjury, and section 1434, providing that it shall be sufficient to set forth substance of offense, an indictment, which charges that prejury was committed in making a certain report to auditor of public accounts as required by law on blanks furnished by him, sufficiently charges a demand by auditor in view of Laws 1908, c. 111, providing that such report shall be made on a form prescribed by auditor.

[Ed. Note.—For other cases, see Perjury, Cent. Dig.  $\S$  66, 71.]

2. PERJURY  $\S$ 19(2) — INDICTMENT — MAKING AND DELIVERY—SUFFICIENCY.

Under Code 1906,  $\S$  1318, providing that every person who shall swear falsely to any material matter lawfully required by any executive or administrative officer shall be guilty of perjury, and section 1434, providing that it shall be sufficient to set forth substance of offense, an indictment, charging that defendant in making a certain report to auditor of public accounts as required by law swore falsely, is sufficient to charge that report was made and delivered to auditor in view of Laws 1908, c. 111, requiring such making and delivery.

[Ed. Note.—For other cases, see Perjury, Cent. Dig.  $\S$  66, 71.]

3. PERJURY  $\S$ 23—ALLEGATION OF WRITING—SUFFICIENCY.

An indictment, charging that defendant in making a report to the auditor of public accounts, as required by law, on blanks furnished by said auditor, he being then and there duly sworn, and it thereupon became a material mat-

ter to be reported, etc., did make oath, etc., is sufficient to show that oath was made in such statement and therefore in writing.

[Ed. Note.—For other cases, see Perjury, Cent. Dig.  $\S$  71, 80.]

4. PERJURY  $\S$ 19(2) — INDICTMENT — ALLEGATION OF FALSITY—SUFFICIENCY.

In an indictment for making a false report, to auditor of public accounts, of condition of accounts of a bank, an allegation that the amount owed by directors became a material matter to be reported, and that defendant, knowing that directors owed a great deal more than \$59,164.24, made oath that they owed that amount, sufficiently shows wherein oath was false.

[Ed. Note.—For other cases, see Perjury, Cent. Dig.  $\S$  66, 71.]

5. INDICTMENT AND INFORMATION  $\S$ 81(1) — ALLEGATION OF OFFICIAL CAPACITY—SUFFICIENCY.

An indictment for perjury, charging that defendant being the assistant cashier of the C. C. Kelly Banking Company, etc., sufficiently charges that he was an officer of the bank.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig.  $\S$  216, 217, 224.]

Appeal from Circuit Court, Attala County; H. H. Rodgers, Judge.

R. E. Kelly was indicted for perjury. From a judgment sustaining a demurrer to the indictment, the State appeals. Reversed and remanded.

J. A. Teat, of Jackson, for the State. R. H. & J. H. Thompson, of Jackson, for appellee.

ETHRIDGE, J. This is an appeal by the state from a judgment of the circuit court of Attala county sustaining a demurrer to an indictment filed against Kelly for perjury. The indictment reads as follows:

"The grand jurors of the state of Mississippi, taken from the body of good and lawful men of said county, elected, impaneled, sworn, and charged to inquire in and for the county aforesaid, at the term aforesaid of the court aforesaid, in the name and by the authority of the state of Mississippi, upon their oaths present that R. E. Kelly in said county, on the 23d day of October, A. D. 1913, being the assistant cashier of the C. C. Kelly Banking Company, a corporation legally chartered under the laws of the state of Mississippi, and doing a general banking business, and receiving the deposits of the money and other valuable things of other persons, domiciled in the city of Kosciusko, in said county and state, as aforesaid, and he, the said R. E. Kelly, in making a certain report to the auditor of public accounts of the state of Mississippi, as required by the laws of the state of Mississippi, for said C. C. Kelly Banking Company, known as a balanced statement on a blank form furnished by said auditor of public accounts of the state of Mississippi as aforesaid, of the condition of the said C. C. Kelly Banking Company, and showing the resources and liabilities thereof and the amount of indebtedness to the said C. C. Kelly Banking Company which was owing to it by its directors, stockholders, and officers, and then and there being duly sworn by E. L. Ray, a notary public in and for the city of Kosciusko in said county and state, who was then and there duly authorized to administer oaths; it thereupon became and was a material matter to be reported to the said auditor of pub-

lic accounts in said statement, the amount of money owing to the said C. C. Kelly Banking Company, by the directors thereof, and to this the said R. E. Kelly, in said statement, before said E. L. Ray, notary public, as aforesaid, who was then and there duly authorized to administer oaths as aforesaid, then and there willfully, unlawfully, feloniously, corruptly, and knowingly, did make oath that there was owing to the said C. C. Kelly Banking Company, the sum of \$59,164.24, whereas in truth and in fact, as the said R. E. Kelly then and there well knew, there was at that time owing to the said C. C. Kelly Banking Company, by its directors, a great deal more than the said sum of \$59,164.24.

"And so the grand jurors, as aforesaid, upon their oaths as aforesaid, do say that the said R. E. Kelly, before the said E. L. Ray, notary public, as aforesaid, being sworn as aforesaid, and in manner and form as aforesaid, and by his own act and consent, falsely, willfully, unlawfully, and feloniously did commit willful and corrupt perjury contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Mississippi."

The demurrer presents many separate grounds, but is in substance confined to about six propositions:

First. The indictment is fatally defective because it fails to show that the auditor of public accounts made the requisition on the bank for the statement in question.

Second. That the indictment is fatally defective because it does not charge that the statement was rendered to the auditor of public accounts and does not charge that it was intended to be rendered to the auditor or that it ever passed from the custody of the defendant.

Third. The indictment fails to charge that the false oath was by affidavit or that it was in writing.

Fourth. That the indictment is bad because it fails to show wherein the oath or affidavit was false.

Fifth. The indictment does not charge with sufficient certainty that the auditor of public accounts demanded of the bank the statement as provided by law, nor does it charge in any way that the blank forms of such statement were furnished in duplicate by the auditor.

Sixth. The indictment is bad because it fails to charge that the defendant was an officer of the bank.

[1] As to the first ground, the indictment charges that the perjury was committed by Kelly in making a certain report to the auditor of public accounts of the state of Mississippi, as required by the laws of the state of Mississippi. This statement is required by chapter 111 of the Laws of 1908, which reads, as far as is material to this inquiry, as follows: Every bank and every person, corporation, or association of persons receiving money on deposit, of buying, issuing, or selling exchange, or otherwise doing a banking business, shall make a balanced statement under oath of the owner, or one or more officers of the bank, to the auditor of public accounts, at least four times in each year, of the con-

dition of the bank and the amount of indebtedness to the bank which is owing by its owners or stockholders, officers, and directors, on a blank form prescribed by the auditor in duplicate. And then provides that, after this statement is examined and found correct by the auditor, it shall be published within 10 days by the bank in a newspaper published in the county. The allegation of the indictment that, in making a report to the auditor of public accounts of the state of Mississippi, as required by the laws of the state of Mississippi, necessarily means the report required by this act, and that carries with it an allegation that demand was properly made, etc. And it is not necessary to set out in detail the things that the auditor and the appellee did that were required by the act.

[2] In reference to the second point made, the same portion of the indictment which charges that an affidavit was made in making a certain report to the auditor of public accounts for the state of Mississippi, as required by the laws of the state of Mississippi, is sufficient to charge that the report was made and delivered to the auditor.

[3] The third ground, that the indictment is fatal because it fails to charge that the alleged false oath was made by affidavit or in writing, is sufficiently charged in the indictment; the indictment charging that the report made to the auditor of public accounts "as required by the laws of the state of Mississippi" known as the "balanced bank statement" on a blank furnished by the said auditor of public accounts and that he was then and there duly sworn, etc., and it thereupon became and was a material matter to be reported to the auditor of public accounts in said statement, shows that the oath was made in said statement, which, under the law, was required to be in writing, and which, under the allegations of the indictment, was "made as required by the laws of the state of Mississippi."

[4] In regard to the fourth ground, "that the indictment is bad because it fails to show wherein the oath of the affidavit was false": The indictment charges that it thereupon became and was a material matter to be reported, the amount of money owing to the said C. C. Kelly Banking Company by the directors thereof and to this the said R. E. Kelly in said statement before E. L. Ray, notary public, then and there willfully, unlawfully, feloniously, corruptly, and knowingly did make oath that there was owing to the said C. C. Kelly Banking Company the sum of \$59,164.24, whereas in truth and in fact the said R. E. Kelly then and there well knew there was at that time (that is to say, at the time of making the affidavit) owing to the said C. C. Kelly Banking Company by its directors a great deal more than the sum of \$59,164.24, and charging that the grand jury "do say that said R. E. Kelly, etc., in the manner and form aforesaid, by his own

act and consent, falsely, willfully, unlawfully, and feloniously did commit willful and corrupt perjury," etc. In other words, Kelly swore as charged in the indictment that the directors were owing the bank \$59,164.24, when at the time he well knew that in truth and in fact the said directors in reality owed more, a great deal more, than the said sum. This plainly alleges that the affidavit was false in stating that the amount owed was \$59,164.24, when in fact much more than that was really owing. It is manifest from the indictment that the affidavit alleged to be false said in the statement that the amount really owing by the directors was in the sum of \$59,164.24, and that Kelly, knowing that this debt was much larger, deliberately, willfully, and corruptly swore it was a less sum than it really was.

The fifth contention is covered by the allegation that the report made and sworn to was made to the auditor of public accounts as required by the laws of the state of Mississippi and known as the balanced statement on blanks furnished by the auditor of public accounts sufficiently charges that a demand was made by the auditor.

[§] The sixth ground, that the indictment is bad because it fails to charge that the defendant was an officer of the bank is without merit: If an assistant cashier is not an officer, then what is he? He was discharging the functions imposed by the law upon an officer and was doing this on behalf of the bank, discharging the duty imposed upon the officers of the bank; and we think it manifest that, if the bank was indicted for failure to make the report, it would not be subject to prosecution if its assistant cashier had made the report. An assistant cashier performs the duties of the cashier, and he does not do this as an employé of the cashier, but he does it because he has been elected to represent the bank itself in the discharge of those functions which ordinarily the cashier performs in small banks but is unable to do in the larger banks, or when, for any reason, the cashier cannot be at the bank during the banking hours to perform this work. The indictment in this case is predicated under section 1318 of the Code of 1906, which reads as follows:

"Every person who shall willfully and corruptly swear, testify, or affirm falsely to any material matter under any oath, affirmation, or declaration legally administered in any matter, cause, or proceeding pending in any court of law or equity, or before any officer thereof, or in any case where an oath or affirmation is required by law or is necessary for the prosecution or defense of any private right or for the ends of public justice, or in any matter or proceeding before any tribunal or officer created by the Constitution, or by law, or where any oath may be lawfully required by any judicial, executive, or administrative officer, shall be guilty of perjury, and shall not thereafter be received as a witness to be sworn in any matter or cause whatever, until the judgment against him be reversed."

Section 1434 of the Code provides that:

"In an indictment for perjury it shall be sufficient to set forth the substance of the offense charged upon the defendant—that he was sworn or testified on oath, and before what court, or before whom the oath or affirmation was taken; averring the court or person to have had competent authority to administer the same, together with proper averments to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, and without setting forth the commission or authority of the court, or the commission or authority of the person before whom the perjury was committed."

We think the indictment was sufficient to charge the offense under our statutes, and that the judgment of the court below in sustaining the demurrer was reversible error, and the judgment will be reversed, and the cause remanded for further proceedings.

Reversed and remanded.

(113 Miss. 476)

LUDERBACH PLUMBING CO. v. STEIN.  
(No. 18891.)

(Supreme Court of Mississippi, Division B.  
March 5, 1917.)

#### 1. ACCOUNT, ACTION ON — 23—FAILURE OF PROOF AS TO PART OF ACCOUNT.

In an action for an unpaid plumbing bill, and for labor and material furnished in the installation of electrical fixtures, etc., the instruction that the burden was on plaintiff to establish his case by a preponderance of the evidence, and that, if he failed to establish it by such preponderance as to any part of the account, it was the jury's duty to find for defendant, did not correctly state the law.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 74-77.]

#### 2. TRIAL — 296(1)—INSTRUCTION—CONSTRUCTION AS WHOLE.

In an action on an account, an instruction that, if plaintiff failed to establish his case by a preponderance of the evidence as to any part of the account, the jury should find for defendant, was fatal error, being erroneous, and not to be harmonized with the other instructions given by the court, and it being evident that the jury was warranted in believing that plaintiff had not proven some one of the items of his claim.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-707.]

#### 3. CONTRACTS — 112—ILLEGALITY.

A plumbing company could recover for plumbing work and for labor and material furnished in the installation of electrical fixtures and their transfer, though the house in which the work was done and for which the materials were furnished was run by the party ordering the work as a house of ill fame.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 512, 513, 514.]

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Suit by the Luderbach Plumbing Company against Nellie Stein. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Robert Powell, of Jackson, for appellant. Hamilton & Hamilton, of Jackson, for appellee.

COOK, P. J. Appellant sued the appellee in the circuit court of Hinds county for an unpaid plumbing bill and for labor and material furnished in the installment of electrical fixtures and for transferring same from one house to another. Appellee interposed two defenses—payment and that the debt sued on was for her use in a house of ill fame.

The verdict of the jury and the judgment of the court was for the defendant, and plaintiff appeals to this court.

The first assignment of error is the giving of this instruction, viz.:

"The court instructs the jury for the defendant that the burden of proof is upon the plaintiff, Luderbach, to establish his case by a preponderance of the evidence, and that, if he fails to establish his case by a preponderance of the evidence, as to any part of the account, it is your duty to find for the defendant."

[1] This instruction does not correctly state the law, and this is admitted by counsel for appellee, but it is contended that the error was cured by numerous other instructions given to the jury.

[2] We are of opinion that the instruction was fatal error and cannot be harmonized with the other instructions given by the court. Indeed, it is difficult to understand how the jury could have reached the conclusion that all of the debt sued on had been paid, and it is quite evident that the jury was warranted in believing that plaintiff had not proven some one of the items of his claim, and, believing this, the court had directed a verdict for the defendant. But it is contended that defendant was entitled to peremptory instruction because plaintiff furnished the labor and material to promote the business of prostitution, and therefore the verdict was right.

[3] We do not believe that there is any merit in this contention. This question was presented to this court in a recent case strikingly similar in its facts to the case presented by the present record. See *Insurance Co. v. Heidelberg*, 72 South. 852.

Reversed and remanded.

(113 Miss. 482)

DAVIDSON et al. v. PLANT. (No. 18915.)

(Supreme Court of Mississippi, Division B.  
March 5, 1917.)

1. BILLS AND NOTES — 430—RELEASE—NEW NOTE BY DIFFERENT PARTY.

Notes are released by the execution and acceptance of new notes in renewal of the old notes, with a new principal obligor.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1251-1256.]

2. PRINCIPAL AND SURETY — 113 — AGREEMENT AS TO APPLICATION OF PAYMENTS.

Agreement of bank on which P. signs in form of comaker, but as surety for M., one of M.'s notes to the bank, that such note shall be

paid out of the first money paid by M. on his indebtedness, is valid; and it is immaterial that P. is a director of the bank.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 235-239.]

3. ESTOPPEL — 58—SILENCE—INJURY.

As against a bank, P., a director, who signed as surety one of M.'s notes to the bank, is not estopped to claim benefit of its agreement, on which he signed, that such note should be paid out of the first money paid by M., on his indebtedness, because P. was silent when, after payment by M., the bank pledged such note as collateral; it not being harmed by silence.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 144, 145.]

Appeal from Circuit Court, Lafayette County; J. L. Bates, Judge.

Action by E. O. Davidson and others, receivers, against S. H. Plant. Judgment for defendant, and plaintiffs appeal. Affirmed.

This suit was begun by the appellants as receivers of the defunct Merchants' & Farmers' Bank of Oxford, Miss., against S. H. Plant on a note for \$7,257.60, dated July 3, 1909, signed by R. H. McElroy and S. H. Plant. The Oxford Dry Goods Company was heavily indebted to the Merchants' & Farmers' Bank; and S. H. Plant, who was a director in the dry goods company, and was also a director and vice president of the bank, was a comaker with the dry goods company on a note for \$6,000 evidencing part of the indebtedness due by the dry goods company to the bank. The dry goods company sold its business to McElroy, and McElroy gave his notes to the bank for \$24,000 in place of the notes of the dry goods company, which notes were placed to the credit of McElroy, and McElroy then gave his check to the dry goods company for \$24,000, and this check was deposited by Hampton, manager of the dry goods company, to the credit of the dry goods company. The joint note of the dry goods company and Plant for \$6,000 not having been paid at the time the sale was made to McElroy, a new note for \$6,000 and interest (\$7,257.60) was executed by McElroy, and Plant signed as comaker. This note is included in the total of \$24,000 in notes given by McElroy to the bank. At the time Plant signed this note the president of the bank gave him the written agreement appearing in the notice given under the plea of the general issue, which is hereinafter set out. It seems that McElroy was not aware of the execution of this agreement, and afterwards he paid several thousand dollars to the bank on his notes and took up several of them. No part of the amount paid by McElroy to the bank was credited on the note forming the basis of this suit. After the bank went into the hands of receivers this suit was brought against Plant as a maker of the note.

The defendant pleaded the general issue, and gave notice under the general issue as follows:

"Plaintiff will take notice, that on the trial of this case the defendant will offer evidence

by way of affirmative defense to show as follows, to wit:

"(1) That defendant was only surety on said note sued on; that he received no benefit whatever of said loan, but that the principal therein, R. H. McElroy, received the sole and only benefits thereunder.

"(2) That defendant signed said note sued on upon certain conditions as evidenced by a certain instrument of writing, signed and delivered to him by W. D. Porter, president of the Merchants' & Farmers' Bank of Oxford, Miss., which said contract plaintiffs represent, under the law, in this cause, in the following words and figures, to wit:

"W. D. Porter, President Merchants' & Farmers' Bank, Oxford, Miss., August 13, 1909. It is agreed and understood between S. H. Plant and this bank that when R. H. McElroy shall pay into the bank upon his present indebtedness the amount that S. H. Plant is indorser for him, that the said S. H. Plant shall then be released of his indorsement and obligations in full upon the note of the said McElroy. The payment shall be reckoned out of the first amounts paid by McElroy upon his indebtedness. Merchants' & Farmers' Bank,

"By W. D. Porter, President."

"Defendant will show that upon this condition said defendant signed said note at the instance and request of said W. D. Porter, president of said bank, for the use and benefit of said bank, and, furthermore, defendant will show that said R. H. McElroy, principal in said note sued on, paid into said bank a sum much greater than the amount of said note, and that no application whatever was ever made of such money, or any part of the same, to said note.

"(3) That there was no consideration for defendant signing said note.

"(4) Payment of said note by R. H. McElroy, principal."

Plaintiff gave notice that he would introduce testimony to show that the agreement was without consideration and ultra vires, and had been waived by the defendant.

At the close of the testimony a motion was made by each party for a peremptory instruction, and the following ruling was made by the court after refusing both of the peremptory instructions:

"The Court overrules the motion for the plaintiff and the defendant for a peremptory instruction. The court holds that the Plant estate is estopped to plead any right or privilege accruing to S. H. Plant by virtue of the agreement signed 'Merchants' & Farmers' Bank, by W. D. Porter, President,' the proof showing that Plant was director and vice president of said bank, participated in the directors' meetings, and knew that the bank was claiming that note as an asset, and by virtue of his office and his conduct in the premises he was estopped to plead any right that may have accrued to him under and by virtue of said agreement made after the signing of said note sued on by McElroy. The court submits this case to the jury on the question as to whether the \$24,000 check testified to by Hampton and McElroy was accepted in full payment of the original note which the one sued on was given in lieu thereof."

The jury returned a verdict for the defendant, and the receivers appeal.

D. I. Hutchinson, of Oxford, and Creekmore & Stone, of Water Valley, for appellants. Falkner, Russell & Falkner, of Oxford, for appellee.

STEVENS, J. [1, 2] We think the right result was reached by the trial court in this

case. The note sued on was a renewal of the old note for \$6,000, executed by the Oxford Dry Goods Company and S. H. Plant, in favor of the Merchants' & Farmers' Bank. The execution of the new note released the old corporation, the Oxford Dry Goods Company, and substituted an entirely new maker, R. H. McElroy. Mr. Plant, when the new note was presented to him for execution, in the exercise of his inherent right to make his own contracts, then had the absolute right either to execute or decline to execute the new paper. It appears that he agreed to execute the new note upon the condition evidenced by the separate written contract "that when R. H. McElroy shall pay to the bank upon his present indebtedness the amount that S. H. Plant is indorser for him, that the said S. H. Plant shall then be released of his indorsement and obligation in full upon the note of the said McElroy. The payments shall be reckoned out of the first amounts paid by McElroy upon his indebtedness." This separate written contract executed by the Merchants' & Farmers' Bank in favor of Plant did not contradict or vary the terms of the note. It simply stipulated that this note should be paid out of the first moneys McElroy turned into the bank upon his general line of indebtedness. This was a legitimate undertaking on the part of the bank, and the mere fact that Mr. Plant was at that time a director in the bank in no wise precludes him from claiming the benefits of this agreement. As to the bank, Mr. Plant was a comaker on the note; as to McElroy, he was a surety. Mr. Plant at that time was a very old man, and it is most natural that he should desire to be released from his suretyship within a reasonable length of time.

[3] But appellants pleaded, and the trial judge seems to have been of the opinion, that the benefits of the written contract executed by the bank in Plant's favor, agreeing that the notes should be liquidated out of the first amounts, had been waived by Mr. Plant. This waiver is attempted to be based upon evidence that he was a director in the bank; that this note was carried for several years as a part of the bank's assets; that it was reported along with the other bills receivable to the directors at their regular meetings; and that Mr. Plant at none of these meetings advised the board of directors that he was relying upon the written agreement in question, but, on the contrary, permitted the bank to discount the note and use it as a basis of credit. But the party to whom the bank assigned or pledged the note at any time is not here complaining. This is a controversy between the bank and Mr. Plant, the original parties to the agreement. It could hardly be said that the board of directors had no knowledge of an agreement executed by the bank through its president. More than this, Plant neither said nor did anything, with reference to the note; to the

hurt or injury of the bank. The mere silence of Mr. Plant in no wise changed the status of the parties. To say that Mr. Plant, by mere silence, waived the benefits of the private agreement in question would be a misconception of the doctrine of estoppel.

We readily subscribe to the doctrine that a director of the bank must act in good faith in all of his dealings with the institution which he is helping to manage, and cannot take advantage of his position to make an unlawful profit or be excused from his obligations. But there is here no showing of fraud. There was ample consideration for the new note. The old corporation was released, a new party was introduced, and an extension of time granted. As we see it, appellee was entitled to a peremptory instruction; and this being our view of the case, it is unnecessary to discuss the errors complained of. The jury, under an incorrect issue, brought in a correct verdict.

Affirmed.

(113 Miss. 488)

**COX v. REED. (No. 18856.)**

(Supreme Court of Mississippi, Division A.  
March 12, 1917.)

**1. EVIDENCE §461(1) — PAROL EVIDENCE — INTENT OF PARTIES.**

The intention of those who executed an instrument being ascertainable from a reading thereof, it being plain and unambiguous, parol evidence relating thereto is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2129.]

**2. WILLS §88(2)—WILL OR "DEED"—TIME OF TAKING EFFECT.**

An instrument in form of deed from parents to child, in consideration of love and affection, and \$1, providing, "This deed shall take and be in effect on and after the death of myself and wife," clearly showing intention of signers that it was not to be in any way operative or effective till after their death, and vesting no interest in present in the grantee, is not a deed, but testamentary.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 209.

For other definitions, see Words and Phrases, First and Second Series, Deed.]

Appeal from Chancery Court, Tippah County; J. G. McGowen, Chancellor.

Suit by Mrs. Nannie Cox against Chas. M. Reed. From an adverse decree, complainant appeals. Reversed and remanded.

Spight & Street, of Ripley, for appellant. Thos. E. Pegram, of Ripley, for appellee.

SYKES, J. The appellant, Mrs. Nannie Cox, filed her bill in the chancery court of Tippah county against Charles Reed, the appellee, in substance alleging that appellant and appellee are sister and brother, and that their father, Allen Reed, died seised and possessed of the lands involved in this controversy. The bill further alleges that Allen Reed and his wife in 1901 executed an instrument in writing which was intended as a will, devising the land in controversy to ap-

pellee; that this instrument was not properly witnessed as a will, and is therefore void; that the deceased, Allen Reed, left surviving him as heirs and distributees the appellant and the appellee. It then prays that the lands involved in this controversy be sold for a division of the proceeds. The answer of appellee denied that the instrument executed by Allen Reed was intended to be a will, but that it was in fact a deed. Appellee attempted by parol testimony to prove that Allen Reed intended the instrument to be a deed, and not a will. The chancellor sustained the contention of the appellee, and held that the instrument was a deed, and dismissed the bill of appellant, from which decree this appeal is prosecuted.

The sole question presented to this court for decision is whether or not this instrument be a deed or whether it be testamentary in character. The instrument reads as follows:

"State of Mississippi, Tippah County.

"Be it known that for and in consideration of the natural love and affection I have for and do bear toward Charley M. Reed, my son, and for one dollar cash in hand paid to us the receipt of which is hereby acknowledged, I hereby grant bargain sell and convey and warrant to him and to his heirs and assigns forever the following described property in said county of Tippah, Mississippi: All that portion of the north-east quarter of section sixteen in township three of range three east except what has heretofore been sold off. This deed shall take and be in effect on and after the death of myself and wife.

"Witness our signatures the 29th day of November, 1901.

his  
"A. X Reed.  
mark

her  
"Mary An X Reed.  
mark

"State of Mississippi, Tippah County.

"Personally appeared before me, E. C. McElwain, a justice of the peace of said county and state, the within-named A. Reed and his wife, Mary An Reed, who acknowledged that they signed and delivered the foregoing instrument on the day and year therein mentioned.

"Given under my hand this 29th day of November, 1901. E. C. McElwain, J. P.

"State of Mississippi, Tippah County.

"I, J. W. Street, clerk of the chancery court, do hereby certify that the foregoing deed was filed for record the 6th day of May, A. D. 1913, at 9 a. m., and was recorded the same day. This the 6th day of May, 1913.

"J. W. Street, Clerk."

[1] We think the intention of Allen Reed and his wife, who executed this instrument, can be ascertained from a reading of the instrument, which is plain and unambiguous. It therefore follows that it was error of the lower court in admitting parol testimony relating thereto. Jones, Commentaries on Evidence, vol. 3, § 454 et seq.

[2] In Wall v. Wall, 30 Miss. 91, 64 Am. Dec. 147, the court, in discussing the difference between a deed and a will, summarizes the rule as follows:

"In the one case [a deed] the conveyance takes effect in present, to a certain extent; in the

other it has no effect whatever until the death of the testator."

See, also, *Sartor v. Sartor*, 39 Miss. 772.

In the case of *Cunningham v. Davis*, 62 Miss. 366, this court says:

"If by it any present interest was vested it should be held to be a deed. If it was not to have any operation or effect until the death of the maker it could not be treated as a deed, although it was so named, and is in form a deed."

This court in the case of *Simpson v. McGee*, 73 South. 55, a case in which the instrument construed, in legal effect, is similar to the one above quoted, had the following to say:

"It is clear from the language hereinbefore quoted from this instrument that it was the donor's intention that the instrument itself should not take effect, for any purpose, until after her death; consequently under the rule announced in [citing authorities] it must be held to be testamentary in character, and therefore not a deed."

See, also, *Thomas v. Byrd*, 73 South. 725.

The clause in this instrument, "This deed shall take and be in effect on and after the death of myself and wife," clearly shows the intention of the signers of this instrument that it was not to be in any way operative or effective until after their death. No interest whatever was vested in present in the grantee, "Charley M. Reed." It therefore follows that the instrument was not a deed.

Reversed and remanded.

(113 Miss. 496)

GEISENBERGER v. PROGRESS KNITTING MILLS et al. (No. 18872.)

(Supreme Court of Mississippi, Division A. March 12, 1917.)

EXECUTORS AND ADMINISTRATORS §415 — PROBATE OF CLAIMS—STATUTE.

Code 1906, § 2103, provides for a notice to creditors giving them one year to probate and register their claims against the estate of a decedent. Section 2116 provides that, if an estate is declared insolvent after publication of notice to creditors, another publication shall not be necessary, but, if declared insolvent before publication is made, the court shall order publication requiring creditors to present their claims within six months. *Held* that, when publication has been made under section 2103, it is not left to the discretion of the court to make a second publication under section 2116 shortening the time allowed in the first publication, and such second publication will in no way affect the time allowed in the prior notice for probating and registering claims.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1630-1645.]

Appeal from Chancery Court, Adams County; R. W. Outrer, Chancellor.

Proceeding for the allowance of the claims of the Progress Knitting Mills and another against the estate of Benjamin B. Dreyfus, deceased. From a decree allowing the claims, Sam Geisenberger, administrator, appeals. Affirmed.

E. E. Brown, of Natchez, for appellant. R. H. & J. H. Thompson and Fulton Thompson, all of Jackson, for appellees.

SYKES, J. The appellant, as administrator of the estate of Benj. B. Dreyfus, prosecutes this appeal from a decree of the chancery court of Adams county allowing the claims of the Progress Knitting Mills and R. S. Stearn Company to be admitted to probate and allowed. The agreed statement of facts in the case, in brief, shows the appointment of appellant as administrator on November 30, 1914; that shortly after he qualified as administrator he made publication under section 2103 of the Code of 1906 to creditors to probate and register their claims within one year. On or about December 28, 1914, or about one month after his appointment as administrator, upon his application to the chancellor, the administrator obtained a decree adjudging the estate insolvent and directing the administrator to give notice to creditors by publication to present their claims within six months and have them probated and registered, as is provided in section 2116. The appellees undertook to probate their claims, and they were both allowed by the clerk of the court and duly registered. After the expiration of the six months allowed in the second publication relating to insolvent estates, and before the expiration of the twelve months allowed creditors in which to probate their claims under section 2103, and under the first publication to creditors made in the administration of this estate the chancery court caused notice to be published under section 2117 of the Code fixing a time and place for taking up and examining the claims. At this meeting the claims of these two appellees upon objection were disallowed, because they were not properly itemized. After this meeting, and before the expiration of the 12 months allowed creditors under the first notice under section 2103, these creditors had their claims properly itemized, and presented them a second time to the clerk of this court to be allowed and registered. The clerk declined to do so. Appellees then made application to the chancellor for an order directing the clerk to probate, allow, and register the claims. After a hearing the chancellor granted the application and entered a decree in accordance therewith.

The question presented to us for determination is whether or not after publication has been made under section 2103 of the Code of 1906, in which one year is given creditors to probate and register their claims against the estate of a decedent, a chancery court can then order a second publication where the estate is insolvent, under section 2116 of the Code, and by so doing thereby shorten the period of one year already given

creditors within which to probate and register their claims. This question has not been heretofore determined by this court. The first part of section 2116 states that:

"If an estate be declared insolvent after the executor or administrator has made publication to the creditors to present their claims and have them probated and registered, another publication to present claims shall not be necessary."

In this case this publication had already been made under section 2103 before the estate was declared to be insolvent. Therefore it was not necessary for a second publication to be made. When, however, no publication to creditors has been made in the first instance, and the estate be declared insolvent before any publication, then the six months' notice may be given under the second part of this section (2116), which reads as follows:

"But if an estate be declared insolvent before the executor or administrator has made such publication, the court shall order the executor or administrator to make publication, requiring the creditors to present their claims within six months, and have them probated and registered; and any creditor who shall not register his claim by the day stated in the publication, shall be forever barred."

It is not left to the discretion of the court to make this second publication shortening the time allowed in a first publication. The statute only contemplates the giving of the six months' notice by publication in the first instance, when no other or different publication has been made. It therefore follows that the second publication in this case is not provided for under section 2116, was unnecessary, and can in no way affect the time allowed for probating and registering these claims.

The decree of the lower court will be affirmed.

**Affirmed.**

(113 Miss. 500)

**McCLAVE-BROOKS CO. v. BELZONI OIL WORKS.** (No. 18670.)

(Supreme Court of Mississippi, Division B.  
March 5, 1917.)

**1. SALES §353(6) — ACTION FOR PRICE — PLEADING.**

In suit for the purchase price of an outfit, for use under a boiler, which was guaranteed to reduce defendant's coal bills and increase the capacity of the boiler, it was permissible for plaintiff to allege in its declaration that defendant's wrong prevented it from making good its guaranty by demonstration, that it would have performed its contract and made good its guaranty but for defendant's failure and refusal to make the test, for the period of time named in the contract, under plaintiff's direction and instruction, so that the court erred in striking out a count of the declaration setting up such matter.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1001.]

**2. PLEADING §192(1), 354(1) — OBJECTION — MOTION TO STRIKE—DEMURRER.**

Motion to strike from the files was an improper way to raise objection to a pleading; as, if its defects appeared upon its face, a demurrer should have been taken and plaintiff given an opportunity to amend if advised that such course was proper.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 408, 412, 413, 418-425, 1092, 1093½-1095.]

**3. SALES §353(1) — EVIDENCE — ADMISSIONS OF CORPORATE OFFICER.**

In suit for the purchase price of an outfit sold defendant corporation for use under a boiler, it was error to refuse to admit the declaration of defendant's manager, made to a third person, that the equipment was giving satisfaction, and was increasing the boiler capacity of the plant; the declaration being a declaration of the corporation itself in legal effect.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1049, 1054.]

**4. SALES §353(6)—PLEADING—PERFORMANCE OF CONTRACT—STATUTE.**

Under Code 1906, § 769, rendering it sufficient to aver generally that plaintiff performed the conditions of a contract on its part, in suit for the purchase price of an outfit to be used under defendant's boiler, it devolved on defendant by its pleadings to assign in what particulars there was a failure on plaintiff's part to perform, to which pleas plaintiff would have a right to reply by confession and avoidance or by tendering issue.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1001.]

Appeal from Circuit Court, Washington County; F. E. Everett, Judge.

Suit by the McClave-Brooks Company against the Belzoni Oil Works. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Boddie & Farish, of Greenville, for appellant. Percy & Percy, of Greenville, for appellee.

**ETHRIDGE, J.** The appellant filed suit in the circuit court of Washington county for \$630, the purchase price of an outfit sold defendant to be used under their boiler, and also for \$20.15, supplemental articles in connection therewith. There were three counts in the declaration; the contract being made an exhibit to the declaration. The first count alleges the sale of the goods, wares, and merchandise of the said amount, alleges performance on the part of plaintiff of the terms of the contract, and demanded judgment for the said amount. The second count of the declaration declares in debt for \$850.15 on itemized account. The third count declares on contract, and alleges that it was agreed by the plaintiff that the equipment sold was guaranteed to save 10 per cent. of defendant's coal bills and that the boilers in defendant's mill would be increased 25 per cent. in capacity, and that, if after sixty days' trial the said guaranty were not made good, the plaintiff would remove the system or equipment at the convenience of the defendant and at the expense of the plaintiff, and



would leave defendant's furnace in as good condition as originally found, but that, if the guaranties were made good, then the defendant was to pay plaintiff one-half the purchase money in cash and the balance at the end of 60 days after the completion of the trial period, and alleges that before the end of the trial period, because of the negligence on the part of the employees of the defendant in charge of said equipment, the principal part of the equipment was burnt out and destroyed and had to be taken out by the defendant, thrown away, and rendered absolutely valueless, and demanded judgment for the full contract price of the equipment. The contract made an exhibit to the bill, omitting the itemized articles embraced in it, reads as follows:

" \* \* \* All the foregoing are to be erected by us complete before August 20, 1914.

"Trial period to start October 1, 1914.

"Guaranty: To make a saving of 10 per cent. in your coal bills, and increase capacity of boilers 25 per cent., the saving in fuel to be evidenced by your coal bills during the trial periods, and further guarantee you will be able to clean fires through the action of the grates with fire doors closed, and your boiler pressure will be more uniform, and you will be able to burn any marketable coal; in burning slack coal, it will not take more than 10 per cent. of slack to do the same work as mine run coal, both coals being from the same mine.

"Price of the equipment as above specified, six hundred and thirty dollars (\$630.00).

"F. o. b. cars Scranton, Pa.; Freight money will be refunded if we do not make good the above guaranties.

"Terms: Trial period of 60 days, if we do not make good the above guaranties we will remove our system at your convenience, and at no cost to you, and leave your furnace in as good condition as originally found, after which our contract becomes void; if we make good the above guaranties you are to pay us half the amount at the end of trial period, and give us 60 days' note for balance.

"This proposal is for prompt acceptance and is intended to cover all material which is a part of the system complete as specified above, but does not include any brickwork or steam fitting"

—which contract was accepted by the Belzoni Oil Works.

Defendants pleaded the general issue and gave notice that under its plea of the general issue (under our statutes) it would claim an offset against the plaintiff for loss of time, increased coal consumption, etc.

Plaintiff introduced evidence that the machinery so ordered was shipped and installed and that it showed the defendant the manner of using the equipment; that after it was installed, and prior to the end of the trial period, it had inspected the works of the defendant, on the complaint of defendant, and found that the defendant had not operated the equipment properly, but had permitted ashes to accumulate in the ash pit, had overheated the equipment, and had installed extra pipes in the drafting of the equipment which impaired the efficiency of the equipment. Plaintiff also proved that it found certain of the grates damaged and burned

out, and had told the defendant to order and put in new grating, which it failed to do. It also offered in evidence statements of the agent of the defendant (defendant being a corporation) to a third party recommending the equipment to the third party as increasing its boiler capacity. Plaintiff offered to prove that plants constructed just as the one in suit was would increase the boiler capacity 25 per cent. and decrease coal consumption 10 per cent. This testimony was objected to, objection sustained by the court, and an exception taken. The testimony offered by the plaintiff to show that the agent of defendant recommended the equipment to a third party, a sawmill man, representing that it had increased the boiler capacity of defendant's plant, was excluded by the court and an exception taken. The plaintiff's witness testified that absolute carelessness on the part of defendant caused the equipment to be burned out.

At the conclusion of the plaintiff's testimony, defendant moved to strike from the files the third count of the declaration, which motion the court sustained.

The defendant offered evidence that the equipment did not perform the work as guaranteed, and that, instead of increasing its boiler capacity, there was a decrease, and that, instead of a decrease in coal consumed, there was an increase in coal consumed. It also offered testimony that it kept the ash pits cleaned out and otherwise conformed to the proper operation of the equipment. In this condition of the record the court granted a peremptory instruction for the defendant.

Plaintiff in its appeal here assigns as error that the court erred in striking out the third count of the declaration; that the court erred in sustaining objections to the testimony above mentioned; and that the court erred in granting a peremptory instruction for the defendant.

[1] We think the court erred in each of these particulars. In striking out the third count of the declaration, we presume it did so on the theory that it was a declaration in tort, but we do not think it is. We think it was permissible for the plaintiff to allege in its declaration that the wrong of defendant prevented it from making good its guarantee by demonstration; that it would have performed its contract and made good its guarantee but for the failure and refusal of the defendant to make the test for the period of time named in the contract, under the direction and instruction of the plaintiff.

[2] The motion to strike from the files was an improper way to raise the objection to the pleadings, but, if the defects appeared upon the face, a demurrer should have been taken and the plaintiff given an opportunity to amend, if advised that such course was proper.

[3] We believe it was erroneous to refuse to admit the declaration of defendant's man-

ager that the equipment was giving satisfaction and was increasing the boiler capacity of their plant, made to a third party. Defendant, being a corporation, must act through its agents, and the declaration of its manager, under the circumstances disclosed in this record, is a declaration of the corporation itself, in legal effect.

[4] In reference to the peremptory instruction given for the defendant, we think we have stated enough to show there was evidence which, if believed by the jury, would warrant a verdict for the plaintiff, even though the third count of the declaration was stricken out. It is our belief that the declaration, alleging performance of all the conditions on the part of plaintiff, was sufficient to show that its contract was regularly performed, when it performed to the extent that defendant would permit it to perform, and that the defendant could not use its own wrong in preventing a performance—which the plaintiff's evidence tends to show that it did—to its own advantage; and if the evidence showed that the defendant's wrong prevented a performance, it could not, under the pleadings in this case, make the objection that the plaintiff was confined to the affirmative averments in its declaration. Under our statutes (Code 1906, § 769) it is sufficient to aver generally that the plaintiff performed the conditions on its part, and it devolved upon the defendant, by its pleadings, to assign in what particulars there was a failure on the part of the plaintiff to perform, to which pleas of the defendant plaintiff would have a right to reply by confession and avoidance or by tendering issue on such pleas of the defendant.

Because of the errors indicated, the judgment will be reversed and remanded.

**MALONE v. STATE.** (No. 19518.)  
(Supreme Court of Mississippi. March 12, 1917.)

Appeal from Circuit Court, Newton County; J. D. Carr, Judge.  
Lem Malone was convicted of murder, and he appeals. Affirmed.

W. I. Munn, of Newton, and W. M. Everett, of Hickory, for appellant. Frank Roberson, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

**HARTFIELD v. STATE.** (No. 19360.)  
(Supreme Court of Mississippi. March 12, 1917.)

Appeal from Circuit Court, Forrest County; Paul B. Johnson, Judge.  
Tom Hartfield was convicted of murder, and he appeals. Affirmed.

J. E. Davis, of Hattiesburg, for appellant. Earle N. Floyd, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

**MOORHEAD et al. v. STATE.** (No. 19569.)  
(Supreme Court of Mississippi. March 12, 1917.)

Appeal from Circuit Court, Winston County; H. H. Rodgers, Judge.  
Lex Moorhead and Elmer Smith were convicted of assault, and they appeal. Affirmed.

L. H. Hopkins, of Louisville, for appellants. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

**FONDREN v. STATE.** (No. 19432.)  
(Supreme Court of Mississippi. March 12, 1917.)

Appeal from Circuit Court, Panola County; E. D. Dinkins, Judge.  
Gus Fondren, Jr., was convicted of assault and battery with intent to kill, and he appeals. Affirmed.

Boyles & George, of Batesville, for appellant. Frank Roberson, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

**THOMPSON v. STATE.** (No. 19451.)  
(Supreme Court of Mississippi. March 12, 1917.)

Appeal from Circuit Court, Amite County. James (alias Wood) Thompson, was convicted of murder, and he appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.

**STAIGER v. STATE.** (No. 19691.)  
(Supreme Court of Mississippi. March 12, 1917.)

Appeal from Circuit Court, Forrest County; Paul B. Johnson, Judge.  
Joseph Staiger was convicted of manslaughter, and he appeals. Affirmed.  
See, also, 110 Miss. 557, 70 South. 690.

Stone Deavours, of Laurel, and S. E. Travis, of Hattiesburg, for appellant. Frank Roberson, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

**CONWAY v. STATE.** (No. 18631.)  
(Supreme Court of Mississippi. March 12, 1917.)

Appeal from Circuit Court, Perry County; Paul B. Johnson, Judge.  
Charlie Conway was convicted of assault and battery, and he appeals. Affirmed.

Currie & Currie, of Hattiesburg, for appellant. Earle N. Floyd, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

**BOGUE HASTY DRAINAGE DIST. v. NAPANEE PLANTATION CO.**  
(No. 18857.)

(Supreme Court of Mississippi. March 12, 1917.)

Appeal from Chancery Court, Washington County; E. N. Thomas, Chancellor.  
Suit between the Bogue Hasty Drainage Dis-

strict and the Napanee Plantation Company. Decree for the latter, and the former appeals. Affirmed.

Thos. S. Owen, of Cleveland, for appellant. Campbell & Cashin, of Greenville, for appellee.

PER CURIAM. Affirmed.

**FOSTER v. STATE.** (No. 19523.)  
(Supreme Court of Mississippi. March 12, 1917.)

Appeal from Circuit Court, Lafayette County; J. L. Bates, Judge.

Mariah Foster was convicted of keeping liquor for sale, and she appeals. Affirmed.

O. E. Slough, of Marks, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

**TRUSTEES OF NEW AUGUSTA CONSOL. SCHOOL DIST. v. BURKS CONST. CO.**  
(No. 18008.)

(Supreme Court of Mississippi. March 12, 1917.)

Appeal from Chancery Court, Perry County; D. M. Watkins, Special Chancellor.

Suit between the Trustees of New Augusta Consolidated School District and Burks Construction Company. Decree for the latter, and the former appeals. Affirmed.

Stevens & Cook, of Hattiesburg, for appellant. Currie & Currie, of Hattiesburg, for appellee.

PER CURIAM. Affirmed.

**FARRIES et al. v. ROSENSTOCK.**  
(No. 18800.)

(Supreme Court of Mississippi. March 12, 1917.)

Appeal from Chancery Court, Bolivar County; Joe May, Chancellor.

Action between Charles E. Faries and others and Morris Rosenstock. Decree for the latter, and the former appeal. Affirmed.

Benj. W. L. Bedford and D. J. Allen, Jr., both of Cleveland, for appellants. Somerville & Somerville, of Cleveland, for appellee.

PER CURIAM. Affirmed.

**THORNTON v. CUMBERLAND TELEPHONE & TELEGRAPH CO.**  
(No. 18998.)

(Supreme Court of Mississippi. March 12, 1917.)

Appeal from Chancery Court, Harrison County; J. M. Stevens, Chancellor.

Suit between Addie M. Thornton and the Cumberland Telephone & Telegraph Company. Decree for the latter, and the former appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.

**PRICE v. WARD et al.** (No. 19004.)  
(Supreme Court of Mississippi. March 19, 1917.)

Appeal from Circuit Court, Marion County; A. E. Weathersby, Judge.

Action between F. V. B. Price and Elmira Ward and others. Judgment for the latter, and the former appeals. Settled and dismissed.

Dale & Rawls, of Columbia, and G. Wood Magee, of Monticello, for appellant. Mounser & Ford, of Columbia, for appellees.

PER CURIAM. Settled and dismissed.

**JOHNSTON, Revenue Agent, v. BRITTON & KOONTZ BANK.** (No. 18999.)

(Supreme Court of Mississippi. March 19, 1917.)

Appeal from Circuit Court, Adams County; R. E. Jackson, Judge.

Action between J. C. Johnston, Revenue Agent, and Britton & Koontz Bank. Judgment for the latter, and the former appeals. Appeal dismissed.

Frank T. Scott, of Jackson, for appellant. E. E. Brown, of Natchez, for appellee.

PER CURIAM. Appeal dismissed.

**McDANIEL v. STATE.** (No. 19306.)

(Supreme Court of Mississippi. March 12, 1917.)

Appeal from Circuit Court, Jones County; Paul B. Johnson, Judge.

J. E. McDaniel was convicted of petit larceny, and he appeals. Affirmed.

See, also, 72 South. 703.

Carter & Freeman, of Laurel, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

**CARD v. CUNNINGHAM.** (8 Div. 879.)

(199 Ala. 222)

(Supreme Court of Alabama. Jan. 18, 1917.  
On Rehearing, Feb. 15, 1917.)

1. HIGHWAYS  $\S$  6(1)—ESTABLISHED BY PRESCRIPTION.

Where a road bounded by a fence has been used continuously and without objection by the public for 20 years, it becomes a public highway by prescription.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 8.]

2. HIGHWAYS  $\S$  154—ESTABLISHED BY PRESCRIPTION—ENCROACHMENT BY FENCE.

Where a road had been bounded on the south by an "old fence" for over 20 years, and plaintiff's present fence occupied a line north of the old fence, it encroached upon the highway, which had become public by prescription.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 418.]

3. HIGHWAYS  $\S$  7(1)—ESTABLISHED BY PRESCRIPTION — RECLAIMED AND UNRECLAIMED LANDS.

There is a distinction between establishment of a public highway by prescription through unreclaimed lands and one defined by fences or barriers through reclaimed lands.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 10, 13, 14, 16.]

4. HIGHWAYS  $\S$  87 — ENCROACHMENT BY FENCE—ABATEMENT.

Where defendant had placed a wire fence within confines of a public highway established by prescription which interfered with plaintiff's

use of her property, the nuisance will be abated, as plaintiff has a special interest.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 297, 300.]

Appeal from Chancery Court, Jackson County; James E. Horton, Jr., Chancellor.

Suit by Maria J. Card against H. M. Cunningham. Judgment for defendant, and plaintiff appeals. Reversed and remanded. On application for rehearing, former opinion sustained.

Bouldin & Wimberly, of Scottsboro, for appellant. Milo Moody, of Scottsboro, for appellee.

**McCLELLAN, J.** The bill in this cause, filed by the appellant against the appellee, seeks to abate a public nuisance effected by the act of the appellee in placing a wire fence within the confines of a public roadway, which, the appellant, insists, had long become established by prescription. The chancellor denied the complainant any relief; it being his opinion that appellee's fence did not obstruct the space previously actually used for road purposes. The chancellor expressly declined to decide whether the lane in question was a public road, and, in consequence, whether the complainant would have been specially injured by the obstruction complained of if the way had been established as a public highway. Our opinion is that the primary question, necessary to be decided, was and is whether the roadway described in the pleadings and in the evidence was in fact a public road at the time appellee built his wire fence about the south line of it.

[1] The application of the rules of law reiterated, as upon apt authority in this court, in *Moragne v. City of Gadsden*, 170 Ala. 126, 127, 54 South. 518, to the conclusions of fact to which a careful consideration of the evidence has led, requires a finding that the roadway in question had become a public highway by prescription before appellee constructed his fence about the south line thereof.

[2] The clear preponderance of the evidence establishes the fact that the present wire fence occupies a line, of varying distances, north of the place or line whereon rested the "old fence," which, in our opinion, afforded the south boundary line of the roadway in question. To the extent that the new wire fence appreciably exceeds, as it does at many points, the line fixed by the "old fence," the appellee's wire fence, recently constructed, is an encroachment upon the public highway established by more than 20 years of use by the public.

[3] If this roadway had continued, throughout more than 20 years prior to the construction of appellee's wire fence, to be a way over unfenced, open lands, there would have been occasion to apply the rules of law pertinently alluded to in *Rosser v. Bunn*, 66 Ala. 94, 95,

where account was taken of the distinction which must exist between roadways over unreclaimed lands and roadways which, for more than 20 years, have been defined by the erection and maintenance of fences or barriers indicating the line of demarcation between the roadway and the lands thus reclaimed. *Cochran v. Purser*, 152 Ala. 354, 356, 44 South. 579.

The decision of this court in *Merchant v. Markham*, 170 Ala. 278, 54 South. 236, evinces no intent to depart from the rules of law reiterated in *Moragne v. City of Gadsden*, supra. Indeed, it is quite clear from a consideration of the opinion in *Merchant v. Markham*, that the conclusion there given effect was predicated of the particular facts presented in that case. The case of *Trump v. McDonnell*, 120 Ala. 200, 24 South. 353, involved the right, claimed in virtue of adverse use, of a private way, and is, hence, without application in this instance.

[4] In accordance with the authority of *Jones v. Bright*, 140 Ala. 268, 37 South. 79, and *Duy v. Ala. Western Ry. Co.*, 175 Ala. 162, 174, et seq., 57 South. 724, Ann. Cas. 1914C, 1119, it must be held under this evidence that the complainant has suffered in her property special injuries in consequence of the public nuisance created by putting these obstructions in the public highway.

It results from these considerations that the decree appealed from is grounded in error, and must hence be reversed. The cause is remanded that the court below may proceed, according to its practices, to give effect to the conclusion we have stated.

Reversed and remanded.

**ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.**

#### On Rehearing.

**McCLELLAN, J.** The court has given due consideration to the contentions presented by solicitor for appellee in support of the application for rehearing. This court did not undertake in its decree to define, on the soil, the location of the south line of the roadway in question. It was and is content to direct the court below to proceed, according to its practices, to particularly define a line coincident with the line established by the "old fence." If, on further consideration, the court below should attain the conclusion that the "old fence row," defining the south line of this roadway, did not extend from end to end of the "lane," then it will ascertain what, with respect to that part of the south line of the roadway, has been actually used as a roadway for 20 years or more, and thereupon extend the line fixed, as stated, by the "old fence." It is not intended to indicate that on the record here the line of the "old fence" did not mark the entire south line of the roadway. If any part of the newly constructed fence of the appellee encroaches up-

on the south line of the roadway as thus defined, the court should effect its removal.  
Application denied.

(199 Ala. 225)

**LOUISVILLE & N. R. CO. v. BOGGS.**  
(8 Div. 923.)

(Supreme Court of Alabama. Jan. 18, 1917.  
Rehearing Denied Feb. 17, 1917.)

**1. EVIDENCE**  $\S$  345(1)—PUBLIC SERVICE COMMISSION ORDERS—AUTHENTICATION.

Where certified copies of alleged Public Service Commission orders authorizing railway to charge extra passenger fare where no ticket is purchased were vague and indefinite and improperly authenticated, they were properly excluded as evidence in action for ejecting passenger.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1302-1314, 1331-1343.]

**2. EVIDENCE**  $\S$  44—JUDICIAL NOTICE—PUBLIC SERVICE COMMISSION—SECRETARY.

Although the court may take judicial notice that one authenticating certified copies of Public Service Commission orders is its secretary, where no date is stated, the court cannot judicially know that the person named was then its secretary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 66.]

**3. EVIDENCE**  $\S$  164—EJECTION OF PASSENGER—EVIDENCE OF RULE.

If a railway company has adopted written or printed rules charging extra passenger fare where no ticket is purchased, they should be produced when relied upon in action by passenger for wrongful ejection.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 546, 547.]

**4. TRIAL**  $\S$  252(10)—EJECTION OF PASSENGER—INSTRUCTION—CONFORMITY TO EVIDENCE.

Where defendant railway company in action for ejecting a passenger failed to prove its rule charging extra fare where no ticket is purchased, it was not necessary to instruct jury upon a controversy as to plaintiff's opportunity to purchase a ticket; this being immaterial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 603.]

**5. CARRIERS**  $\S$  381(4)—EJECTION OF PASSENGER—SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to warrant passenger's recovery for ejection from defendant's railway train for nonpayment of additional fare demanded where no ticket was purchased.

**6. APPEAL AND ERROR**  $\S$  870(6)—REVIEW—AMOUNT OF RECOVERY.

Where compensatory damages awarded passenger for wrongful ejection was claimed excessive in motion for new trial, the court's action overruling such motion is reviewable on appeal from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3497.]

**7. CARRIERS**  $\S$  382(7)—EJECTION OF PASSENGER—EXCESSIVE DAMAGES.

In action for damages resulting from conductor's insistence that passenger get off upon his refusal to pay additional fare demanded, where no ticket had been purchased, compelling plaintiff to walk a mile and wait a half hour for another train, from which he suffered no harmful consequences, a verdict of \$250 will be reduced to \$25.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1490.]

**8. CARRIERS**  $\S$  382(7)—EJECTION OF PASSENGER—EXCESSIVE DAMAGES—HUMILIATION.

Where passenger refused to pay 15 cents additional fare demanded and told conductor he would have to forcibly put the passenger off, and that he would make a test case of it, and was evidently laying the foundation for a lawsuit, plaintiff was not damaged to amount of \$250 by his humiliation, where he suffered no actual injury beyond having to walk a mile and to wait a half hour for another train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1490.]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Action by Clayton Boggs against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals to Court of Appeals, which transferred the cause under Acts 1911, p. 450, § 6. Reversed and remanded conditionally.

Eyster & Eyster, of New Decatur, for appellant. Wert & Lynne, of Decatur, for appellee.

SAYRE, J. [1] The effort to certify the copies of the alleged orders of the Railroad or Public Service Commission, the effect of which were to allow railroad companies to charge 15 cents over and above the price of a ticket to passengers boarding trains without a ticket at a station where a ticket office is maintained, was formless, vague, and indefinite in its reference to the matter it was probably intended to certify.

[2] Moreover, and this is more material, the papers offered in evidence were authenticated by the dateless certificates of "Atticus Mullin, Secretary." The court may know judicially that Atticus Mullin is secretary of the Railroad Commission or its successor, the Public Service Commission, and has been for some time, but the court cannot know that he was such secretary at the unknown time when the certificates were made, and hence, for aught appearing, they were the certificates of a private person charged with no duty or authority in respect of the records of the commission. Therefore we will not predicate error of the trial court's action in excluding the so-called certificate offered in evidence by the defendant.

[3] If the defendant had adopted a written or printed rule to the same effect, the written or printed rule should have been produced, or its absence accounted for. *L. & N. R. Co. v. Orr*, 94 Ala. 602, 10 South. 167.

[4, 5] There being no competent evidence of the rule upon which defendant relied to justify its ejection of plaintiff from its train, the case was left to rest upon the undisputed proof that defendant ejected plaintiff for the reason that plaintiff, who got on the train without a ticket, refused to pay for his passage 15 cents in addition to the regular ticket rate. Plaintiff had alleged and undertook to prove that, though he

went to the station in time, he had no opportunity to purchase a ticket before the departure of his train, for the reason that the ticket office was not attended by an agent. Defendant having failed in its effort to get before the jury evidence of the rule authorizing conductors to collect the extra 15 cents, this controversy as to plaintiff's opportunity to purchase a ticket became immaterial, and this evidently was the view taken by the trial judge in instructing the jury. On the undisputed facts and court's charge plaintiff's recovery was inevitable, and, indeed, upon proper request, the court might well have given the general affirmative charge for plaintiff. *Kennedy v. Birmingham Rwy.*, 138 Ala. 225, 35 South. 108; *Evans v. M. & C. R. R.*, 56 Ala. 248, 28 Am. Rep. 771.

[6] However, the complaint claimed compensatory damages only, and the evidence went far enough to show that there was a bona fide insistence on the part of defendant's conductor, who did not know what may have happened at the station, that plaintiff was liable for the 15 cents extra. The jury were instructed that they might award damages for compensation only. They awarded \$250, and upon the motion for a new trial defendant took the point that this award was excessive. The action of the court in overruling the motion is subject to review on this appeal from the judgment rendered on the jury's verdict. *Henry v. Couch*, 132 Ala. 570, 31 South. 463.

[7] By being put off the train plaintiff was compelled to walk a distance the maximum estimate of which did not exceed one mile. Within a half hour he caught another train and was carried to his destination, 14 miles away. He does not appear to have suffered any other harmful consequences from his walk. By fair inference he suffered none other. On these facts, without more, he was not entitled to recover the sum of \$250 as compensation. See *L. & N. R. R. v. Sanders*, 7 Ala. App. 547, 61 South. 482.

[8] But, it is suggested, he suffered humiliation and mental distress by being ejected from defendant's train in the presence of other passengers. The damages awarded, if referred to this theory of plaintiff's injury, were still excessive. It is entirely clear on his own showing that plaintiff was not averse to such proceedings as would give him the chance for a lawsuit. He said to the conductor:

"You put me off and I will make a test case of this."

And either plaintiff or his brother, who was with him, said:

"We will get some money out of the company or your damned job, one or the other."

He testified:

"I told him [the conductor] he would have to take hold of me to assist me off, make some effort to put me off in a small way. He did

not use force enough to hurt me. My brother and I got off the train."

Evidently plaintiff was laying the predicate for an action for a wrong which he feared might not be as complete as he desired. The alleged humiliation and mental distress, avoidable by the payment of 15 cents, but which plaintiff thus invited, could hardly have damaged plaintiff to the amount assessed by the jury. Our judgment is that \$25 will properly redress the wrong plaintiff claims to have suffered, and on this judgment the cause will proceed as provided by the act of September 17, 1915 (Acts 1915, p. 610).

The assignments of error are numerous, but we have said enough to disclose our opinion that there was no error committed at the trial of the cause. However, the ruling on the motion for a new trial was erroneous for the reason indicated.

Reversed and remanded conditionally.

ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., concur.

(199 Ala. 228)

#### BLACK v. BLACK. (6 Div. 482.)

(Supreme Court of Alabama. Feb. 8, 1917.)

#### 1. DIVORCE $\Leftrightarrow$ 130—DECREE—SUFFICIENCY OF EVIDENCE.

Evidence showing husband's habits as to use of intoxicants, threats, and violence to the wife and conviction for assault and battery upon her, *held* sufficient for granting of a divorce decree under Code 1907, § 3795, allowing such decree for husband's cruelty.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 442-445.]

#### 2. DIVORCE $\Leftrightarrow$ 50—CONDONATION—CONDITIONED ON HUSBAND'S CONDUCT.

Condonation by wife because of her return to husband upon his promises to accord her proper treatment is always conditioned upon his conduct.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 180-183.]

#### 3. DIVORCE $\Leftrightarrow$ 49(6)—CONDONATION—ACTS CONSTITUTING.

Where, after separation for husband's cruelty, the wife returned and lived with him for two months upon his promise to accord her proper treatment, which promise was not kept, there was no such condonation as will defeat the allowance of divorce decree to her.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 176.]

#### 4. DIVORCE $\Leftrightarrow$ 240(5)—PERMANENT ALIMONY—EXCESSIVE AMOUNT.

Where husband, aged 47, owned a farm worth over \$1,000, a store worth over \$500, and live stock, all unincumbered, and had an income between \$500 and \$1,000, and wife owned a small farm given her by her father, award of \$200 annually as alimony, *held* not excessive where the decree was left subject to modification.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 678, 680.]

Appeal from Chancery Court, Lamar County; James E. Horton, Jr., Chancellor. Suit by Cora Black against J. B. Black.

Decree for plaintiff, and defendant appeals. Affirmed.

Suit by the wife against the husband for divorce, on the ground of drunkenness and cruelty, and for alimony, including reasonable attorney's fees. The chancellor retained full control over the cause, ordering that the decree be subject to change or modification as to custody of the children and the amount and manner of payment of alimony as the court may deem proper in the future.

There was evidence tending to show the habits of respondent as to the use of intoxicants and as to acts of violence upon the wife, cruel threats, etc., and that he was convicted and fined in the county court for assault and battery upon his wife. There was also evidence to show that the respondent owned 215 acres of land, variously estimated to be worth from \$1,000 to \$2,500, on which was located his home and a storehouse in which he conducted a mercantile business worth from \$500 to \$1,200. He also owns some live stock, wagons, buggies, etc., all of which property appears to be unincumbered. Respondent is also engaged in farming and in the active practice of the medical profession, and the chancellor concluded that his annual income exceeded \$500, but was "probably less than \$1,000."

The complainant owns a small farm adjoining that of her husband, given her by her father, and she is now residing with her father.

From the decree rendered in favor of complainant, the respondent appeals.

J. C. Milner, of Vernon, for appellant. Walter Nesmith, of Vernon, for appellee.

GARDNER, J. [1] The complainant in the court below was awarded a divorce on the ground of cruelty, under the provisions of section 3795 of the Code. A discussion of the evidence would serve no good purpose, and on the contrary would but bring into bold relief the details of the domestic unhappiness of these parties. Suffice it to say, the evidence in this record has been most carefully considered, and we have reached the conclusion that there is no just reason for disturbing the decree of the court below.

[2, 3] Much stress is laid by counsel for appellant on what they term a *condonation* on the part of the wife, because of her return to her husband and living with him for more than two months after having left him on account of his cruel treatment of her. It is well recognized that in cases of this character condonation is always conditional. We are persuaded that at the time of the first separation the husband went to the wife for the purpose of having her return to him, and that on solemn promise on his part that she would be accorded proper treatment she was persuaded to go back with him, and that after her return these promises were

not kept. We do not quote the language, but are convinced that what was said in *Reese v. Reese*, 23 Ala. 785, and *Turner v. Turner*, 44 Ala. 437, upon the question of condonation in cases of this character is fully applicable here.

[4] It is insisted by counsel for appellant that the amount awarded as permanent alimony is excessive. The above statement of the case suffices as a general outline of the evidence upon which the chancellor based this allowance, and the court below retains control over the cause for any modification of the same should justice require it.

The respondent is 47 years of age; he is engaged in farming, merchandising, and in the active practice of medicine. His indebtedness appears to be very small, with no incumbrances upon any of his property. The chancellor concluded that "his annual income exceeds \$500, but that it is probably less than \$1,000." We are well convinced on consideration of the evidence that the award of \$200 a year alimony should not be disturbed as excessive.

The decree of the court below will be affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and SAYRE, JJ., concur.

(199 Ala. 218)

NANCE v. WALKER. (1 Div. 910.)

(Supreme Court of Alabama. Jan. 18, 1917.  
On Rehearing Feb. 15, 1917.)

1. ADVERSE POSSESSION §7(3) — GOVERNMENT LAND—ACQUISITION OF TITLE—PAPER TITLE.

Where title to land was in the government while plaintiff had possession under color of title, and never passed out of it until the issuance of defendant's patent, plaintiff had no paper title, and did not acquire title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 84.]

2. EJECTMENT §10—BASIS OF RECOVERY—COLOR OF TITLE.

One claiming prior possession under color of title can recover in ejectment against a trespasser, but when defendant, not a trespasser, holds under color of title, and shows title out of the government in a party with whom plaintiff does not connect himself, plaintiff cannot recover merely on strength of previous possession under color of title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 30-41.]

3. DEEDS §116—CONSTRUCTION—SUBSEQUENTLY ACQUIRED TITLE.

Deed conveying "all my right, title, interest, estate, claims, and demand, both at law and in equity, as well as in possession or in expectancy of, in, and to all that certain farm," etc., included and conveyed a subsequently acquired title to the land.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 330.]

4. JUSTICES OF THE PEACE §75(1)—TITLE TO LAND—TRANSFER TO CIRCUIT COURT—PETITION BY DEFENDANT.

In order for defendant to remove an action of forcible entry and unlawful detainer into the circuit court under Code 1907, § 4283, under a petition to try title, defendant must aver and prove a peaceable entry on the land under claim of title thereto, and the fact that defendant's father had a life estate in the land and was primarily entitled to the possession, did not preclude him from showing that plaintiff had no title, and did not deprive him from being a bona fide claimant, so as to prevent him from resorting to section 4283, and thus putting plaintiff on proof of his title.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 243.]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Ejectment by Roswell S. Nance against Robert G. Walker. Judgment for defendant, and plaintiff appeals. Affirmed.

The action was originally for forcible entry and detainer, and was removed to the circuit court by defendant, under the statute as one claiming to have entered upon the land peaceably and under claim of title thereto. The evidence shows a chain of title in plaintiff from Shreve to Randle, mortgage from Randle to Mastin, foreclosure and purchase by Margaret R. Randle, deed from Mastin to Randle, and a deed from Margaret Randle to Nance; also possession by these parties, and that on August 12, 1912, defendant was found on the lands by agents of Nance, and ordered off and from further cutting of the timber, and defendant's refusal to get off same:

"Well, how are you going to stop me? You have got to have something more severe than that"

—or words to that effect. The evidence of defendant tended to show that he was the son of Ella Vincent Walker and Cyrus P. Walker; that Ella Vincent Walker was the daughter of Glovina Kennedy, who was the daughter of Joseph P. Kennedy; patent of United States to Henry Weathers, dated March 15, 1913; deed from Henry Weathers to Joseph Kennedy, February 15, 1819; will of Joseph Kennedy April 9, 1824, devising in general terms all property to his wife for life, with remainder to his children Glovina, Oscar, and Louise. The proof further showed that Cyrus C. Walker, the father of defendant, and husband of Ella Vincent Walker, the daughter of Glovina Kennedy, was living at the time of defendant's entry. After getting possession of the land in 1912, Walker attempted and perfected a patent to the lands from the government through the equity of Henry Weathers who had originally made the entry.

Bestor & Young, of Mobile, for appellant. Ervin & McAleer, of Mobile, for appellee.

ANDERSON, C. J. This was originally an action of forcible entry and unlawful detain-

er, and was transferred to the circuit court under a petition to try title as provided by the statute (section 4283 of the Code of 1907) by one claiming to have entered upon the land peaceably and under claim of title thereto.

[1] The appellant proved a prior possession under color of title to the land sued for, but as the title to the same was in the government during that time and never passed out of it until the issuance of the patent in 1913, he had no paper title, and did not acquire title by adverse possession. *Nelson v. Weakley*, 177 Ala. 131, 59 South. 157; *Swift v. Williams*, 162 Ala. 147, 50 South. 123.

[2] It is true that one claiming a prior possession under color of title can recover in ejectment against a trespasser, yet when the defendant is not a trespasser, but holds under color of title and also shows title out of the government in a party with whom the plaintiff did not connect himself, the plaintiff, in order to recover, is required to establish his title, and cannot recover merely upon the strength of his previous possession under color of title. *Warten v. Weatherford*, 191 Ala. 31, 67 South. 667; *McCreary v. Jackson Lumber Co.*, 148 Ala. 247, 41 South. 822. The plaintiff not only failed to connect himself with the patentee, and which was fatal to his title, but the defendant went further than was necessary, and connected himself therewith.

[3] It is true that the deed from Henry Weathers to the defendant's grandfather was made long before the issuance of the patent to Weathers and his heirs, but we think that the said deed is so worded as to include and convey a subsequently acquired title to the land in question. It conveys:

"All my right, title, interest, estate claims and demand both at law and in equity as well as in possession or in expectancy of, in and to all that certain farm," etc. *Garrow v. Toxey*, 188 Ala. 572, 66 South. 443.

It is insisted by the appellant that the defendant, Walker, is in no position to invoke the statute to try title: First, for the reason that at the time of his entry upon the land he did not do so under claim of title, as the title was in the government; and, second, that even if he has title, he is not entitled to the immediate right of possession, for the reason that his father is still living and has a life estate in the land which the said defendant inherited from his mother.

[4] It is true that in order for the defendant to remove the cause into the circuit court, under section 4283 of the Code of 1907, he must aver and prove a peaceable entry upon the land under a claim of title thereto, but we think that these facts were established without dispute. The defendant had an inchoate claim or equity in the land, which ripened into the legal title upon the subsequent issuance of the patent. The fact that



defendant's father had a life estate in the land and was primarily entitled to the possession might be a barrier to a recovery by this defendant if he was the plaintiff in an action of ejectment, but would not preclude him from showing in this action that the present plaintiff had no title, and did not deprive him from being a bona fide claimant of title so as to prevent him from resorting to section 4283, and thus putting the plaintiff upon proof of his title. The case of *Mallon v. Moog*, 121 Ala. 303, 25 South. 583, is not in conflict with this holding. We think that the real effect of that holding is that one who enters as a bare trespasser cannot invoke the statute, even if he subsequently acquires a right or title to the land, but do not think that it was meant to hold that one who entered under a claim of title, whether a complete legal one at the time or not, was not entitled to invoke the statute, simply because the claim of title under which he entered was not complete or perfected until after the entry.

The judgment of the circuit court is affirmed.

Affirmed.

MCCLELLAN, SAYRE, and GARDNER, JJ., concur.

#### On Rehearing.

ANDERSON, C. J. It is suggested upon rehearing that the court did not take sufficient notice of the insistence of counsel for appellant, that the appellee was not authorized to try the title to the land under the statute for the reason that he entered by force, or if he entered peaceably, he forcibly withheld the land. We repeat that the record does not disclose such a forcible entry or forcible withholding of the land as to preclude appellee from the benefit of the statute for removal of the cause to the circuit court for the purpose of trying title.

It is next urged that the holding that the deed from Henry Weathers conveyed an expectancy was in direct conflict with the case of *Derrick v. Brown*, 66 Ala. 165. This point was so decided upon the authority of *Garrow v. Toxey*, 188 Ala. 572, 66 South. 443. We do not understand that the opinion in the case at bar, or the one in the *Garrow* Case, supra, held that the deeds considered were warranty deeds, as distinguished from a quitclaim, but, notwithstanding they may not have amounted to a warranty because qualified by the word "quitclaim," still they expressly conveyed an estate in the land in expectancy. The holding in the *Derrick* Case, supra, merely is that the deed was a quitclaim, notwithstanding the use of the word in "expectancy" as well as in possession, but the court did not there hold that the deed did not or would not operate to convey the expectancy of the grantor, and said case is

easily reconciled with the present holding. Indeed, the opinion in the *Derrick* Case, supra, in speaking of the conveyances, says:

"They conveyed no title other than that they owned, legal or equitable, in possession or in expectancy."

Rehearing, denied.

MCCLELLAN, SAYRE, and GARDNER, JJ., concur.

#### BAINS v. DANK. (6 Div. 399.)

(199 Ala. 250)

(Supreme Court of Alabama. Feb. 8, 1917.)

#### 1. LANDLORD AND TENANT §150(1) — REPAIRS—DUTY TO MAKE.

In the absence of agreement between the parties, a landlord need not keep the demised premises in repair.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 536.]

#### 2. LANDLORD AND TENANT §166(4) — REPAIRS—DUTY OF LANDLORD.

Where a landlord voluntarily at the tenant's request undertakes to make repairs, he is liable for injuries which may result from the negligent manner in which the work is done, even though not bound to make such repairs.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 650.]

#### 3. MASTER AND SERVANT §315—INJURY TO THIRD PERSONS—INDEPENDENT CONTRACTOR.

Where the agent of the lessor on the request of the lessee agreed to repair the roof of the demised premises, and ordered the work done by a reliable independent contractor, he is not liable for injuries to the tenant or her property resulting from the negligence of the independent contractor.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1241, 1244-1253, 1255, 1256.]

#### 4. APPEAL AND ERROR §843(2)—REVIEW—QUESTIONS FOR DETERMINATION.

Where defendant's motion for a directed verdict was improperly denied as to one count of the complaint, the question whether the evidence warranted a verdict against defendant on the other count need not be determined on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 333.]

Appeal from City Court of Birmingham; John C. Pugh, Judge.

Action by Sarah Dank against H. L. Bains. From a judgment for plaintiff, defendant appeals. Transferred from Court of Appeals under section 6, Acts 1911, p. 450. Reversed and remanded.

In the first count of the complaint the plaintiff (appellee here) sought recovery of damages for injury to her personal property, and also to her person, occasioned by a rainfall through the roof of the house she occupied in the city of Birmingham. The count alleged that the defendant was the agent in charge of said house and in having it repaired he "negligently allowed the said repair work to be so negligently done that said house, or a portion thereof, was not covered, and as a proximate consequence thereof the rain fell upon and damaged the plaintiff's personal property," etc.

In the second count it is alleged that the defendant "negligently failed to promptly send out paper or other covering for said house, as it was his duty to do, and as a proximate consequence thereof the rain fell upon and injured her personal property," etc.

By way of special pleas the defendant set up that he was the agent for one McGhee, owner of the property referred to in the complaint, and that as such agent, and with the consent and authority of the owner, he agreed at plaintiff's request to put a new roof on the house and contracted with the firm of Bates & Bumpus for the work. The said firm was generally reputed to be reliable and competent, and, beyond supplying the necessary material, defendant had nothing further to do with the job; but the contractors were to turn the completed job over to him as agent for the owner, and said firm was responsible as independent contractors for any negligence done or permitted while the repair work was being prosecuted. To these pleas demurrers were interposed to each count separately and severally by the plaintiff, and, the demurrers being overruled, issue was joined on the plea of the general issue and the special pleas.

The evidence was without dispute that the defendant was requested by plaintiff to have the new roof put on the house, and that, further than contracting with said firm for the job and furnishing the necessary material, defendant had nothing more to do with it. He gave the order for the material to be sent to the premises on June 26, 1914, and the work was begun on the morning of July 2d thereafter. The reliability of the firm from which said material was ordered was not questioned at the trial, and likewise that the contractors were competent and reliable was without dispute. When the work was begun the sheeting needed was already on the ground, but the roofing material had not then arrived, and the evidence showed that while the roof was partly uncovered during the progress of the work a heavy rain fell, damaging plaintiff's property, and also causing personal injuries. It was without dispute, however, that the roofing material had arrived and was being put on before the rain fell, and it was also undisputed that the defendant did not know when the contractors were to begin the repair work nor that they had begun it. The record shows that a separate suit against the contractors, Bates & Bumpus, is now pending.

The affirmative charge requested by the defendant as to each count of the complaint was refused, and motion for a new trial denied. Verdict and judgment for plaintiff, and defendant appeals.

James A. Mitchell, of Birmingham, for appellant. Frank S. Address, of Birmingham, for appellee.

GARDNER, J. [1] It is a well-recognized rule in this state that, in the absence of any agreement between the parties, the landlord is under no obligation to keep the demised premises in repair, and that the rule of caveat emptor applies in regard to leases *Morgan v. Sheppard*, 156 Ala. 403, 47 South. 147; *Hart v. Coleman*, 192 Ala. 447, 68 South. 315; *Anderson v. Robinson*, 182 Ala. 615, 62 South. 512, 47 L. R. A. (N. S.) 330, Ann. Cas. 1915D, 829.

[2] In the present case no agreement on the part of the landlord to keep the premises in repair is shown to have existed, and none was set up in the pleadings in the cause. The above-mentioned rule is therefore applicable here, and the landlord was under no obligation to make the repairs. Notwithstanding this, however, if he voluntarily, at the tenant's request, undertakes to make the repairs, he is liable for any injuries which may result to the latter from the negligent manner in which the work is done. 24 Cyc. 116; 1 *Tiffany, Landlord & Tenant*, p. 608.

[3] The general rule that the owner or proprietor is not liable for the negligent acts of an independent contractor is well established in this state. *Chattahoochee & G. R. R. v. Behrman*, 136 Ala. 508, 35 South. 132; *Massey v. Oates*, 143 Ala. 248, 39 South. 142; *So. Ry. v. Lewis*, 165 Ala. 555, 51 South. 746, 138 Am. St. Rep. 77; *Montgomery St. Ry. v. Smith*, 146 Ala. 316, 39 South. 757. There are, of course, exceptions to this general rule, but with such we are not here concerned. In regard to its application to the relationship of landlord and tenant where the repairs on leased premises are committed by the landlord to an independent contractor, Mr. *Tiffany*, in his work on *Landlord & Tenant* (volume 1, p. 610), says:

"The general rule is that for the acts of such contractor not under the control of his employer the latter is not liable; but this rule is subject to a number of exceptions, the extent and application of which raise questions of difficulty, and the uncertainty and confusion which exists in other connections in this respect are fully present in the decisions rendered as between the landlord and tenant."

In discussing such exceptions the author cites many authorities, all of which we have carefully examined, and we find that this case does not come within any well-recognized rule of exception. The general rule therefore finds application here.

That Bates & Bumpus were independent contractors is clear from the undisputed evidence, and this was so recognized by the trial court. *Harris v. McNamara*, 97 Ala. 181, 12 South. 103; *Republic I. & S. Co. v. Luster*, 192 Ala. 501, 68 South. 358. The evidence shows that the work was being done by said firm as independent contractors, and if there was any negligence on their part (a question upon which we would indicate no opinion), the landlord would not be liable there-

for. The repair work was being made gratuitously on the part of the landlord at the tenant's request. The evidence is without dispute that the contractors were entirely competent and reliable. Discussing a case similar in principle, and after referring to the general rule above noted as to immunity from liability on the part of the owner for negligence of an independent contractor, the Supreme Court of Illinois, in *Jefferson v. Jameson & Morse*, 185 Ill. 133, 46 N. E. 272, said:

"The fact that appellee was a tenant of appellant, occupying the building where the repairs were made, does not, in our opinion, make this case an exception to the general rule heretofore announced. Appellee contracted in writing with appellant, for a certain consideration therein expressed, that the improvement or repairs might be made. Having agreed that the repairs might be made, it occupies no better position, so far as its right to recover damages is concerned, than a stranger. In other words, after appellee contracted that the work might be done, it and appellant, so far as the work was concerned, occupied the position of strangers to each other."

The first count rested for recovery upon the allegation of negligence as to the repair work. As before stated, this work was being done by independent contractors, and the pleas to said count setting up immunity from liability for this reason were established without conflict. It results, therefore, that the affirmative charge was due the defendant as to count 1 of the complaint.

[4] As the cause must be reversed, we need state no definite conclusion as to the second count of the complaint, relying upon the negligence of the defendant in failing to promptly have the roofing delivered on the premises. We might add, however, that the evidence shows that the material was ordered by the defendant from materialmen whose reliability was not questioned on the trial, and the order was made several days before the work was begun. Aside from this, the record discloses that the roofing was delivered on the day the work was commenced, and that it arrived and was being put in place before the rain fell. It nowhere appears that delay in the repairing of the roof was due to any failure on defendant's part to more promptly deliver the roofing material. We are therefore inclined to the view, without expressly deciding the same, that the evidence found in this record in support of count 2 is of too uncertain and conjectural a nature upon which to rest a judgment against the defendant. We are also inclined to the view, though this is unnecessary to be decided, that the demurrer to the complaint taking the point that it failed to allege by what right or authority plaintiff was occupying the house, was well taken. We merely direct attention to this question as a matter of pleading.

The judgment of the court below will be reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and SAYRE, JJ., concur.

(199 Ala. 242)

SEWELL v. SEWELL. (8 Div. 918.)

(Supreme Court of Alabama. Feb. 8, 1917.)

1. EXECUTORS AND ADMINISTRATORS §59 — ACTION BY—ADMISSIBILITY OF EVIDENCE.

Where, upon a son's death, the father took possession of money found in his possession and disposed of part of it to certain persons, in action by son's administratrix to recover it, it was error to refuse to allow the father to show that the money actually belonged to such persons.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1875.]

2. PROPERTY §9—EVIDENCE AS TO TITLE—POSSESSION.

Possession of property alone and without explanation is presumptive evidence of ownership, which may be overcome by other evidence.

[Ed. Note.—For other cases, see *Property*, Cent. Dig. § 9; *Evidence*, Cent. Dig. § 78.]

3. EXECUTORS AND ADMINISTRATORS §59 — PROPERTY FOUND IN DECEDENT'S POSSESSION—PRESUMPTION.

Personal property found in decedent's possession or under his control at time of death is presumed to belong to him, but this presumption is rebuttable.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1875.]

4. EXECUTORS AND ADMINISTRATORS §214 — ACTION BY—ADMISSIBILITY OF EVIDENCE.

In action by administrator to recover money found in decedent's possession and taken by his father, it was proper to permit the father to show that part of the money was used in paying funeral expenses.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 755.]

5. EXECUTORS AND ADMINISTRATORS §205(1) — ASSETS—EXPENSE OF LAST SICKNESS.

In view of Code 1907, §§ 2597, 2598, providing that expenses of last sickness are preferred claims against an estate, but that no preference will be given among debts of same class, if amount found in son's possession taken by father, part of which was paid for physicians summoned before it was known the son was dead, was reasonable and necessary, and other preferred claims would not be prejudiced thereby, the father was entitled to such deduction.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 732.]

Appeal from Circuit Court, Lawrence County; R. O. Brickell, Judge.

Action by Lattie Sewell, administratrix of Lee Sewell, against J. W. Sewell. Judgment for plaintiff, and defendant appealed to Court of Appeals, which transferred cause under Acts 1911, p. 450, § 6. Reversed and remanded.

J. M. Irwin, of Moulton, and Sample & Kilpatrick, of Cullman, for appellant. Chenault & Downing, of Moulton, for appellee.

McCLELLAN, J. [1-4] Lee Sewell, appellee's intestate, met a tragic death. On his

person, at the time of his death, was about \$165 in money. His father (appellant) took it into his possession. Later, and before a personal representative was appointed, the father disposed of a part of this money in a manner he sought to disclose through testimony serviceable for the purpose. He proposed to show that \$115 of this money really belonged to Joe Sewell, who had, that day, commissioned intestate to carry and deliver it to Mr. Puckett at Hartselle, to which place intestate was en route when he was killed; that \$5 of the amount in the possession of intestate was money really belonging to appellant, also delivered to intestate for a particular purpose, and that \$7.50 of the fund taken from intestate's person was used by the defendant to pay physicians who were summoned to attend intestate and who were on the way when advised that intestate had died. The court refused to permit the defendant to make the proof indicated, though the court did permit the defendant, quite properly, to show that approximately \$46 of the money was used by the defendant in purchasing a coffin and in paying the funeral expenses for the burial of plaintiff's intestate. "Possession of property alone and without explanation is evidence of ownership; but it is the lowest species of evidence. It is merely presumptive, and liable to be overcome by any evidence showing the character of the possession, and that it is not necessarily as owner." *Vines v. Vandegrift*, 192 Ala. 351, 353, 68 South. 280; 16 Cyc. p. 1074. Personal property found in one's possession or under his dominion and control at the time of his death is presumed to belong to him and to constitute assets of his estate; but this presumption is of course rebuttable by evidence appropriate and competent to show that such property did not belong to the decedent and was not an asset of his estate. 18 Cyc. p. 193. The court was in error in not permitting defendant to show, by legal evidence, that the \$115 and the \$5 was not the property of Lee Sewell.

[5] The expenses of the last sickness of a decedent are made preferred claims against his estate by Code, § 2597; but no preference among debts of the same class will be given in the course of the administration. Code, § 2598. If the charge made by and paid to the physicians was shown to be reasonable, and there appeared to be, at the time they were summoned, a reasonable necessity for the presence of physicians in reasonable number, and the other preferred demands against the estate of the intestate would not be prejudiced, in respect of preference, by allowing and crediting the defendant with the sums so paid by him to the physicians, then this defendant was entitled to have that sum deducted from any liability on account of the reception by him of the money he took from the person of the intestate.

For the errors committed in refusing to permit the defendant to make the proof indicated, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

(199 Ala. 244)

STATE ex rel. TURNER v. HENDERSON,  
Governor. (3 Div. 273.)

(Supreme Court of Alabama. Feb. 2, 1917.)

1. MANDAMUS ~~64~~—PERSONS SUBJECT—GOVERNOR.

The courts can issue mandamus, directing the Governor to do a purely ministerial act, though they have no means to compel obedience, since the court is a supreme authority in the determination of legal questions, and it will not be assumed that the Governor will refuse to execute the law as declared by the courts.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 128, 129.]

2. STATES ~~131~~—FISCAL MANAGEMENT—“APPROPRIATION”—INDEFINITENESS.

Acts 1915, p. 719, authorizing the Attorney General to employ with the approval of the Governor necessary counselors and attorneys, section 8 of which appropriates money sufficient to meet the expenses incurred under the act, is a valid appropriation within Const. 1901, § 72, providing that no money shall be paid out of the treasury except upon “appropriation” made by law, though no definite sum or maximum which cannot be exceeded was thereby fixed.

[Ed. Note.—For other cases, see States, Cent. Dig. § 129.]

For other definitions, see Words and Phrases, First and Second Series, Appropriation.]

3. MANDAMUS ~~101~~—SUBJECTS OF RELIEF—MINISTERIAL ACTS.

Under Acts of 1915, p. 720, § 4, authorizing the Attorney General, whenever in his opinion the public interest requires it, to employ, with the approval of the Governor, attorneys and counselors, who shall be paid upon the warrant of the auditor drawn on the certificate of the Attorney General, approved by the Governor, that their services were actually rendered, the approval by the Governor of the Attorney General's certificate that attorney whose employment he had approved had rendered the services and was entitled to the agreed compensation is a ministerial act, the performance of which can be compelled by mandamus; the Governor's discretion having been exercised when the employment was approved.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 211–216.]

Appeal from Circuit Court, Montgomery County; Leon McCord, Judge.

Petition by the State, on relation of Perry W. Turner, against Charles Henderson, as Governor of the State. From a judgment sustaining a demurrer to the petition, relator appeals. Judgment reversed, and cause remanded.

W. L. Martin, Atty. Gen., and L. E. Brown, P. W. Turner, and Harwell G. Davis, Asst. Attys. Gen., for appellant. Rushton, Williams & Crenshaw and Ball & Samford, all of Montgomery, for appellee.

SAYRE, J. This appeal was submitted for decision under rule 46 (178 Ala. xix, 65 South. vii), and has been considered by the court in accordance with that rule.

This is a petition by the state, on the relation of Perry W. Turner, for a writ of mandamus, commanding the Governor to approve the Attorney General's certificate to the effect that relator had rendered services as Special Assistant Attorney General for the month ending September 30, 1916, that such services were necessary for the efficient conduct of the public business, and could not be promptly performed by the officers regularly provided by law, and that thereupon relator was entitled to be paid from the state treasury the sum of \$250. The petition shows that on December 18, 1915, the Attorney General, acting for and on behalf of the state, had entered into a contract with relator by the terms of which relator had agreed to devote his time, as Special Assistant Attorney General, to the performance of such duties as might be assigned to him by the Attorney General for the period beginning January 1, 1916, and ending January 20, 1919, in consideration whereof the state had agreed to pay him the sum of \$3,000 per annum in monthly installments. In the court below a demurrer was sustained to the petition, and petitioner, declining to plead further, took this appeal.

[1] Of the several questions raised by the appeal we consider first that which involves the availability of the remedy sought in the circumstances of this case. It is hardly necessary to say that with one accord the courts deny their power to coerce the Governor to perform any act calling for the exercise of judgment or discretion. As to the question whether the Governor is amenable to the writ in case it is sought to compel his performance of a purely ministerial duty, the courts are not agreed. In a good number of the states it is held that mandamus will never issue to the chief executive to compel the performance of any duty imposed upon him by law, whether ministerial or otherwise. In a note to the case of *State of Wyoming ex rel. Irvine v. Brooks*, Governor, reported in 6 L. R. A. (N. S.) 750, where the cases are collected and reviewed, the editor, after noting the irreconcilable conflict of authority upon the question of the judicial control of the chief executive in regard to purely ministerial duties, says:

"But the reason, if not the weight, of authority, would seem to be \* \* \* that, as to duties of this character, the general principle of allowing relief against ministerial officers should apply, and that the mere fact that it is the Governor against whom the relief is sought should not deter the courts from the exercise of their jurisdiction, since the authority of the courts is supreme in the determination of all legal questions judicially submitted to them within their jurisdiction, and no one is exempted from the operation of the law, and the duty of faithfully executing the laws is solemnly enjoined upon the Governor by his oath of office; and, if the relief sought were refused, those per-

sons whose rights have been invaded by executive neglect or refusal to act would very often be altogether without redress."

This court, in *T. & C. R. R. Co. v. Moore*, 36 Ala. 371, held that mandamus would lie to compel the Governor to draw his warrant in favor of the relator for a sum of money lent to it by an act of the Legislature, the court being of the opinion that the Governor, as well as any other officer, was amenable to the writ. This conclusion was questioned by Judge Byrd in *Chisholm v. McGehee*, 41 Ala. 197, who doubted "whether this court has the right or power to enforce by mandamus any duty imposed upon a Governor of the state by law," citing cases holding that the court had no such power. And in *State ex rel. Plock v. Cobb*, 64 Ala. 127, Brickell, C. J., considered it "a question not free from difficulty, and embarrassed by a conflict of authority, whether the Governor, the head of the executive department \* \* \* of the state, can be controlled by the judicial department, in the performance of duties devolved on him in his official capacity." He referred to the decision in *T. & C. R. R. Co. v. Moore*, supra, but dismissed the subject with the observation that "whether this case falls within the principle thus announced, or whether the principle itself is sound, and can be safely acted on, are questions which have not been argued by counsel, and in reference to which we express no opinion." Again in *State ex rel. Higdon v. Jelks*, 138 Ala. 115, 35 South. 60, the court pointedly "declined to express any opinion as to the soundness of the principle in *Moore's Case*."

Notwithstanding the shadow that may have been thrown over the authority of *Moore's Case* by subsequent references thereto, the court, now considering that it has jurisdiction, and, having jurisdiction, is under duty to declare the law of this case, apprehending no disturbance or impairment of the independence of the separate powers assigned to the different departments of government, nor permitting the intrusion of a doubt that the Governor will faithfully execute the law so declared, notwithstanding it would lack the power to enforce its judgment, should he choose to ignore its mandate, prefers to follow the authority of that case, and, without further citation of authorities or elaboration of the principle involved, refers to the quotation from the note to *Wyoming ex rel. Irvine v. Brooks*, supra, for a sufficient statement of the rationale of its conclusion.

[2] In the next place we consider the objection to the writ in this case, taken on the ground that there has been no lawful appropriation of money for the purpose in question.

Section 72 of the Constitution provides that:

"No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof."

Relator claims relief according to the provisions of the act entitled an act "To further prescribe the authority and duties of the attorney general," etc., approved September 22, 1915 (Gen. Acts 1915, p. 719 et seq.), section 4 of which in pertinent part reads as follows:

"That whenever in his opinion the public interest requires it, by reason of the volume of the work in his office and in the importance of the business and the interest of the state in the matter, whether civil or criminal, the Attorney General, with the approval of the Governor, or the Governor himself, may retain and employ, in the name of the state of Alabama, such attorneys and counselors at law as he thinks necessary to the proper conduct of the public business, and shall stipulate in writing with such attorneys and counselors the amount of their compensation to be approved by the Governor before employing them. \* \* \* The special assistants to the Attorney General herein authorized shall be paid upon the warrant of the auditor drawn upon the certificate of the Attorney General, approved by the Governor, that their services were actually rendered," etc.

Section 8 of the same act reads as follows:

"There is hereby appropriated out of the state treasury a sum of money sufficient to meet the expenses incurred under the provisions of this act."

Appellee contends that section 8 of the act, supra, cannot be allowed to operate as an appropriation, for that it sets apart no maximum or otherwise ascertained amount to meet the expenses that may be incurred under authority of the act; that, quoting from *State ex rel. Davis v. Eggers*, as reported in 29 Nev. 469, 91 Pac. 819, 16 L. R. A. (N. S.) 630:

"As all appropriations must be within the legislative will, it is essential to have the amount of the appropriation, or the maximum sum from which the expenses could be paid, stated. This legislative power cannot be delegated nor left to the recipient to command from the state treasury sums to any unlimited amount for which he might file, claims. True, the exact amount of these expenses cannot be ascertained nor fixed by the Legislature when they have not yet been incurred, but it is usual and necessary to fix a maximum \* \* \* specifying the amount above which they cannot be allowed."

Here again the cases are in conflict. The wisdom of the rule announced in the case supra, *l. e.*, that to allow any person or officer to draw upon the treasury for unlimited amounts in effect delegates to that person or officer the power of appropriating the public money, so commends itself to the reason that, were the question altogether a new one in this state, we might feel inclined to appellee's view. But the question is not entirely new. This provision has been common to all the Constitutions of this state. In the Constitutions of 1819, and 1861 it appeared under the head "General Provisions." In the later instruments it has appeared under the head of "Legislative Department." In *Smith v. Speed*, 50 Ala. 276, where may be found a brief statement of its historical development, it was said of the

provision upon which appellee now relies that:

"In the light of its history, this constitutional provision is conservative, not restrictive or prohibitory of the legislative power over the public revenue"

—and in most of the older states, where any question has been raised concerning its meaning and effect, it has been held not to prohibit indefinite appropriations such as that of the act under consideration, while the decisions to the contrary come from the newer western states. Now the diligence of counsel for appellant has brought to light many examples of appropriations made in this way from the beginning of the state's legislative history down to the date hereof, and it may be assumed, nothing appearing to the contrary, that from time to time as occasion arose during all these years these indefinite appropriations have been acted upon by the executive departments of the government, thus in one way or the other involving a long line of the state's legislative and executive officials in a necessarily implied approval of that interpretation of the provision which would sustain the act now in question, and providing a practical exposition of its meaning too strong and obstinate to be now shaken or controlled except upon a clear conviction of error. *Stuart v. Laird*, 1 Cranch, 299, 2 L. Ed. 115; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Wetmore v. State*, 55 Ala. 198. However loose, unwise, or dangerous this mode of appropriating the public money may be deemed, the court, in view of the considerations to which we have adverted, is unwilling to hold that it is prohibited by the Constitution. If the statute be as mischievous in its tendencies as appellee's brief would indicate, the answer, sufficient for us, is that the responsibility therefor rests upon the Legislature, not upon the court.

[3] It is further contended by appellee that the payment sought is made discretionary with the Governor and, for that reason, cannot be compelled by mandamus. It appears, however, that the Governor gave his written approval to the contract between the relator and the Attorney General at the time it was entered into, and that the relator has fully performed the services he then agreed to perform. At least there is no denial of the truth of the Attorney General's certificate, nor any indication that the Governor's refusal was put upon any such ground. Upon these facts the court holds that the Governor's discretion was exercised in this case at the time when he gave his approval to the contract, and that his required approval of the Attorney General's certificate remains to be performed as an act merely ministerial. The judgment of the circuit court, sustaining the demurrer to relator's petition, is therefore reversed, and the cause is remanded, to

the end that, if necessary, it may proceed to a final judgment.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., concur.

(199 Ala. 261)

SLOSS-SHEFFIELD STEEL & IRON CO. v. HARRIS. (8 Div. 908.)

(Supreme Court of Alabama. Feb. 8, 1917.)

1. MASTER AND SERVANT ⇨280(10)—INJURIES TO SERVANT—QUESTION FOR JURY—NEGLIGENCE—SAFE PLACE TO WORK.

In an action for the death of an employé killed by a fragment thrown off from a rapidly revolving belt wheel, where there was evidence that the wheel had been two or three times previously patched, and that it was old, worn, and unsafe, and that the previous breaks had resulted from the rapid revolution in the use for which it was designed, it was a question for the jury whether the employer was negligent in failing to keep the ways and works in safe condition, as required by Code 1907, § 3910.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1017.]

2. MASTER AND SERVANT ⇨286(25)—INJURIES TO SERVANT—QUESTION FOR JURY—CAUSE OF INJURY.

In an action for the death of an employé killed by a fragment thrown off by a rapidly revolving belt wheel, where there was evidence that the wheel had been previously repaired two or three times merely by riveting new pieces in place of those broken off, it was a question for the jury whether the defendant had reasonable knowledge of the defect in the wheel in time to have repaired it, even though the fragment which killed the employé was not one of the new pieces which had been riveted on.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1060.]

3. MASTER AND SERVANT ⇨291(10)—TRIAL ⇨184(19)—INJURIES TO SERVANT—INSTRUCTION—BURDEN OF PROOF—INVADING PROVINCE OF JURY.

In an action for the death of an employé, portions of the charge stating that if the jury are satisfied from the evidence that there was a defect in the machinery which had been discovered by the agent in charge whose duty it was to repair, and such agent had not repaired the defect in a reasonable time after discovering it, they should find for plaintiff, provided they were not reasonably satisfied that plaintiff's intestate was guilty of negligence which contributed proximately to his own injury which was repeated with slight variation in other parts of the charge, did not qualify the plaintiff's obligation to sustain the burden of proving at least prima facie the negligence imputed to defendant, nor invade the jury's province to decide whether there was contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1141; Trial, Cent. Dig. § 468.]

4. TRIAL ⇨191(10)—INJURIES TO SERVANT—QUESTION FOR JURY—ASSUMPTION OF FACTS.

In an action for the death of an employé killed by a fragment from a belt wheel which flew off and struck him, portions of the court's charge which stated that if the jury found that the defective condition of the wheel existed at the time, that this condition was the cause of the death, and that the condition was previously known to defendant's agent for a sufficient period to allow a reasonable time to remedy it and that the opportunity was not availed of, they

should find for the plaintiff, was not erroneous as unwarrantably assuming the existence of a defect in the condition of the wheel as the means whereby the employé was killed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 430.]

5. TRIAL ⇨295(1)—INSTRUCTION—ORAL CHARGE—CONSTRUCTION AS A WHOLE.

The part of the oral charge excepted to must be interpreted in connection with the whole deliverance bearing on the subject or the phase of the case to which the part excepted to refers.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703, 704, 713, 714, 717.]

Appeal from Circuit Court, Franklin County; C. P. Almon, Judge.

Action by Margie K. Harris, as administratrix, against the Sloss-Sheffield Steel & Iron Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The pleadings and the facts sufficiently appear. The following excerpts from the oral charge were excepted to:

(1) But if you are satisfied from the evidence there was a defect in the machinery, and this defect had been discovered by the agents or servants of defendant who were in charge of this machinery, and whose duty it was to repair it, and said agent or servant had not repaired such defect in a reasonable time after discovering same, then it would be your duty in that event to find for plaintiff under the first count of the complaint, provided you are not reasonably satisfied that plaintiff's intestate was himself guilty of negligence which contributed proximately to his own injury.

(2) Now, when defendant employed plaintiff's intestate, it was under the duty to provide for him a reasonably safe place to work, and if defendant did not provide a reasonably safe place to work for plaintiff's intestate, if you are satisfied of that from the evidence, it would be your duty to find for plaintiff, provided you are not reasonably satisfied that plaintiff's intestate was himself guilty of negligence which contributed proximately to his own death.

(3) If defendant did not provide a reasonably safe place for plaintiff's intestate to work, and you are satisfied of that, and are not satisfied from the evidence that he himself was guilty of negligence which contributed proximately to his own injury, it would be your duty to find for plaintiff under the fourth count of the complaint.

(4) If the wheel was defective, and this defect was the cause of plaintiff's intestate's death, it would be your duty to find for plaintiff, unless you further find that plaintiff's intestate himself was guilty of negligence which contributed proximately to his own death, and if you find that he was himself guilty of negligence which contributed proximately to his death, it would be your duty to find for defendant under the first count.

The court then said:

I have gotten the charge a little confused, and in order to get it straight, I charge you that it is incumbent upon plaintiff, in order to recover in this case, to reasonably satisfy your mind that the wheel was defective, and that plaintiff's intestate's death was caused by this defective wheel, and that this defective wheel had been discovered by some one in the employ of defendant who was in charge of this machinery, and whose duty it was to repair the wheel if it became defective, and that said wheel was not repaired in a reasonable time. If they reasonably satisfy you that the wheel was defective, and that some one in the employ of de-

defendant whose duty it was to repair the wheel had discovered it, and did not repair it within a reasonable time, then it would be your duty to find for plaintiff under the first count of the complaint, provided you are not satisfied reasonably that intestate of plaintiff was himself guilty of negligence which contributed proximately to his death. If he was guilty of negligence contributing proximately to his death he would not be entitled to recover, or if the wheel was not defective plaintiff would not be entitled to recover, or if some one whose duty it was to repair it had not discovered it, then he would not be entitled to recover. The following charges were refused to defendant:

(2) If you believe from the evidence that no part of the patched part of the wheel broke, then you must find for defendant.

(3) If you believe from the evidence that the wheel broke at places therein where it was not patched, old, worn, and unsafe, then your verdict must be for defendant.

(4) If you believe from the evidence that the wheel which broke and killed intestate was broken only at places therein where it had not been broken or patched theretofore, you must find for defendant.

Tillman, Bradley & Morrow, and L. C. Leadbeater, all of Birmingham, for appellant. A. H. Carmichael, of Tusculumbia, and W. L. Chenault, of Russellville, for appellee.

MCCLELLAN, J. [1] Plaintiff's intestate, J. W. Harris, who was then in the service of the defendant (appellant) as "washer foreman," was killed by being hit by a fragment of metal thrown off of a rapidly revolving belt wheel used in defendant's plant. The case went to the jury on the issues made by a general traverse of the averments of the first count, and several pleas of contributory negligence. The count was drawn to state a cause of action under the first subdivision of our Employers' Liability Statute (Code, § 3910), and described the defect in the condition of the ways, works, etc., as consisting in the fact that the belt wheel "had in time passed been cracked or broken, and had been patched, and was old, worn, and unsafe." There was evidence tending to establish every phase and feature of these descriptive averments. There was evidence to the effect that this wheel had been at least twice, if not thrice, previously patched; that it was worn; and (by the witness Wingo, with other testimony) that it was an old wheel. Under the circumstances shown by this record, it was a question for the jury's consideration whether there was culpable negligence, attributable to the defendant, with respect to the discovery or repair of this defective belt wheel. The fact, to state the effect of tendencies of the evidence, that it had previously broken while in rapid revolution, that it had been patched at least twice before this tragedy, that its function was to transmit to other machinery, through a belt, the power the engine imparted to it, that it was thereby driven to very rapid revolutions, thus subjecting its unity to the strain of centrifugal force against the effect of which on its parts it had not been theretofore ef-

ficient to withstand, that it was repaired, after breaks, by a process of bradding a distinct piece of metal in or across the space in the rim of the wheel wherefrom the original or the supplied part had been thrown off or broken away, lead very plainly to the conclusion that only the jury could decide the issue of negligence vel non as charged in the first count of the complaint.

[2] It was for the jury to consider whether, under the circumstances disclosed by phases of the evidence, there was negligence with respect to the discovery or the repair of this defective wheel as a wheel. The evidence is without dispute that a fragment of the metal then forming a part of the rim of the belt wheel caused Harris' death. Unless his contributory negligence intervened to defeat a recovery, it is obvious that the proximate, negligent cause of his injury and death—if the jury concluded to negligence as averred in the first count—was the blow inflicted by the piece of metal thrown from the rim of the rapidly revolving belt wheel. Whether this piece of metal was that put on the wheel in the process of repairing it or was a piece originally a part of the rim, and then for the first time disengaged, was, under the evidence, an inquiry peculiarly within the jury's province to decide. It was impossible, in the light of the evidence and of the conflicting inferences generated by the evidence, for the court to say that, even if the piece of metal inflicting the injury was the result of a "new break," its release from its place in the rapidly revolving wheel was not to be ascribed, or rather was not ascribable, to an effect wrought by the process employed to repair the belt wheel whereby an unwelded piece of metal was merely riveted to the ends of the broken arc of the rim of the wheel. The court properly declined to take from the jury's consideration the issues made by the averments of count 1. As indicated, the averments of count 1 charge a defect in the condition of the belt wheel as a unit in the plant's construction and operation. In some parts of the argument of the appellant it seems that an assumption is indulged that the defective condition described in that count was a defective condition restricted to only the part of the belt wheel added thereto by the bradding process to which reference has been made, and that the means of Harris' injury was limited by the averments to a blow inflicted by the flying off of the part of the belt wheel thus riveted thereto. Such an interpretation of the count cannot, as has been stated, be accepted. The repeated failure of the wheel to withstand the disengaging effect of the natural tendency of rapidly revolving bodies to throw off that part or those parts not so securely attached as to resist the operation of this natural law may—in the jury's necessary to be taken judgment of what was at least reasonable care and precaution in the circumstances



shown to have been known to competently authorized representatives of the defendant—have been an entirely sufficient warning to those responsible as the representatives of the common master that as a unit in that service this belt wheel was due either to be removed from its place or not used in that particular service, or repaired to a better, safer end than was done. The second break, preceding Harris' injury, might have been found to contradict the assumption that as thus repaired it was good and reasonably safe. Plainly, this wheel was not as good, as safe, as it was before many inches of its arc gave way, for it is to be supposed that such wheels are properly balanced in their original construction; and to brad in a broken place in the rim another or other metals might be found to have contributed to the destruction of the evenly distributed balance originally designed, thereby imposing upon the places where the riveting was made a greater strain to retain the new part as an element of the rim of the wheel. These considerations, and others might be added, justified the trial court in refusing defendant's requested charges 2, 3, and 4, all of which proceeded upon the erroneous hypothesis that the only lead, under pleading and evidence, to liability was that the repair was itself and alone negligently made; whereas other considerations were present which the determination to repair, after the manner undertaken, may not, in due prudence, have been accorded proper influence or weight.

[3, 4] Four excerpts from the oral charge of the court, together with an explanation given by the court after the exceptions were taken, constitute the remaining assignments of error urged in the brief. These excerpts, together with the court's explanation, when read in the light of the full charge, did not qualify the plaintiff's obligation to carry the burden of proof to establish, at least prima facie, the negligence imputed to the defendant through the averments of the first count; nor did they invade the jury's province to decide whether pleaded contributory negligence, on the part of Harris, intervened to defeat a recovery under the first count; nor did they unwarrantably assume the existence of a defect in the condition of the ways, works, etc., viz. of the belt wheel, as the means whereby Harris was injured. Given: A conclusion attained by the jury from the evidence that the defective condition averred in count 1 existed at the time; a further conclusion, likewise attained, that this defective condition was the means of Harris' injury; a further conclusion, likewise attained, that the existence of this defective condition was previously known to defendant's representative for such a period as to allow a reasonable time before Harris' injury in which to remedy this condition, and that the opportunity was not availed of in a way due care

and precaution would suggest, and that Harris was injured in consequence of an happening attributable alone to that defective condition—it is manifest, we think, that the proximate cause of Harris' injury must, inevitably, have been ascribed to negligence imputable to the defendant, unless, and solely unless, Harris was himself guilty of contributory negligence precluding his personal representative from a right to recover. The physical condition in which the wheel had been for a long time previous to Harris' injury was not a subject of real dispute in the evidence, viz. that it had been broken and had been repaired in the mode we have stated. A reasonable opportunity to remedy a defective condition in machinery necessarily comprehends a reasonable period of time in which to do so. The hypothesis upon which the court instructed the jury in respect of reasonable opportunity to remedy the defective condition expressly included reasonable time to serve the purpose of the performance of the defendant's duty to exercise reasonable care and diligence to remedy a defective condition, to the end that it might, in case of injury therefrom, avert the consequences of actionable negligence.

[5] Excepted to parts of oral charges given to juries by trial courts must be interpreted in connection with the whole deliverance bearing upon the subject, or the phase of the case to which the excepted to part has reference.

There is no merit in the errors assigned. The judgment must be affirmed.

Affirmed.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

(199 Ala. 240)

McDONNELL v. STATE ex rel. JONES.  
(8 Div. 958.)

(Supreme Court of Alabama. Feb. 15, 1917.)

JUDGES ~~GO~~8—VACANCIES IN OFFICE—HOLDING BY APPOINTEE.

Under Const. 1901, § 155, fixing, "except as otherwise provided in this article," term of office of judge at six years, section 156, providing for some of the Supreme Court justices elected in 1904 holding for only two years and others of them only four years, and section 158 providing that vacancies in the office of judge shall be filled by appointment, the appointee to hold his office till the next general election held at least six months after the vacancy occurs, and till his successor is elected and qualified, the successor chosen at such election to hold for the unexpired term and till his successor is elected and qualifies, however many vacancies occur during a regular term, and whenever they occur, one appointed to a vacancy can hold only to the end of the original six-year term; a successor being then elected and qualifying.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 30-39.]

Appeal from Circuit Court, Madison County; O. Kyle, Judge.

Action by the State, on the relation of Thomas W. Jones, against A. McDonnell. Judgment for relator, and respondent appeals. Affirmed.

Lanier & Pride and Betts & Betts, all of Huntsville, for appellant. Spragins & Speake and Taylor & Watts, all of Huntsville, for appellee.

ANDERSON, C. J. Section 155 of the Constitution of 1901, "except as otherwise provided in this article," fixes the term of office of the Chief Justice and Associate Justices of the Supreme Court, circuit judges, chancellors, and judges of probate at six years. Section 156 makes other provision as to certain of the Associate Justices of the Supreme Court to be elected in 1904, so that some of them shall hold for two and some for four years, thus fixing it so that all of them will not thereafter stand for election at the same time, but ultimately leaving the term of all of them at six years as fixed by the preceding section. Section 158 of the Constitution of 1901 makes no change whatever, by way of extension, curtailment, or otherwise, of the term of office as fixed by section 155. Said section 158 reads as follows:

"Vacancies in the office of any of the justices of the Supreme Court or judges who hold office by election, or chancellors of this state, shall be filled by appointment by the Governor. The appointee shall hold his office until the next general election for any state officer held at least six months after the vacancy occurs, and until his successor is elected and qualified; the successor chosen at such election shall hold office for the unexpired term and until his successor is elected and qualified."

This section deals solely and entirely with vacancies and the method of filling same by restricting the appointee of the Governor, or one elected thereunder, to the filling of a vacancy to the unexpired term, and is not intended to encroach upon a new succeeding term so as to cut it down or to change the commencement and termination thereof so as to throw it out of harmony with the general system and term of all probate judges. This section succeeds section 17 of the Constitution of 1875, which old section provided for filling vacancies in the offices there mentioned and who should hold under appointment from the Governor for the remainder of the term, regardless of the date that the office became vacant, and section 158 of the present Constitution changed this clause, not to extend in any manner the term so fixed by section 155, but merely to restrict the time that the appointee should hold under certain conditions and giving the people the right to fill the vacancy by an election in case the vacancy occurred over six months prior to an election. We think that this section of our organic law is plain and unambiguous, and that it deals only with vacancies and the filling of same, and cannot be so reasonably construed as to change, alter, or extend the

term as fixed by section 155. The Lawler term began with his election in November, 1910, and his qualification thereunder and extended to the election and qualification of a successor at the November election in 1916, and it matters not how many vacancies occurred, or when they occurred in the Lawler term, 1910 to 1916, the appointee thereunder could, in no event, hold beyond the election and qualification of the relator Jones, who was elected at the November election, 1916. We think that it is so plain and manifest that section 158 deals only with vacancies and unexpired terms that there is little left for interpretation, and that resort to authorities of other states is not necessary, but it is sufficient to state that this holding finds support in the cases of *People v. Potter*, 47 N. Y. 375, and *Babcock v. Black*, 22 Minn. 336.

The case of *Foster v. Stanford*, 149 Ala. 632, 43 South. 179, arose under a construction of section 158 of the Constitution as to the meaning of the six months there used, and when the time commenced to run, and did not involve the question here presented, as the vacancy there occurred in 1906, four years before the expiration of the term for which the decedent, Beck, had been elected.

We hold that the relator, Jones, who was elected probate judge in November, 1916, is entitled to the office, and the ruling of the trial court, which would lead to this result, is affirmed.

Affirmed.

MAYFIELD, SOMERVILLE, GARDNER, and THOMAS, JJ., concur.

(199 Ala. 371)

NASHVILLE, C. & ST. L. RY. v. ABRAMSON-BOONE PRODUCE CO.  
(7 Div. 828.)

(Supreme Court of Alabama. Feb. 15, 1917.)

1. PLEADING  $\S$  248(1)—AMENDMENT—DEPARTURE.

An amendment of the complaint, containing counts for conversion and money had and received by adding common counts and counts for failure to deliver a shipment, is permissible under Code 1907,  $\S$  5367, and does not constitute a departure, the subject of controversy being the same as in the original.

[Ed. Note.—For other cases, see Pleading, Cent. Dig.  $\S$  686, 689-692.]

2. CARRIERS  $\S$  76—INJURY TO GOODS—PARTIES PLAINTIFF.

Where the seller is consignor and consignee, and indorses the bill of lading with drafts on the ostensible purchaser, and the real purchaser pays the draft, and the goods are delivered to him, he, as the party beneficially interested, is the proper plaintiff to sue the carrier for injury to goods.

[Ed. Note.—For other cases, see Carriers, Cent. Dig.  $\S$  256-271, 363.]

3. CARRIERS  $\S$  177(1)—CONNECTING CARRIERS—INJURY TO GOODS—INTERSTATE COMMERCE.

The Carmack Amendment (Act Cong. June 29, 1906, c. 3591,  $\S$  7, pars. 11, 12, 34 Stat. 593 [U. S. Comp. St. 1913,  $\S$  8592]) does not

abrogate liability of connecting carrier for injury to goods in interstate shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775, 778.]

4. APPEAL AND ERROR —762—SUPPLEMENTAL BRIEF.

Argument in the supplemental or reply brief on a point not presented on submission of the cause in the original brief is too late for consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3097.]

Anderson, C. J., and Sayre, J., dissenting.

Appeal from City Court of Gadsden; John H. Disque, Judge.

Action by the Abramson-Boone Produce Company, suing for J. M. Smith & Co., against the Nashville, Chattanooga & St. Louis Railway. Judgment for plaintiff, and defendant appeals. Transferred from Court of Appeals under section 6, Acts 1911, p. 449. Affirmed.

Goodhue & Brindley, of Gadsden, for appellant. Norman & Davis, of Gadsden, for appellee.

GARDNER, J. J. M. Smith & Co., a partnership doing business at Gadsden, Ala., ordered through one Harris, a broker, a carload of hay which was to come from the Abramson-Boone Produce Company of Idaho. The hay was shipped November 22, 1913, and arrived in Gadsden December 16th following, and was delivered to J. M. Smith & Co. on December 20th. The bill of lading was issued by the Oregon Short Line Railroad, and the car of hay was consigned to the order of said Abramson-Boone company for delivery at Gadsden and indorsed by said company. Attached to the bill of lading was a draft on Harris & Co. for the purchase price of the hay. Notice of the arrival of the hay was given by the railroad company to said Harris & Co., but J. M. Smith & Co. paid the draft and delivery was made to them. In unloading the hay it was discovered that more than a hundred bales of it was greatly damaged, caused, as plaintiff insisted, by leaks in the car. The defendant company (appellant here) offered evidence tending to show that the car was in good condition, and that the hay was damaged before shipment. Plaintiff refused the hay, delivering it back to the railroad company, and brought suit to recover the damages thereby sustained. The cause was tried by the court without a jury, and resulted in a judgment for plaintiff, from which defendant appeals.

The complaint as originally framed contained two counts, one seeking damages for the conversion by the defendant company of 102 bales of hay, and the other for money had and received. It was alleged in the second count that the money claimed therein arises out of the same facts as are involved in the claim on which the first count is based. Subsequently, during the progress of the trial,

the plaintiff was permitted to amend the complaint by adding counts 3, 4, 5, and 6. Counts 3 and 6 were the common counts, and 4 and 5 sought damages for defendant's failure to deliver the 102 bales of hay received by it as a common carrier for delivery to plaintiff at Gadsden.

[1] It is first insisted that the amendment was improperly allowed, as it wrought a departure from the original cause of action. But both the pleadings and evidence disclosed that the plaintiff was seeking a recovery on account of the damaged condition of the hay on its delivery to plaintiff. The parties were the same, the subject of controversy the same, and we are of the opinion that, under our liberal system of pleading, the amendment was permissible and did not constitute a departure. Code 1907, § 5367; *Gaines v. B. R. I. & P. Co.*, 164 Ala. 6, 51 South. 238.

Plaintiff was permitted to further amend the complaint so as to make the Abramson-Boone Produce Company, suing for the use and benefit of J. M. Smith & Co., the parties-plaintiff in the cause. The objection to this amendment, on which the fifth assignment of error is based, is not insisted on in appellant's brief.

[2] It is insisted that, under the facts here disclosed, this action cannot be maintained by either J. M. Smith & Co. or for said company's benefit by the Abramson-Boone Company, for the reason that the hay was not consigned to the Smith Company, and up to the time of its delivery they had no title or interest in it, and the cause of action therefore rested in the Abramson-Boone Company alone, it being both consignor and consignee. In support of this contention, we are cited to the following cases: *Gulf Compress Co. v. Jones Co.*, 172 Ala. 650, 55 South. 206; *Hood v. Commercial Bank*, 12 Ala. App. 511, 67 South. 721; *Fletcher v. Prestwood*, 150 Ala. 135, 43 South. 231; *Zimmerman v. L. & N. Co.*, 6 Ala. App. 475, 6 South. 598; *So. Ry. v. Jones Cotton Co.*, 167 Ala. 581, 52 South. 899; *L. & N. R. R. Co. v. Allgood*, 113 Ala. 163, 20 South. 986; *Walter v. A. G. S. Ry. Co.*, 142 Ala. 485, 39 South. 87.

Under the undisputed evidence in this case, although the brokers, Harris & Co., were the ostensible buyers of the car of hay, yet they were purchasing it from Abramson-Boone Produce Company for and on behalf of J. M. Smith & Co., who were the real purchasers and the parties beneficially interested in the shipment. *So. Exp. Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118; *So. Ry. Co. v. Brewster*, 9 Ala. App. 597, 63 South. 790. As the shipment was made by the said Produce Company as both consignor and consignee, the hay could not rightfully be delivered until payment of the draft. *A. C. L. Ry. v. Dahlberg Co.*, 170 Ala. 617, 54 South. 168; *Howell v. Home Bank*, 70 South. 686. The bill of lading was indorsed by the consignor and con-

signee—the said Produce Company—with draft made on Harris & Co., but J. M. Smith & Co. paid the draft and the hay was delivered to them. They were the real purchasers.

We are not here concerned with the question in whose name the action should have been brought had there been no delivery of goods and no payment of the draft. Whether in the Abramson-Boone Produce Company originally, or in Harris & Co., under the facts as here disclosed the right of action clearly passed to the plaintiff, the J. M. Smith Company, as they were the parties beneficially interested or who would suffer any loss. This conclusion is supported by what was said in the recent case of *So. Ry. Co. v. Brewster*, cited *supra*. See, also, 4 R. O. L. 490, § 397, and page 944, § 400; *So. Ry. Co. v. Brewster*, 69 South. 111.

The cases hereinbefore cited as relied on by counsel for appellant do not present situations analogous to that here under consideration, and therefore do not militate against the conclusion reached.

[3] It is also insisted that, this being an interstate shipment, the initial carrier is alone liable under the federal statute for any loss, damage, or injury caused by any carrier over whose line the interstate shipment may have passed, and in support of this insistence we are cited to a recent case from the Georgia Court of Appeals, that of *So. Ry. v. Bennett*, 17 Ga. App. 162, 86 S. E. 418. A reading of that case will disclose that the court was there dealing with a statute of the state of Georgia which was repugnant to the federal statute known as the Carmack amendment (Act June 29, 1906, Fed. Stat. Ann. Supp. 1909, pp. 273, 274). We have no such statute under consideration here. The identical question was presented to this court in the recent case of *L. & N. Co. v. Lynne*, 71 South. 338, and decided adversely to appellant's contention. The argument of counsel and the authorities cited have not persuaded us that there was error in this holding, and we, therefore, adhere thereto.

[4] In the supplemental and reply brief of counsel for appellant the argument is advanced that, under the facts as disclosed by the record, the liability of the defendant was that of warehouseman, and not of common carrier. This argument was not presented on submission of the cause in the original brief on file, and, under the rules, comes too late for consideration. *Jebeles-Collias Co. v. Booze*, 181 Ala. 456, 62 South. 12. But in any case, we are not impressed with this insistence.

The judgment appealed from will be affirmed.

**Affirmed.**

**MCLELLAN, MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur. ANDERSON, C. J., and SAYRE, J., dissent.**

(199 Ala. 278)

**DAY v. STATE. (1 Div. 938.)**

(Supreme Court of Alabama. Feb. 15, 1917.)

**CRIMINAL LAW — 1137(3)—APPEAL—INVITED ERROR.**

In a prosecution for murder, where the court charged on murder in the second degree on request of defendant's counsel, whereupon defendant reserved an exception to the charge on the special ground that there was no evidence to support such a verdict, and the state moved to have the charge withdrawn, and the court withdrew it, any error in such withdrawal was invited by defendant, and he could not complain thereof on appeal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3009.]

Appeal from Circuit Court, Washington County; Ben D. Turner, Judge.

Quincy Day was convicted of murder, and he appeals. **Affirmed.**

Granade & Granade, of Chatom, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Ass't Atty. Gen., for the State.

GARDNER, J. Appellant was convicted of the murder of one William Werms, and his punishment fixed at life imprisonment. The fatal shot was fired by some one in ambush, and the defendant denied any participation in the crime, relying upon the defense of alibi.

On the conclusion of the court's oral charge to the jury, the defendant excepted to the failure to charge on murder in the second degree, and requested that such charge be given. The court then charged on murder in the second degree, on the conclusion of which the bill of exceptions discloses the following as having occurred:

"Defendant excepts to the court's charging on murder in the second degree because there is no evidence to support that. The state moves to strike the portion of the charge on murder in the second degree, because there is no evidence to sustain a verdict of murder in the second degree.

"By the Court: I think I will withdraw that charge on murder in the second degree, and I charge you, \* \* \* if this defendant is guilty at all, he is guilty of murder in the first degree, and the punishment would be for you to fix. And if he is not guilty of that, he is not guilty of anything."

To this instruction defendant reserved an exception. Conceding for the purposes of this case that, under section 7087, Code 1907, and the authorities construing same, cited in the recent case of *McPherson v. State*, 73 South. 387, present term, there was error in that portion of the oral charge last quoted, yet we are persuaded, upon a reconsideration of the case, that reversal cannot be predicated upon this action of the court.

It is noted that upon request of the defendant's counsel the court fully charged the jury on murder in the second degree. Thereupon the defendant reserved an exception to such charge, which he had just previously requested, upon the specific ground that there was

no evidence to support such a verdict. Such exception was the equivalent of an objection thereto, and was an open invitation to the court to exclude or withdraw the same. Thereupon the state moved to have same withdrawn, and the court withdrew the charge on second degree murder, as above set out. If this was error, it was superinduced by the conduct of the defendant himself—indeed, openly invited by the exceptions reserved.

It has been repeatedly decided by this court that one who has invoked of the trial court a particular ruling or action will not be heard to complain in this court of such action or ruling, though it be erroneous. As said in *Bardell v. State*, 144 Ala. 54, 38 South, 975:

"To allow the defendant the benefit of the exception would be to give him the benefit of his own wrong."

See, also, *Barber v. State*, 151 Ala. 56, 43 South, 808; *Travis v. Sloss-Sheffield Co.*, 162 Ala. 605, 50 South, 108; *W. U. Tel. Co. v. Griffith*, 161 Ala. 241, 50 South, 91; *Bone v. State*, 8 Ala. App. 59, 62 South, 455.

This, in our opinion, presents the only question of importance upon this appeal. The other matter presented by the record we do not deem of sufficient importance to be given separate treatment here. Suffice it to say, each question appearing in the record has been given careful consideration, and we find nothing calling for a reversal of the cause. The judgment of conviction is therefore affirmed.

Affirmed.

ANDERSON, O. J., and McCLELLAN and SAYRE, JJ., concur.

(199 Ala. 284)

SHOTTS v. COOPER et al. (6 Div. 392.)  
(Supreme Court of Alabama. Feb. 8, 1917.)

1. EXECUTORS AND ADMINISTRATORS §150—AUTHORITY—RIGHT TO RENT.

Nothing appearing to the contrary, executors have statutory power to rent real estate of the deceased, subject to the supervision of the probate court.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 607-613.]

2. CHATTEL MORTGAGES §157(2)—PRIORITY—TENANT HOLDING OVER—EVIDENCE.—SUFFICIENCY.

In trover evidence held to warrant the finding of an implied, if not an express, contract on the part of the executors to allow the tenant to hold over for another year, and so to give validity to a crop mortgage which was prior to other mortgages on the land and crop, executed by the tenant, who thereafter contracted to purchase the land.

3. CHATTEL MORTGAGES §157(2) — LIEN — TENANT HOLDING OVER—IMPLIED TENANCY—EVIDENCE.

A tenant of farm land, while holding over after the expiration of his lease with consent of the executors of the owner, executed a mortgage on the crop to be grown the following year.

Thereafter the tenant contracted to purchase the land, and gave a mortgage upon it and the crop to be grown, for the purchase money. There was evidence that while holding over with consent of the executors and before he contracted to purchase, the tenant prepared the land for cultivation. Held, that such evidence was admissible to show that at such time the tenant had an interest in the land, so that the crop mortgage first executed by him would be a specific lien on the crops grown.

4. EVIDENCE §273(2) — DECLARATIONS — BY ONE IN POSSESSION—NATURE OF RIGHT.

Declarations by one executing a crop mortgage as to his tenancy of the land, made in the absence of the lessors, are inadmissible to establish the mortgagor's rights, on the theory that declarations of one in possession of property are admissible to explain the same.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1111, 1112.]

Appeal from Circuit Court, Marion County; C. P. Almon, Judge.

Action between W. M. Shotts and J. W. Cooper and others. From a judgment for the latter, the former appeals. Reversed and remanded.

The cause was tried on the second count of the complaint, which was in trover for the conversion by defendant (appellant here) of four bales of lint cotton, and on the plea of the general issue thereon. No question was raised as to the charge of conversion by defendant. The cotton was raised by one J. G. Gann, in Marion county on land known as the "John Mitchell place," Gann having been for several years a tenant of Mitchell, who died in August, 1913. In March, 1914, Gann was still on the land, and made a contract with the executors of Mitchell's estate to purchase it. To secure the purchase price, evidenced by three promissory notes, he executed to them on March 23, 1914, a mortgage on the land and on the crops that might be grown thereon during that year, which mortgage was duly filed for record on the date of its execution. The cotton in controversy was raised on this land and embraced in said mortgage. The defense set up that the cotton was taken under a mortgage executed by Gann in February, 1914, on crops to be raised that year. Objection to the introduction of said mortgage in evidence was sustained. On the conclusion of the evidence the court gave the affirmative charge at the request of the plaintiffs, and on this action of the court, and the court's rulings on the evidence, the assignments of error are based.

C. E. Mitchell, of Hamilton, Hill, Hill, Whiting & Stern, and W. Raymond Cooper, all of Montgomery, for appellant. E. B. & K. V. Fite, of Hamilton, for appellees.

GARDNER, J. The evidence is without dispute that the mortgagor, Gann, purchased the land on which the cotton in controversy was grown from the estate of his former landlord, John Mitchell, in March, 1914, and to secure the purchase price he executed a

mortgage on the land and on the crops to be grown thereon during 1914; that Mitchell died in August, 1913, and Gann continued on the land up to the time of his purchase thereof.

[1-3] Appellants rested for defense upon the mortgage executed on February 16, 1914, on the crop for that year. Plaintiff's insistence seems to be that at the time of the execution of the crop mortgage the mortgagor did not own the land, nor any interest therein, and had no rental contract thereon, and that therefore such a mortgage conferred no specific lien on such after-acquired property, citing *Windham v. Stephenson*, 156 Ala. 341, 47 South. 280, 19 L. R. A. (N. S.) 910, 130 Am. St. Rep. 102; *McNeill v. Henderson & Hill*, 1 Ala. App. 405, 55 South. 269; *Young v. Hall*, 4 Ala. App. 603, 58 South. 789. The evidence that Gann had occupied the land as tenant for Mitchell for a period of ten years prior to the execution of the mortgage here in question, and that his occupancy continued after Mitchell's death, was not disputed. The record does not disclose when the executors of the estate were appointed, but they had the statutory power, nothing appearing to the contrary, to rent the real estate of the deceased, subject, of course, to the supervision of the probate court. Testimony was offered, as we understand the bill of exceptions, to show on the part of the defendant that the tenant mortgagor paid the rent of 1913 to the executors of the estate, and that they had permitted him to remain on the place after the expiration of the crop year under the same conditions as theretofore, and in January, 1914, he was preparing to make another crop. Defendant also offered to show that on land of that character the time for the planting of corn would be prior to March 23d of the year. We recognize that the doctrine of "holding over" by a tenant after the expiration of his lease, where the circumstances are such that the landlord may be held to have elected to treat the tenancy as continuing, rests upon the principle that the law implies a contract between the parties for a lease for another year (*Robinson v. Holt*, 90 Ala. 115, 7 South. 441; *Wolfe v. Wolfe*, 69 Ala. 549, 44 Am. Rep. 526), and as a general rule may be confined to the parties to the contract. Whether such limitation exists here, however, we need not determine. The evidence not only discloses that the tenant did occupy the same land for a long term of years and continued to occupy it in the same manner as theretofore, but the testimony above referred to, offered by the defendant and to which objections were interposed and sustained, was, in our opinion, sufficient for submission to the jury of the question as to whether or not at the time of the execution of the mortgage to appellant on February 16, 1914, the tenant had made some arrange-

ment or entered into any valid agreement with the executors for the cultivation of the land for another year. We are of the opinion that from this testimony, in connection with that already introduced, the jury might infer an implied, if not an express, contract on the part of the executors with the tenant as to the occupancy of the land for another year. 24 Cyc. 882; *Rainey v. Capps*, 22 Ala. 288. We, therefore, conclude that there was reversible error in excluding the evidence referred to.

[4] The defendant offered to prove a declaration of the mortgagor, made prior to the execution of defendant's mortgage, to the effect that he had made arrangements for another year; and the following cases are cited by counsel for appellant to the effect that declarations of one in possession of property, explanatory of the possession, are admissible: *Clealand v. Huey*, 18 Ala. 347; *Daffron v. Crump*, 69 Ala. 77; *Holman v. Clark*, 148 Ala. 291, 41 South. 765; *Gary v. Terrill*, 9 Ala. 206; *Oden v. Stubblefield*, 4 Ala. 40. While the general principle announced in these cases is well understood, yet we are of the opinion that the evidence here offered was inadmissible. There was no question that the mortgagor was in possession of the land at the time of the execution of defendant's mortgage. The only purpose to be served by the question was to show a rental contract by the mere declaration of the mortgagor, in the absence of the parties interested in the cause. We do not think that the principle announced in the above-cited cases can be made to extend to the situation here presented.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and SAYRE, JJ., concur.

(199 Ala. 300)

SPAFFORD v. SPAFFORD. (1 Div. 949.)  
(Supreme Court of Alabama. Feb. 15, 1917.)

1. HUSBAND AND WIFE § 235½—SEPARATE MAINTENANCE — JURISDICTION OF COURTS — EQUITY.

Courts of equity exercise original jurisdiction to award alimony by way of separate maintenance independently of a bill for divorce.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1074.]

2. HUSBAND AND WIFE § 233(1)—SEPARATE MAINTENANCE—RIGHT OF WIFE—CAUSE FOR DIVORCE.

It is not absolutely essential for the support of a bill for alimony by way of separate maintenance that the facts alleged are sufficient to warrant a divorce.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1062, 1065-1072.]

3. HUSBAND AND WIFE § 3(1) — PERSONAL RIGHTS—SELECTION OF DOMICILE.

The universally recognized right of the husband to select his own domicile must be rea-

sonably and not arbitrarily exercised; the question in each case to be determined on the peculiar facts and circumstances there existing.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 7.]

**4. HUSBAND AND WIFE — 296 — SEPARATE MAINTENANCE — RIGHT OF WIFE — HUSBAND'S CHOICE OF DOMICILE.**

A bill which alleged that the husband took his wife, contrary to his antenuptial promise, to reside in the home with his mother and sister, where she was given no authority as mistress of the home, and where she was insulted, humiliated, and made to feel that she was not welcome by the mother and sister, and that the husband, in refusing the wife's request that in view of the delicate state of her health he remove her from her unpleasant surroundings, stated that he held his duty to his mother and sister to be above all else, and declared he would not support her if she refused to reside there with him, is sufficient to entitle the wife to separate maintenance.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1069.]

**5. HUSBAND AND WIFE — 296 — SEPARATE MAINTENANCE—PLEADINGS—CONSTRUCTION.**

A suit for separate maintenance is one in which the public occupies in effect the position of a third party, and mere legal niceties in regard to pleading should not interfere with the meritorious consideration of the cause, though the rights of the parties must be fully respected, and the bill must contain sufficient averment of facts to give the respondent due notice of what he is called upon to defend.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1089.]

**6. PLEADING — 8(3)—CONCLUSIONS—COLLECTIVE FACTS.**

A bill for separate maintenance, which alleged that the husband took his wife to live with his mother and sister, who insulted, mistreated, and humiliated the wife and made her feel that she was not welcome, is not defective as alleging conclusions of the pleader, since the facts amounting to such treatment could hardly be specifically alleged, and the allegations may be classed as those stating a collective fact.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 13.]

McClellan, J., dissenting.

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Suit by Bernadine Spafford against Ralph B. Spafford for alimony without divorce. From a decree overruling demurrers to the bill, defendant appeals. Affirmed.

Suit by the wife, appellee here, against the husband for alimony alone. The bill shows both parties to be over the age of 21 and residents of the city of Mobile, Ala., and their marriage on October 28, 1915. The bill further shows that prior to their marriage, respondent promised complainant that he would take her into a home owned by him which would not be occupied by other members of his family, and where she could keep house and be the mistress of her own home; that instead of carrying out his promise he took her into a home in Mobile which was occupied by his mother and sister, the latter

being a widow with two children who resided with her; that after entering said home the wife was insulted, mistreated, and humiliated by the said mother and sister, and was made to feel that she was not welcome—that she was eating food to which she was not welcome; that respondent's sister was the head of his home, and complainant had no authority and no rights therein, except with reference to the one room actually occupied by her; that when she hung some of her pictures in the parlor of the home the mother and sister refused to permit them to remain in the parlor, and carried them back to the room occupied by complainant; that in such and in many other ways, by the adoption of similar methods of treatment, the mother and sister of respondent made complainant very miserable and kept her unhappy, and she appealed to respondent to remove her from these unpleasant surroundings, urging him to take her to his other home, as he had promised, or go with her to her own mother's home in the city of Mobile, and there board until different arrangements might be made; that instead of being moved by the appeals thus made to him by her, respondent assumed a lofty and haughty attitude, and informed her that he held duty to his mother and sister to be above all else; that he would not go with her to her mother's home, and would not move with her out of the home then occupied by his mother and sister, nor support her if she refused to reside in said home. The bill further alleges that complainant is soon to become a mother, and is in such physical condition that she is very nervous, and it is impossible for her to continue in the said home and suffer said indignities; that although respondent is aware of her said condition he still refuses to do anything for her, or to contribute in any manner to her support, unless she remove back into said home; and that respondent knows complainant has absolutely no property, and that she even now finds it necessary to work for her support and will soon be unable to work at all until after her approaching travail.

The demurrers to the bill take the point that the bill is without equity, and shows upon its face that the respondent is willing to support complainant if she will live in his home, and that it shows upon its face that she voluntarily removed from his home without legal cause. There are also grounds of demurrer taking the point that certain allegations in the bill—such as that oratrix was insulted, mistreated, and humiliated by the mother and sister of respondent, and made to feel that she was unwelcome in the home—are but mere conclusions of the pleader and not the allegation of any fact.

The chancellor overruled the demurrers, and appellant prosecutes this appeal.

Inge & McLeod, of Mobile, for appellant. Webb, McAlpine & Grove, of Mobile, for appellee.

GARDNER, J. [1] This is a bill by the wife for separate maintenance. That courts of equity exercise in this state original jurisdiction to award alimony independently of a bill for divorce was established in the early history of this court, and is of course not questioned on this appeal. *Clisby v. Clisby*, 160 Ala. 572, 49 South. 445, 135 Am. St. Rep. 110.

[2] There has existed some diversity of opinion as to whether or not the wife to sustain such a suit must necessarily establish facts sufficient to warrant a divorce. Such a view seems to be entertained by Mr. Bishop in his work on Marriage and Divorce (1 Bish. Mar. and Div. § 796). The author recognizes the rule in Alabama to be to the contrary, however. Section 797, note. And in 1 *Rul. Case Law*, § 85, p. 937, we find the following:

"Although some cases require that she establish grounds such as would entitle her to a decree of judicial separation or divorce, the preferable view appears to be that facts sufficient to show a persistent, unjustifiable course of conduct on the part of the husband rendering the wife's life miserable. Thus, where she has been unjustifiably abandoned she is entitled to alimony, even though it is not of sufficient duration to entitle her to a divorce."

This principle found application in the recent case of *Cook v. Cook*, 71 South. 986, where the separation was of only a few months' duration. It is therefore not absolutely essential for the support of a bill of this character that facts be alleged sufficient to warrant a divorce.

The question pleaded as of prime importance by counsel for appellant on this appeal relates to the equity of the bill, it being insisted that the facts set up in the bill of complaint disclosed that the husband was willing to support the wife in the home also occupied by his mother and sister, and that notwithstanding the alleged conduct of the two latter toward the wife, he owed her no further duty than to support her under that particular roof, and that her quitting it was therefore without legal excuse. It is urged as a settled rule that the husband is the head of the family, and as such has the right to select his own domicile.

[3] This general rule, so far as we have been able to discover, is universally recognized. It was given recognition by this court in the recent case of *Winkles v. Powell*, 173 Ala. 46, 55 South. 536. It is also conceded by equal weight of authority that the rule has its limitations. In *Winkles v. Powell*, supra, it was held that while the husband ordinarily has the power to select the domicile, yet this right must be reasonably and not arbitrarily exercised. No general rule can be laid down as a safe guide, but each case must be determined upon its own peculiar facts and cir-

cumstances. In the note to *Brewer v. Brewer*, 13 L. R. A. (N. S.) 222, the author thus expressed the rule:

"In considering questions of this nature, the courts confine themselves more to the determination of what is reasonable under the facts of each case than to the discussion of precedents. But it is commonly laid down as a general proposition that the power of determining where the marital domicile shall be located, or who shall be the inmates thereof, rests primarily in the husband in correlation to his duty to make provision for the wife. It is universally conceded, however, that this right must be reasonably exercised."

The *Brewer Case* bears a striking analogy to the one here under consideration, and we quote the following from the opinion:

"The husband has the right to direct the affairs of his own house, and to determine the place of the abode of the family; and it is in general the duty of the wife to submit to such determination. The right which the husband exercises in these matters is not, however, an entirely arbitrary power. He must have due regard for the welfare, comfort, and peace of mind of his wife. *Dakin v. Dakin*, 1 Neb. (Unof.) 457, 95 N. W. 781. The cases cited by the appellant establish the doctrine that a husband may not require his wife, against her will, to reside in the family of his mother, especially in a subordinate capacity. *Powell v. Powell*, 29 Vt. 149; *Shinn v. Shinn*, 51 N. J. Eq. 78, 24 Atl. 1022. Every wife is entitled to a home corresponding with the circumstances and condition of her husband, over which she shall be permitted to preside as the mistress. The defendant in this case has shown a strong sense of filial duty. This is commendable, but it must not conflict with the conjugal duty he owes to his wife. The family is the unit of the social organism, and, while the institution of new families to some extent involves the disintegration of the older household, it is absolutely necessary to continued social existence. When a man marries and founds a new family, he assumes new duties and obligations; and, when these conflict with his former ties, they must be held paramount. The very existence of the family depends upon the enforcement of this principle." 13 L. R. A. (N. S.) 226.

We do not express approval of all that was said in the above quotation, but only as to the general principle set forth. That it is correct in principle we think is supported by other authorities, as well as by common sense. This was recognized by the New Jersey Chancery Court in *Wright v. Wright*, 43 Atl. 447, by the Supreme Court of Massachusetts in *Franklin v. Franklin*, 190 Mass. 349, 77 N. E. 48, 4 L. R. A. (N. S.) 145, 5 Ann. Cas. 851, and by the Court of Appeals of Illinois in *Albee v. Albee*, 43 Ill. App. 370, affirmed by the Illinois Supreme Court, 141 Ill. 550, 31 N. E. 153. The case of *Powell v. Powell*, 29 Vt. 148, has been frequently cited, with both approval and disapproval. It is disapproved in 1 Bish. Mar. and Div. § 789, and in *Nelson's Divorce and Separation*, vol. 1, § 68. In the Vermont case the wife refused to go to the husband "to live with him near his relatives." After discussing the disquietude occasioned in the mind of the wife by close proximity to the husband's relatives and reaching the conclusion that her absence un-



der such circumstances was not a willful desertion, the court said:

"While we recognize fully the right of the husband to direct the affairs of his own house, and to determine the place of the abode of the family, and that it is in general the duty of the wife to submit to such determinations, it is still not an entirely arbitrary power which the husband exercises in these matters. He must exercise reason and discretion in regard to them. If there is any ground to conjecture that the husband requires the wife to reside where her health or her comfort will be jeopardized, or even where she seriously believes such results will follow which will almost of necessity produce the effect, and it is only upon that ground that she separates from him, the court cannot regard her desertion as continued from mere willfulness. Any man who has proper tenderness and affection for his wife would certainly not require her to reside near his relatives if her peace of mind were thereby seriously disturbed. This would be very far from compliance with the Scriptural exposition of the duty of husbands: 'For this cause shall a man leave father and mother and cleave to his wife, and they twain shall be one flesh.'"

We quote from this case because of the fact that it has excited general interest and found frequent reference in subsequent decisions, but we do not mean thus to indicate approval thereof. Indeed, we are inclined to the view that the principle there sought to be applied is too far extended. But of course no general rule would cover all cases. As was said by the Kentucky Court of Appeals in *Klein v. Klein*, 96 S. W. 848:

"It may be conceded that it is the duty of a husband to provide a comfortable home for his wife, and to surround her with agreeable associations, and to do everything within reasonable and proper limits that can be done to make her happy. The provision that the husband should make for his wife in respect to home, companions, and surroundings necessarily depends upon such a variety of circumstances involving the social standing, pecuniary condition, employment or business of the husband, and his place of residence, that no rule of general application can be laid down. Each case must be adjudged on the facts upon which it rests; what would be reasonable and proper in one might be wholly unsuitable and inadequate in another, and it is also true that, within reasonable bounds, he has the right to determine the place where he will live, and it is the duty of the wife to accept such residence and such place as the husband may, without unwarranted parsimony or stubbornness, select."

The following observations pertinent to the question here under consideration, quoted by the Supreme Court of West Virginia in *Hall v. Hall*, 69 W. Va. 175, 71 S. E. 103, 34 L. R. A. (N. S.) 758, commend themselves to the thoughtful mind in cases of this character:

"In assuming the marriage relation, it is understood that the contracting parties do so fully aware of the frailties and imperfections of human nature, and conscious of the fact that mutual forbearance must be practiced to enable them to pursue pleasantly the journey of life as companions; each party undertaking to overlook moral wrongs and infirmities in the other. The best interests of society, decency, and morality combine in demanding that the obligations taken upon themselves, by the parties who enter into the marriage contract, should not be abandoned and disregarded upon the mere whim or caprice of either party, or upon alight cause, real or imaginary."

The duty of the husband to seek reconciliation in cases of this character is fully discussed in the note to *Hill v. Hill*, 39 L. R. A. (N. S.) 1117. See, also, *Edwards v. Edwards*, 69 N. J. Eq. 522, 61 Atl. 531.

It is insisted that the bill of complaint shows no misconduct on the part of the husband himself, but only on the part of his mother and sister. As bearing particularly upon this phase of the subject attention is directed to the case of *Hall v. Hall*, 9 Or. 452, in which case the husband's children were disobedient and insulting to their stepmother, and one of them was convicted in the courts for assaulting her. The wife left the husband, insisting that she could not live in peace with his children, and he refused to provide for them elsewhere. No misconduct was charged on the part of the husband. After reviewing the evidence the court said:

"All these facts were within his knowledge, and he either could not, or would not, control his daughters, or comply with his wife's request to send them away, or make other provision for them. In our judgment, the appellant, by this course, adopted the responsibility of their misconduct towards his wife, and made their cruel and humiliating treatment his own. And we think, in connection with his own defaults in the discharge of marital duties, it was sufficient to render the respondent's life burdensome, and that there is sufficient ground to believe that such was its effect. At least, we are not satisfied to disturb the decree of the court below in the matter."

[4] In the case here under consideration the husband (according to the averments of the bill) carried his wife, contrary to his antenuptial promise, to reside in the home with his mother and sister, where it is alleged she was insulted, humiliated, and made to feel that she was not welcome, and was without any rights or authority. The wife, being in a delicate state of health and approaching travail, appealed to the respondent to remove her from her unpleasant surroundings, and in refusing her request he haughtily informed her that he held duty to his mother and sister to be above all else, and declared he would not support her if she refused to reside there with him.

As was remarked in the *Brewer Case*, supra, and applicable here, the respondent discloses a strong sense of filial duty, which is of course highly commendable, but which must not conflict with the conjugal duty which he owes his wife. He has assumed new duties and obligations, and when they conflict with his former ties the conjugal duties must be held paramount, which principle is in keeping with the Biblical injunction that the husband shall forsake father and mother and cleave to his wife.

The averments of this bill disclose the unhappiness of the wife produced by mistreatment on the part of the mother and sister of her husband. His conjugal duty seems to have been lost sight of in that which he conceives he owes his mother and sister. The wife received no sympathy or encouragement

from her husband, and no support in her effort to reconstruct and adjust their household affairs.

The cases herein cited fully support the equity of this bill, and numerous cases in point are found collected in the notes to these authorities. The same principle was recognized by this court in the case of *Brown v. Brown*, 178 Ala. 121, 59 South. 48, where the wife left her husband after living for a short time in the home with his parents. The husband sought a divorce on the ground of abandonment, and relief was denied him on the ground that the wife had not voluntarily abandoned the husband.

We have made no attempt to declare any general principles or rules, for the reason that we recognize that questions of this character present the fundamentals of society and are of the most delicate nature with which courts have to deal, and each case must rest upon its own peculiar facts and circumstances.

[5] There are assignments of error taking the point that the averments of humiliation to complainant and her unwelcomeness in the home were but conclusions of the pleader, and not the allegation of any fact. Suits of this nature are regarded as of a tripartite character, wherein the public occupies in effect the position of a third party, and the court is bound to act for the public in such cases, though of course the rights of the parties themselves must be fully respected. *Wilkinson v. Wilkinson*, 133 Ala. 381, 32 South. 124; *Powell v. Powell*, 80 Ala. 595, 1 South. 549. We apprehend, therefore, that in cases of this character questions of mere legal niceties in regard to pleading should not interfere with the meritorious consideration of the cause. The bill should of course contain sufficient averment of facts on which the suit is founded to give due notice to respondent of what he is called upon to defend.

[6] The complainant here founds her rights upon a continued misconduct on the part of respondent's mother and sister covering a period of several months and embracing such conduct as would make her feel an unwelcome guest in the home, an intruder, with no rights to exercise or privileges to enjoy. She relies upon no blow, either threatened or apprehended. The conduct on which complainant does rely may be produced not only by word of mouth in insulting language, nor by denial of the rights to which she is entitled, but by the silent shrug of the shoulder, the sneer or disdainful look, and by a haughty and unsympathetic attitude. In such a situation it is difficult to allege the facts other than in general terms, and the averments of the complainant in this case may be classed with those cases embracing the doctrine of a statement of a collective fact. This form of pleading is recognized as proper in cases of this character in *1 Nelson on Divorce*

and Separation, § 336, wherein is found the following:

"It is difficult to allege a course of ill conduct without using comprehensive terms which are apparently open to objection as being indefinite and uncertain. The rule in such cases is that where the fact is of such a nature that specific statement of it cannot be made with a reasonable number of words, a general allegation specifying the nature of the acts is sufficient."

No one can read the bill in this case without being convinced that the averments therein fully informed the respondent of what he is called upon to defend, and a more particular form of pleading would seem to call for a detailed statement as to particular parts of the evidence which it is entirely unnecessary to embrace in a bill of this character. We therefore conclude that the bill has equity, and is not subject to the demurrers interposed. The decree is accordingly affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD, SAYRE, SOMERVILLE, and THOMAS, JJ., concur. McCLELLAN, J., dissents.

(199 Ala. 309)

Ex parte SPAFFORD. (1 Div. 949.)

(Supreme Court of Alabama. Feb. 15, 1917.)

HUSBAND AND WIFE ~~§ 285~~ — SEPARATE MAINTENANCE—ALLOWANCE PENDENTE LITE—PENDENCY OF APPEAL.

The pendency of an appeal from the decree overruling a demurrer to a bill for separate maintenance does not affect the right of the chancellor in the exercise of his discretion to order the payment of alimony pendente lite to complainant.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1084-1088.]

Petition for mandamus by R. B. Spafford against the Chancellor of the Southwestern Chancery Division to have set aside an order of reference. Writ denied.

Inge & McLeod, of Mobile, for appellant. Webb, McAlpine & Grove, of Mobile, for appellee.

GARDNER, J. Petition for writ of mandamus, to be directed to the chancellor of the Southwestern chancery division, to have set aside an order of reference entered in the cause of Bernadine Spafford v. Ralph B. Spafford, 74 South. 354, pending in said court, which order of reference is for the purpose of ascertaining reasonable alimony pendente lite for complainant in said cause. Prior to the decree of reference a decree had been entered overruling demurrers to the original bill, and from such decree an appeal has been prosecuted to this court.

It is conceded by counsel for appellant, or at least it was not disputed in the argument of the cause, that the pendency of the appeal from the decree on demurrer would have no effect upon the right of the chancellor, in the exercise of his discretion, to enter an order

for the payment of alimony pendente lite to complainant. Ex parte King, 27 Ala. 387; Lawrence v. Lawrence, 141 Ala. 356, 37 South. 379.

The petition in this case rested upon the contention on the part of petitioner that the original bill in this case is without equity. The equity of the bill has been determined by this court on the appeal from the decree overruling the demurrer. We held that the bill contained equity. See Spafford v. Spafford, 74 South. 354, this day decided. It results that the writ will be denied.

Writ denied. All the Justices concur.

(199 Ala. 268)

**BIRMINGHAM RY., LIGHT & POWER CO.  
v. SLOAN. (6 Div. 164.)**

(Supreme Court of Alabama. Feb. 15, 1917.)

**1. TRIAL  $\S$  132—MISCONDUCT OF COUNSEL—  
CURE BY COURT.**

A judgment on the verdict, awarding plaintiff \$2,750 for personal injuries, will not be reversed for the improper argument of plaintiff's counsel that the jury should give \$20,000; that if they gave only \$2,000, defendant would save it in 30 days—where on defendant's objection counsel withdrew the remark, with the qualifying statement that he did not desire the case reversed on a technicality, and the court instructed the jury not to consider the remark, and where defendant requested no further action of the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 315, 316.]

**2. TRIAL  $\S$  143—TAKING CASE FROM JURY—  
EXTENT OF INJURY—WEIGHT OF TESTIMONY  
—EXPERT TESTIMONY.**

Where plaintiff testified that she received permanent injuries and injury to her eyes, it was not error to refuse requested charges that she could not recover for permanent injury or for injury to her eyesight, though the great weight of the evidence and the testimony of experts was against plaintiff, since the jury are not bound by the expert testimony, and the question is still one for their consideration, though the great weight of the testimony is on one side.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343.]

Mayfield, J., dissenting.

Appeal from City Court of Birmingham; John C. Pugh, Judge.

Action by Sallie Sloan against the Birmingham Railway, Light & Power Company, for damages for injuries resulting from a collision while she was a passenger on one of its cars. Judgment for plaintiff, and defendant appeals. Affirmed.

In his opening argument to the jury counsel for plaintiff says:

You should give \$20,000 in this case. If you give only \$2,000, they will save it in 30 days.

On objection by defendant's counsel, plaintiff's counsel said:

Gentlemen, I withdraw this remark. I do not want this case reversed on any technicality.

And thereupon the court said:

Gentlemen, you will not consider that remark.

The damages recovered were \$2,750, which counsel for appellant insists were clearly ex-

cessive and grossly so under the evidence, insisting that Dr. Lester, her former family physician, disclosed the fact in his testimony that he had performed a most serious operation on plaintiff prior to the accident for the very same troubles with which she charged defendant, and that this operation involved the removal of pus tubes, indicating a previous diseased condition of long standing, and that some three or four months before the accident she was continuously bleeding from the effects of her previous trouble, and that she was in bad condition, and refused to obey his instructions to obtain a cure.

The charges refused to defendant were:

That the jury could not award plaintiff damages for permanent injury, nor for injury to her eyes, as well as the affirmative charge as to the first and third counts, and the general affirmative charge.

Tillman, Bradley & Morrow, L. C. Leadbeater, and J. A. Simpson, all of Birmingham, for appellant. Erie Pettus and C. D. Ritter, both of Birmingham, for appellee.

SAYRE, J. [1] The argument of counsel to the jury was improper, but upon objection it was withdrawn. The withdrawal was not altogether unequivocal, and seemed by indirection to reiterate plaintiff's opinion that defendant's wealth or earning capacity should be considered by the jury in estimating the compensation to be awarded to herself; but counsel for defendant, appellant, appeared to be satisfied with the court's disposition of the matter; at least counsel invited no further action by the court. This court is unable to say that the argument was grossly improper or highly prejudicial, and in this state of the case the court is of opinion that a reversal should not be ordered. Birmingham Railway v. Gonzalez, 183 Ala. 273, 61 South. 80, Ann. Cas. 1916A, 543.

Nor is the court able to say upon the record that the jury awarded damages for an injury not counted upon in the complaint or contrary to the court's instruction. It seems likely that the jury were unduly limited by the court, and that plaintiff was entitled under the complaint to recover damages for any acceleration of her previous physical trouble that may have been caused by the wrong which is made the subject of complaint. The damages awarded are discomfortably large; but plaintiff's alleged injuries were of a character that left room for considerable diversity of opinion in respect to the proper compensation therefor, and the court, in view of plaintiff's testimony, feels its inability to interfere intelligently with the result.

[2] There was no error in the refusal of the charge requested by the defendant. The jury was not concluded by the expert testimony as to the physical consequences of plaintiff's injury. Plaintiff also testified on that subject, and it may be supposed that

she knew something whereof she spoke. By her testimony the jury were authorized to infer that her eyes had suffered some injury, and it does not support the proposition of error in the refusal of this charge to say that the great weight of the testimony was against the plaintiff. The question was still one for the jury.

The foregoing has been written in an effort to state the opinion of a majority of the court. Speaking now for himself, the writer has been inclined to discourage the recurrence of such questions by a close adherence to the course indicated by the following excerpts from our adjudicated cases:

"Nothing short of a prompt, emphatic disapproval of such line of argument, and that from the court itself, can avert the probable mischief." *Wolfe v. Minnis*, 74 Ala. 386. "The repressive powers of a court, to prevent such departures from legitimate argument of a cause before a jury, should be vigorously applied. No mere statement that it is out of order or improper can meet the exigencies of the case. Nothing short of such action on the part of the court and a clear satisfaction that the prejudice naturally excited by the use of such language had been removed from the minds of the jury ought ever to rescue a case from a new trial on motion of the party against whom rendered." *Florence Co. v. Field*, 104 Ala. 471, 16 South. 538.

While the principle of procedure is clear and undisputed, it is to be conceded that its proper application is often a matter of great delicacy and difficulty. Though at first of opinion that the judgment in this cause should be reversed, I have recognized that the question is close, and have yielded to the judgment of the majority.

Affirmed.

ANDERSON, C. J., and SOMERVILLE, GARDNER, and THOMAS, JJ., concur in the views expressed for the court. McCLELLAN, J., concurs in the conclusion. MAYFIELD, J., dissents.

(199 Ala. 231)

REYNOLDS v. WOODWARD IRON CO.  
(6 Div. 357.)

(Supreme Court of Alabama. Feb. 15, 1917.)

1. MASTER AND SERVANT — ACTIONS — EVIDENCE — SUFFICIENCY.

In an action for the death of a servant killed when he came in contact with an unguarded trolley wire in a mine, the question of the master's negligence held, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1028.]

2. MASTER AND SERVANT — NEGLIGENCE — TO SERVANT.

Under Act April 18, 1911 (Laws 1911, p. 536) § 106, declaring that whosoever shall, while under the influence of intoxicating liquor, enter any coal mine, or any of the buildings connected with the operation of the same within the state where miners or other workmen are employed, or whosoever shall carry intoxicating liquors into the same shall be deemed guilty of an offense, there can be no recovery for the death of a coal miner where on the day

of his death he entered the mine under the influence of intoxicating liquor, or carried liquor therein, and such acts proximately contributed to the injuries received by him, for the statute was enacted for the benefit of the mine owner and his employees.

3. MASTER AND SERVANT — ACTIONS — INJURIES TO SERVANT — ACTIONS — INSTRUCTIONS.

In an action for the death of a coal miner killed when he came into contact with an unguarded trolley wire, charges that, if he knew of the presence of the wire at the place where he was working, knew that he was carrying a current of electricity, and that he was liable to be injured or killed if he touched the same, but nevertheless he allowed his head to come in contact with the wire, there could be no recovery are not improper under Employers' Liability Act (Code 1907, § 3910), declaring that the master or employer is not liable if the servant or employee knew of the defect, or negligence, causing the injury and failed within a reasonable time to give information thereof, unless the master or employer already knew of such defect, or negligence, the charges not declaring that deceased's continuance at work amounted to an assumption of risk, but denying recovery only on account of negligence with knowledge of the facts.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1185.]

On Rehearing.

4. MASTER AND SERVANT — ACTIONS — INJURIES TO SERVANT — DEGREE OF CARE.

While a master is not required to use the best possible appliances in the conduct of his business, and may show that the appliances adopted and used by him were such as were used by many prudent persons engaged in the same business under like circumstances, that fact does not necessarily exempt the master from liability, and hence a charge that defendant master was not required to exercise the highest degree of care, nor to use the appliances that were in use only by those exercising a very high degree of care, the measure of duty being to use such appliances as were used by persons of ordinary care in the same business, was erroneous.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 185, 191.]

Mayfield and Sayre, JJ., dissenting.

Appeal from City Court of Birmingham; John H. Miller, Judge.

Action by Minnie Reynolds, as administratrix, against the Woodward Iron Company, for damages for the death of her intestate. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The facts, as well as some of the written charges refused to defendant, sufficiently appear. The following charges given to defendant need to be set out:

(10) If you are reasonably satisfied from the evidence that deceased knew of the presence of the trolley wire at the place where he was working, and knew that said trolley wire was carrying a current of electricity, and that if he touched the same, he was apt or liable to be injured or killed, and that nevertheless plaintiff's intestate negligently allowed his head to come in contact with said wire, as a proximate result of which he received the injuries from which he died, then you cannot find for plaintiff under the third count of the complaint.

(11) Same as 10, except that it concludes: "Then your verdict should be for defendant."

(13) If you believe from the evidence that

said trolley wire, and the fact that it was carrying a current of electricity, were open to ordinary observation, and that plaintiff's intestate knew of the location of said wire and the fact that it was carrying electricity, and that plaintiff's intestate further knew that if he came in contact with or touched said wire, he was apt or liable to be injured or killed, and that nevertheless plaintiff's intestate negligently did touch said wire, as a proximate consequence of which he received the injuries from which he died, then your verdict must be for defendant.

McQueen & Ellis and Allen, Bell & Sadler, all of Birmingham, for appellant. Cabaniss & Bowie, of Birmingham, for appellee.

THOMAS, J. Plaintiff's intestate was employed in the coal mines of the defendant company, and while so engaged met his death by coming in contact with a trolley wire, which transmitted electric current to propel the tram cars, conveying coal and timbers between the various passages in the mine and the surface. Count 1 of the complaint as amended was for failure to furnish plaintiff's intestate a reasonably safe place to work, and the second and third counts were, respectively, under the first and second subdivisions of the Employers' Liability Act (Code 1907, § 3910). The defendant replied in short by consent the "general issue, with leave to give in evidence any matter that might be specially pleaded, and with like leave to the plaintiff to give in evidence any matter that might be specially replied." There was judgment for the defendant.

[1] The evidence of plaintiff showed that the room in which deceased, John Reynolds, worked (room No. 12), was at the tenth right heading; that a tram track, over which defendant operated its cars in said business, was laid along this heading from the surface of the earth to and beyond said room; that by means of a switch situated in the heading, a car could pass along the main line into the room; that by "slewing" the front end of the car over to the right and the rear end of the car to the left, just above the switch, the flange on the front wheel would be made to catch on the track leading into room 12, and thus guide the car therein; that over the left-hand rail of the tram track (facing down the mine), and 4 feet  $7\frac{1}{2}$  inches above the rail, and about 6 inches to the left of that rail, was the trolley wire, on which moved the trolley pole of the motor by which the car was operated; that this wire carried 250 volts of electricity, alternating current, and that there were no guards over it. Plaintiff's evidence tended to show that the usual and customary way to "slew" a car into the room was for one man to stand to the front, on the left, of the car, and push the front to the right, and another man to stand to the rear, on the right, and push the rear end to the left. The evidence for the defendant tended to show that the usual and ordinary way to get the car into the plaintiff's intestate's room was to stand immediately in front of the car and slew it, and

then come around the right of the car, to the rear, to do the pushing. Defendant's evidence further tended to show that the usual, customary, and safe way, after leaving the front of the car, was to go on the opposite side (of the car) from the side on which the trolley wire was located (the side furthest from the wire); that plaintiff's intestate did not attempt to go by this way, but went by the side on which was located the trolley wire. On the occasion of the injury, deceased and Hawkins were working in room No. 12; they were needing timbers for props, which timbers had been loaded on a tram car, and the car brought and stopped, as required, above said switch leading into their room. It was then the duty of deceased and Hawkins to slew the car and push it into their room. Plaintiff's account of the conduct of deceased immediately before, and when injured, was that:

"Deceased went to the immediate front of the car, and John Hawkins had hold of the right-hand rear bumper, and in such positions they slewed the car in position to be pushed into room No. 12, and to assist in the pushing of the car deceased quit his position at the front of the car and walked around the left of the car on the side where the trolley wire was, and after he had about reached the left rear bumper \* \* \* and was crossing under the trolley wire, his head came in contact with the trolley wire," and he was killed.

Defendant's version of how the injury occurred was that after leaving the front end of the car, deceased went on the wrong side of the car, thereby having to pass in close proximity to the trolley wire; that just as he passed under the wire, after he had reached the rear end of the car, he raised his head and struck the wire, and was killed; that some hours before intestate was killed "he had drunk some whisky, which he had carried into the mine with him, and felt a little happier than usual, but continued his work in the regular way." The evidence was in conflict as to whether the mine inspector had called the attention of the defendant's mine superintendent to the fact that the wire was dangerous in its then condition. It is without dispute, however, that at least two coal mining companies in the Birmingham district had provided shields for trolley wires situated as was the one complained of, though there were many well-conducted coal mines operated in that district that had and maintained wires "in the same manner and under the same conditions as the wire" that caused deceased's death; that is to say, without guards over or along the trolley wire to prevent contact therewith. There was no evidence that deceased informed defendant of the condition of said trolley wire. But the evidence showed that the defendant knew of its condition, having installed the wire some weeks previously, and that it was in the same condition when deceased was killed that it was in when installed. The evidence further showed that it was not the duty of the deceased to repair or remedy any defec-

tive condition of the trolley wire, and that he did not cause the condition in which the wire was installed, or in which it was maintained at the time of his death. The location of the wire was open to ordinary observation; and the fact that it carried a current of electricity, and that any one who touched the wire would receive an electric shock and be injured, was generally known and understood by the men working in the mine. The several charges given at defendant's request are assigned as error. Under the evidence the question of liability *vel non* was properly submitted to the jury.

While the master is not required to use the best possible appliances in the conduct of his business, and he may show that the appliances adopted and used by him are such as are adopted and used by many prudent persons engaged in the same business under like circumstances, "yet this fact does not necessarily exempt the employer from liability. Prudent persons may do imprudent things and may fall to use proper appliances." *Prattville Cotton Mills Co. v. McKinney*, 178 Ala. 554, 568, 59 South. 498, 502; *Davis v. Kornman*, 141 Ala. 479, 37 South. 789; *L. & N. R. R. Co. v. Allen's Adm'r*, 78 Ala. 494; 6 Mayf. Dig. 585; *Hough v. Railroad*, 100 U. S. 213, 25 L. Ed. 612; *Wabash R. R. Co. v. McDaniels*, 107 U. S. 459, 2 Sup. Ct. 932, 27 L. Ed. 605. In the *Allen Case*, supra, the court said 78 Ala. 503:

"We conceive the correct and just rule to be that a railroad company's duty to its employees does not require it to adopt every new invention or appliance useful in its business, although it may serve to diminish risks to life, limb, or property, incident to its service. It is sufficient fulfillment of duty to adopt such as are ordinarily in use, by prudently conducted roads engaged in like business, and surrounded by like circumstances."

Likewise in *Richmond & Danville Railroad Co. v. Bivins*, 103 Ala. 147, 15 South. 515, it was declared that:

"It is regarded as a sufficient fulfillment of the company's duty, to adopt such [machinery] as is in ordinary use by prudently conducted roads, engaged in like business and surrounded by like circumstances." *Wilson v. L. & N. R. R. Co.*, 85 Ala. 272, 4 South. 701; *L. & N. R. R. Co. v. Jones*, 83 Ala. 382, 3 South. 902; *Ga. Pac. R. R. Co. v. Propst*, 83 Ala. 518, 3 South. 764; *R. & D. R. R. Co. v. Jones*, 92 Ala. 225, 9 South. 276; *L. & N. R. R. Co. v. Hall*, 87 Ala. 719, 6 South. 277, 4 L. R. A. 710, 13 Am. St. Rep. 84; *A. G. S. R. R. Co. v. Arnold*, 84 Ala. 171, 4 South. 359, 5 Am. St. Rep. 354.

Of the rule, thus early announced by our court in the *Allen* and *Propst Cases*, Chief Justice Anderson said (*Caldwell-Watson Co. v. Watson*, 183 Ala. 334, 335, 62 South. 859, 863):

"We think the holding means, where evidence is shown that the ways and works of the defendant are unsafe, or insufficient, that proof that similar instruments are generally used by other prudent persons engaged in similar calling is evidence in rebuttal, and might influence the jury in holding that there was no negligence, but such proof would not, as matter of law, conclusively show that there was no negli-

gence in the selection or use of such machinery or instrumentality."

The charges condemned in *Caldwell-Watson Co. v. Watson*, supra, and *Davis v. Kornman*, supra, were different in effect from charges 22 and 26, given in the instant case at defendant's request, and no error was committed in giving these charges.

[2] Charge 21 is as follows:

"If the jury believe from the evidence that plaintiff's intestate on the day of his death entered into defendant's mine while under the influence of intoxicating liquor, or carried intoxicating liquors into the mine, and that by so doing said intestate proximately contributed to the injuries sustained by him, you must find for the defendant."

By section 106 of the act of April 18, 1911, it is provided that:

"Whoever shall, while under the influence of intoxicating liquor, enter any coal mine, or any of the buildings connected with the operation of the same, within this state, where miners or other workmen are employed, or whoever shall carry intoxicating liquors into the same, shall be deemed guilty of an offense against this act, and upon conviction shall be punished accordingly." Gen. Acts 1911, pp. 500, 536.

The evidence was undisputed that plaintiff's intestate did go into defendant's mine, where other workmen were employed, in this state, under the influence of intoxicating liquor. Intestate was therefore guilty of violating this provision of the act in question. If this violation of the statute proximately caused, or was a contributing cause of, the injury complained of, why may not such violation of the act be pleaded as contributory negligence?

In *Watts v. Montgomery Traction Company*, 175 Ala. 102, 57 South. 471, it was held that the violation of a statute or of an ordinance is negligence per se, and that a person proximately injured thereby may recover for such injuries, against the violator of the ordinance. On the question now before us the court said:

"We are not cited to and have found no Alabama case where the violation of a statute or ordinance by the injured party was pleaded by the defendant by way of contributory negligence, yet we see no reason why such a violation, if proximately causing the injury complained of, cannot be set up as a defense to the simple negligence charged in the complaint. Such a defense has been approved, and we think properly so, in the cases of *Broschurt v. Tuttle*, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33; *Weller v. Chicago R. R.*, 120 Mo. 635, 23 S. W. 1061 [25 S. W. 532]. The statute or ordinance violated, however, must have been enacted for the benefit of the party who seeks to invoke its violation as distinguished from the public generally or a class to whom the ordinance necessarily applies." *L. & N. R. R. Co. v. Murphree*, 129 Ala. 432, 29 South. 592; *Cent. of Ga. Ry. Co. v. Sturgis*, 149 Ala. 573, 43 South. 96.

This doctrine was approved in *Armstrong v. Sellers*, 182 Ala. 582, 62 South. 28.

The statute violated in the instant case, making it a misdemeanor to enter any coal mine under the influence of liquor, or to carry intoxicating liquors into the same, was enacted for the benefit of the mine owner and

of his employ  , as distinguished from the public generally. This statute may therefore be invoked as a defense to the charge of simple negligence, if its violation proximately caused the injury complained of. This issue was properly submitted to the jury in given charge 21.

[3] Assignments of error 4, 5, and 6 are based on the giving, at defendant's request, of written charges 10, 11, and 13. In *Burnwell Coal Company v. Setzer*, 191 Ala. 398, 405, 67 South. 604, 606, it is said, of the concluding words of section 3910 of the Code (page 602), that:

"The only effect of the addition [there italicized] to the statute was to remove as a basis of *assumption of risk* and of *contributory negligence* on the part of an employ  , in respect of a defective condition within the purview of the first subdivision of the Liability Act (section 3910), the remaining in service after knowledge by the employ  , injured in consequence of the defect in condition to which the complaint or a count thereof attributed the injury for proximate cause, of the defect in condition of the ways, works, machinery, or plant of the master, except in cases where the employ   injured was under the duty to remedy the defect causing his injury, or where the employ   injured committed the negligent act causing the injury complained of."

See, also; on this statute *Standard Portland Cement Company v. Thompson*, 191 Ala. 444, 67 South. 608; *Clinton Miping Co. v. Bradford*, 192 Ala. 576, 69 South. 4; *Sloss-Sheffield Co. v. Stapp*, 70 South. 267; *A. G. S. R. R. Co. v. Taylor*, 71 South. 676.

The effect of the proviso to section 3910 is to relieve the servant from the imputation of contributory negligence or assumption of risk predicated on the fact of his remaining in the service after knowledge of the defect or negligence, in an action by an employ   who did not commit the negligent act causing the injury, and upon whom the duty to remedy the defect did not rest; but it does not relieve such employ   of the duty to give information of such defect or negligence, when he knows of it and the master or superior employer has no notice or knowledge thereof.

Given charges 10, 11, and 13 were not predicated upon plaintiff's intestate's assumption of risk, nor upon his contributory negligence *in remaining in the employment of the defendant after knowledge of the defect or negligence* that subsequently caused his death, but upon the fact that, with full knowledge of the situation (of the danger of coming in contact with the trolley wire charged with electric current), he negligently touched the same or allowed his head to come in contact therewith, thereby receiving his fatal injury.

Under the issues presented, and the evidence thereon, these charges were properly given at defendant's request.

The judgment of the lower court is affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

On Rehearing.

THOMAS, J. [4] The majority of the court are of the opinion that reversible error was committed in the giving by the trial court of the defendant's written charge 26; that the charge was contrary to the rule declared in the cases of *Davis v. Kornman*; *Prattville Cotton Mills Co. v. McKinney*, and *Caldwell-Watson Co. v. Watson*, supra. See, also, discussion of the question in *Wilita v. Interstate Iron Co.*, 103 Minn. 303, 115 N. W. 169, 16 L. R. A. (N. S.) 134.

The application for a rehearing is granted. The judgment of affirmance heretofore rendered in this court is set aside and vacated, and the judgment of the city court of Birmingham is reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN, SOMERVILLE, GARDNER, and THOMAS, JJ., concur. MAYFIELD and SAYRE, JJ., dissent.

MAYFIELD, J. I dissent for the reason that I believe the court has either misread or misconstrued a charge held bad. This charge reads as follows:

"(26) The defendant was not required to exercise the highest degree of care, nor to use the appliances that were in use by only those exercising a very high degree of care. The measure of duty that defendant owed to plaintiff's intestate was to use such appliances as were used by persons of ordinary care and prudence in the same line of business."

This charge is not only practically, but literally, taken from the law books on the subject; and all the law books, English and American, that have written on the subject, coincide to the soundness of such an instruction. Our own reports contain charges couched in the exact language used in the charge in question, and in the decisions these are held to state correctly the law on the subject. How is it, then, that it was error to give the charge here under consideration? Even if abstract, it would not have been reversible error to give it.

This was an action by a servant against his master for injuries received, alleged to have been in consequence of unsafe ways, works, machinery, or appliances; hence I do not see how the charge can be abstract. If the instruction had been of the nature or character of those which requested or authorized a finding one way or the other, provided the master had used the diligence or care required of him in the instruction, then it might have been misleading, or even erroneous; but it did not do this, neither does it belong to that class of charges or instructions. It belongs to that class of charges which merely states propositions of law ap-

plicable to the case on trial. In this case the jury might believe that the master, the defendant, had complied with the law as stated in this charge—and, for that matter, in all the law books on the subject of the propositions stated in the charge—and yet believe and find for the plaintiff. The charge gives no intimation to the jury as to how they should find touching this proposition or any other involved in the case. The authorities on the subject, cited in the opinion in this case, and all the text-books dealing with the subject, will show that this charge asserts a correct proposition of law, and that it is literally taken from the books, if you change the words "plaintiff" and "defendant" to "servant" and "master," or "employee" and "employer," respectively, where they occur. I have never before seen the law stated in this charge as I read it doubted or criticized, much less held to be erroneous.

(199 Ala. 280)

**BOARD OF REVENUE OF JEFFERSON COUNTY v. STATE ex rel. WILEY.**  
(6 Div. 512.)

(Supreme Court of Alabama. Feb. 15, 1917.)

**CONSTITUTIONAL LAW** §213—CORONERS §3½—EQUAL PROTECTION OF LAW — QUALIFICATIONS—STATUTE—VALIDITY.

The provision of Acts 1915, p. 858, that a person elected coroner must be a practicing physician in good standing is not unconstitutional as denying equal protection of law.

[Ed. Note.—For other cases, see Coroners, Cent. Dig. §§ 2, 29.]

Appeal from Circuit Court, Jefferson County; H. A. Sharpe, Judge.

Action by the state, on relation of C. C. Wiley, against the Board of Revenue of Jefferson County. Judgment for the relator, and defendant appeals. Affirmed.

W. K. Terry and Richard H. Fries, both of Birmingham, for appellant. London, Yancey & Brower, of Birmingham, for appellee.

ANDERSON, C. J. The sole question argued for decision upon this appeal is the constitutionality vel non of Acts 1915, p. 858, prescribing the qualifications of coroners in counties there provided, and upon the ground that that part of the act prescribing that the person elected must be a practicing physician in good standing denies equal protection of the law, and falls within the influence of the case of *Kentz v. City of Mobile*, 120 Ala. 634, 24 South. 952. We think that the qualification fixed by the act is sanctioned by this court in the case of *Finklea v. Farish*, 160 Ala. 230, 49 South. 366, and which said case was reaffirmed in the case of *State ex rel. Brassell v. Teasley*, 194 Ala. 574, 69 South. 723, wherein it was pointed out that the case of *Kentz v. Mobile*, supra, and *Dorsey's Case*, 7 Port. 293, were not opposed thereto, as they dealt with a section, or clause, of

previous Constitutions which had been omitted from the Constitution of 1901.

The judgment of the circuit court is affirmed.

Affirmed.

McCLELLAN, SAYRE, and THOMAS, JJ., concur.

(199 Ala. 275)

**RICHARDSON et al. v. N. N. & T. J. POWELL.** (1 Div. 880.)

(Supreme Court of Alabama. Feb. 8, 1917.)

**1. APPEAL AND ERROR** §361(3)—TRANSCRIPT—PARTIES APPEALING — SUFFICIENCY OF SHOWING.

A formal application for an appeal in the name of the respondents in the case and the register's certificate that the first-named respondent "et als." applied for and took an appeal sufficiently shows that the appeal was taken on behalf of all respondents, though the security for costs was not signed by all.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1942, 1944.]

**2. APPEAL AND ERROR** §493—JURISDICTION OF APPELLATE COURT — ORGANIZATION OF COURT BELOW.

The jurisdiction of the Supreme Court depends upon an affirmative showing in the transcript that the judgment from which the appeal was taken was rendered by a court organized according to law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2282-2284.]

**3. APPEAL AND ERROR** §493—TRANSCRIPT—ORGANIZATION OF LOWER COURT.

A caption as follows: "A transcript of the records in a certain cause pending in the circuit court" of a named county of the state, taken in connection with the certificate of appeal, which recited that the register in chancery thereby certified that in the above-entitled cause a decree was rendered by the chancery court in that county, though informal, sufficiently shows the organization of the lower court to warrant a consideration of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2282-2284.]

**4. JUDGMENT** §743(2) — CONCLUSIVENESS—PARTICULAR PROCEEDINGS.

A judgment in ejectment in favor of some of the respondents and against the complainants in a subsequent bill for partition is conclusive in favor of those respondents.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1253, 1276, 1284.]

**5. PARTITION** §55(2)—BILL—TITLE OF COMPLAINANTS.

A bill in equity for partition need not set out the evidences of title under which complainants claim interest in the property.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 150, 152-156, 158.]

Appeal from Chancery Court, Washington County; Thomas H. Smith, Chancellor.

Bill for partition by N. N. & T. J. Powell against A. G. Richardson and others. Decree for complainants, and respondents appeal. Reversed and remanded.

The caption is as follows:

A transcript of the record and proceeding had in a certain cause pending in the circuit court of Washington county, state of Alabama, there-



in lately pending, wherein N. N. and T. J. Powell were complainants and A. G. Richardson and others were defendants.

The original bill and summons was:

N. N. and T. J. Powell v. A. G. Richardson et al., Chancery Court, Washington County, Ala.

The certificate of appeal is:

I, C. E. Pelham, register in chancery, in and for Washington county, state of Alabama, do hereby certify that in the above-entitled cause a decree was rendered by the chancery court in and for Washington county, state of Alabama, in favor of N. N. and T. J. Powell, and against A. G. Richardson and others, on December 3, 1914, for a partition of the land as prayed for in the bill, besides the cost of the court, and that on December 14, 1914, A. G. Richardson and others applied for and took an appeal from said decree, and gave an appeal bond with A. G. Richardson and W. H. Richardson and John A. Richardson as sureties, etc.

The land sought to be partitioned were lots 8, 9, 13, 14, and 15, section 28, T. 6 N., R. 1 E., containing 92 $\frac{2}{100}$  acres. Respondents named were: A. G., H. L., H. B., J. L., John A., C. C. and F. M. Richardson, O. N. Onderdonk, and L. E. Lane. H. B. Richardson was afterwards excluded, and W. H. Richardson was substituted as a party respondent. It appeared from the testimony of T. J. Powell that he and his brother brought an ejectment suit in the circuit court of Washington county against A. G. Richardson and others, and that judgment was rendered for defendants in that case. It seems that the ejectment suit was on behalf of A. G., W. H., Joe L., H. L., C. C., and F. M. Richardson, Ora Onderdonk, and L. E. Lane, and against N. N. and T. J. Powell, and after judgment was rendered for plaintiff, an agreement was entered into by which defendants were allowed to remain in possession of that portion of the land now in the actual possession of defendant, and shall pay plaintiff therefor the sum of \$2 per acre as rent for so much of the land as may be cultivated by them. The lands sought to be recovered in the ejectment suit were the lands above described.

Joe M. Pelham, Jr., of Chatom, for appellants. John S. Graham, of Jackson, and Wm. D. Dunn, of Grove Hill, for appellees.

SAYRE, J. The brief for appellees insists that the appeal should be dismissed for that the transcript fails to show that all the defendants joined in the appeal, nor does it appear that those not joining have been brought in as provided by the statute or the rule of practice for such cases made and provided. The motion to dismiss the appeal on the ground above specified has not been spread upon the motion docket as required by rule 16 (Code, p. 1509), but the submission on the motion has been received nevertheless and will be considered.

[1] The motion is based upon the fact that the security for the costs of appeal is not signed by all the appellants. The security has been approved as sufficient by the register. It was not necessary that all the defend-

ants should join in its execution. Indeed, some of the appellants are minors. The fact that the appeal was taken in the name and on behalf of all the defendants is evidenced by the formal application for an appeal in the name of "the respondents in the case," and by the register's certificate that "A. G. Richardson et als. applied for and took an appeal."

[2, 3] It is further suggested in the brief that the organization of the court below is not shown by the transcript. This court's jurisdiction depends upon the affirmative appearance in the transcript of the fact that the judgment from which the appeal it taken was rendered by a court organized according to law. *Pensacola, A. & W. Ry. Co. v. Big Sandy Iron Co.*, 147 Ala. 274, 41 South. 418. The caption of the proceedings shown by the transcript is informal to a degree, but our judgment is that, in connection with the certificate of appeal, it shows enough to warrant our consideration of the appeal. It may be noted that amended rule 26 (175 Ala. xix, 61 South. vii) does not apply to transcripts in equity cases.

[4] Defendants pleaded and the proof showed that a judgment in ejectment had been rendered in favor of some of them against the complainants in this bill. Under previous rulings of this court this judgment should have concluded the cause in favor of those defendants who were parties to the action at law. *Coleman v. Stewart*, 170 Ala. 255, 53 South. 1020; *Robinson v. Inzer*, 70 South. 717. The failure to observe this rule must result in a reversal of the decree.

[5] The court is of opinion that *Foster v. Ballentine*, 126 Ala. 394, 28 South. 529, lays down the correct rule in regard to the averment of complainants' title in a case of this character. We do not construe *Berry v. T. & C. R. R. Co.*, 134 Ala. 618, 33 South. 8, as holding anything to the contrary of *Foster v. Ballentine*, nor as holding that it is necessary in any case that the complainant in a bill for partition should set out the evidence of the title under which he claims an interest. Some observations to be found in *Berry v. T. & C. R. R. Co.*, and supposed to be influential in this case, are to be explained by the fact that the court was dealing with a case in which, under the law in respect of conveyance of property adversely held as it then was, complainant could not aver title, for it had conveyed its title. Nevertheless complainant in that case was entitled to maintain the suit for the use of its alienee.

We call attention to the fact that the transcript is not prefaced by an index of its contents as required by Supreme Court Rule 26, Code, p. 1512.

For the error indicated above the decree is reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, C. J., and McOLELLAN and GARDNER, JJ., concur.

(199 Ala. 265)

Ex parte STATE.

JOHNSON v. STATE.

(6 Div. 409.)

(Supreme Court of Alabama. Dec. 21, 1916.  
Rehearing Denied Feb. 15, 1917.)WITNESSES  $\S$ 345(2) — BIAS — CROSS-EXAMINATION.

In a prosecution for violating the prohibition law, the trial judge properly allowed a witness to be interrogated on cross-examination as to his own repeated commission of the same offense.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig.  $\S$  1126.]

Sayre, J., dissenting.

Certiorari to Court of Appeals.

G. O. Johnson was convicted of violating the prohibition law, and he appealed to the Court of Appeals, which reversed and remanded (72 South. 561), and the State petitions for certiorari. Writ granted, and judgment of the Court of Appeals reversed.

W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State. L. D. Gray, of Jasper, for appellee.

THOMAS, J. One Johnson was convicted of violating the prohibition law. On the trial the defense introduced a witness who testified to defendant's good character. On the cross-examination of this witness, over the objection and exception of the defendant, the state's counsel was permitted to ask the witness if he had not been recently convicted of the offense for which the defendant was on trial. The witness answered: "Twice—city court and circuit court." For this ruling the Court of Appeals has reversed the trial court and remanded the cause.

1. The latitude allowed upon the cross-examination of a character witness was considered by this court in *Carson v. State*, 128 Ala. 60, 29 South. 609, where the rule was thus stated:

"Much latitude is allowed upon cross-examination of a witness as to character, even sometimes to the extent, within the sound discretion of the trial court, of asking questions which may call for irrelevant evidence. This for the purpose of testing the accuracy, credibility and sincerity of the witness. As to how a witness makes up his estimate of character is a proper subject of inquiry upon cross-examination."

In *Cox v. State*, 162 Ala. 68, 50 South. 399, Chief Justice Dowdell again said:

"A wider latitude is allowable on the cross, than upon the direct, examination of a witness. It is permissible upon a cross-examination, for the purpose of testing the memory, sincerity, etc., of the witness, to interrogate him as to matters wholly irrelevant to the issue in the case. The latitude and extent of such cross-examination, however, is a matter that must, of necessity, rest largely, if not exclusively, within the sound discretion of the trial court, and, so long as that discretion is not abused, the action of the trial court will not be revised on appeal."

This court is committed to the doctrine that the trial court will not be reversed, ex-

cept in an extreme case of abuse of this discretion, for permitting the cross-examination of a witness on irrelevant and immaterial matters, to test his memory or accuracy, credibility, interest, or sincerity; interpreting the tendency of modern practice to be favorable to great latitude in this regard. *Marler v. State*, 68 Ala. 530; *Cox v. State*, supra; *Ingram v. State*, 67 Ala. 67; *Burger v. State*, 83 Ala. 36, 3 South. 319; *Lowman v. State*, 161 Ala. 47, 50 South. 43. It is evident that in this cross-examination there was no abuse of discretion by the trial court.

2. The testimony was admissible as having a tendency to show the bias or interest of the witness in favor of the cause or the person on trial. *Underhill on Cir. Ev.*  $\S$  222; *Cook v. State*, 152 Ala. 66, 44 South. 549; *Patton v. State*, 72 South. 401; *Bullington v. State*, 13 Ala. App. 61, 69 South. 319. In *McCormack v. State*, 133 Ala. 202, 207, 32 South. 268, 269, the court said:

"The interest of a witness in the cause may always be shown as affecting the credibility of his testimony. It was doubtless upon this theory that the solicitor was permitted on cross-examination of Woodward, the proprietor of the Palace Saloon and the employer of the defendant, to ask him if a prosecution was not pending against him for the same offense."

Mr. Wigmore defines three different kinds of emotion constituting untrustworthy partiality, viz.:

"Bias, interest, and corruption. Bias, in common acceptance, covers all varieties of hostility or prejudice against the opponent personally, or of favor to the proponent personally. Interest signifies the specific inclination which is apt to be produced by the relation between the witness and the cause at issue."

In 40 Cyc. 2658, the text laying down that "a mere interest in the question involved in a suit may affect the credibility of a witness, although he has no interest in the event of that particular suit," is supported by authority. In the case of *Dodge v. Hedden* (C. C.) 42 Fed. 446, it was held that:

"In weighing the testimony of witnesses as to trade usage, the jury should consider the extent to which any of the witnesses may have an interest in the result of the litigation which might color their evidence."

So, also, independently of any prejudice or feeling as to the parties, the feeling of a witness in respect to the case which is being tried may be brought out to affect his credibility. *State v. Sam*, 53 N. C. 150; *Cambels v. Third Ave. R. Co.*, 1 Misc. Rep. 158, 20 N. Y. Supp. 633.

The application of this principle has found illustration in this state. In *Prince v. State*, 100 Ala. 144, 14 South. 409, 46 Am. St. Rep. 28, it was held to be error for the trial court to sustain an objection to the question propounded on cross-examination to the state's witnesses:

"State whether the company you are working for is taking any interest in the prosecution of the defendant."

The court said:

"In weighing testimony the jury ought to be in possession of all facts calculated to exert any influence upon the witness. It cannot be said as a conclusion of law that an employé testifying in a matter in which he knows his employer is interested personally, or pecuniarily, is, or is not, wholly unbiased. It is proper for the jury to know the character of the interest of the employer, how it is to be affected, and in what way it is manifested. An employer may act from a sense of public duty, or be interested in seeing that another has a fair trial; or it may be that he is actuated by pecuniary interest, or a spirit of revenge, or vindictiveness, and may use his position as employer to bias the evidence of his employé. We think it safe to hold that when an employé is testifying, it may be shown that his employer is interested in the prosecution." *Harrison v. State*, 12 Ala. App. 284, 68 South. 532.

In *Mason v. State*, 12 Ala. App. 227, 67 South. 715, it was held proper to show on cross-examination of a witness for the accused that the witness had worked for the defendant's father, on the ground that this was within the rule admitting such evidence to show bias. In the case of *Drum v. Harrison*, 83 Ala. 386, 3 South. 715, it was held proper to show that the witness had been sued in another action, by the plaintiff, for a part of the property included in the same mortgage that was being attacked in that suit. *Wilkerson v. State*, 140 Ala. 165, 37 South. 265; *Clifton v. State*, 73 Ala. 473. In *Lodge v. State*, 122 Ala. 98, 26 South. 210, 52 Am. St. Rep. 23, it was held that it may be shown that the father or mother of the witness harbored ill will towards the defendant, which was known to the witness, as tending to affect his credibility. For the like reason it was permitted to be shown that the witness' father had been in the employment of the defendant's father, in the case of *Long v. Boone*, 106 Ala. 570, 580, 17 South. 716, 719. Chief Justice McClellan said:

"His credibility was sharply in issue before the jury. It was, we think, within the discretion of the trial court to allow the plaintiff to draw from him on cross-examination the fact that his father had been in the employment of the defendant's father, he having testified for the defense. The matter was before the court below upon the manner of the witness in a much fuller light than it could be presented here, and we are not prepared to say but that the fact thus adduced tended to show relations between the families of the witness and defendant, when taken in connection with the witness' demeanor on the stand, from which the jury might have inferred a bias on the witness' part in favor of the defendant. The matter was in the discretion of the city court. *Miller v. Smith*, 112 Mass. 470; *Commonwealth v. Lyden*, 113 Mass. 452; *Amos v. State*, 96 Ala. 120, 125 [11 South. 424]; *Phoenix Insurance Co. v. Copeland*, 86 Ala. 551, 558 [6 South. 143, 4 L. R. A. 848]."

So in *Stahmer v. State*, 125 Ala. 72, 27 South. 311, a proceeding to raise the assessment of property for taxation, it was held that, where a witness for the taxpayer testified that the value of the property was less than its assessed value, it was competent for such witness to be asked, upon cross-examination, whether or not the assessment of his property had been raised, in order to

show bias on the part of the witness. His social and business relations with the party, his intimacy or hostility, and such other circumstances as might create bias, may properly be considered. 5 Jones, Ev. §§ 828, 901; *McLaughlin v. Mencke*, 80 Md. 83, 30 Atl. 603; *Magness v. State*, 67 Ark. 598, 50 S. W. 554, 59 S. W. 529; 2 Ency. of Ev. 407. See, also, *Phillips v. State*, 161 Ala. 60, 49 South. 794; *Gosdin v. Williams et al.*, 151 Ala. 592, 44 South. 611; *Kelly v. State*, 2 Ala. App. 103, 57 South. 78; *Patton v. State*, 72 South. 401; *Shepherd v. Butcher Tool & Hardw. Co.*, 73 South. 498; *Nashville, C. & St. L. Railway v. Crosby*, 183 Ala. 237, 62 South. 889. Generally, the moving circumstances which might impel the witness to swear falsely may form the subject of inquiry. *Hicklin v. Territory*, 9 Ariz. 184, 80 Pac. 340; *Crook v. Int. Trust Co.*, 32 App. D. C. 490; *Breckenridge v. Commonwealth*, 97 Ky. 267, 30 S. W. 634; *State v. Johnson*, 48 La. Ann. 437, 19 South. 476; *Styles v. Decatur*, 131 Mich. 443, 91 N. W. 622; *State v. Phillips*, 105 Minn. 375, 117 N. W. 508; *Gallick v. Bordeaux*, 22 Mont. 470, 56 Pac. 961; *Blenkiron v. State*, 40 Neb. 11, 58 N. W. 587; *Rossenbach v. Supreme Court, etc.*, 184 N. Y. 92, 76 N. E. 1085.

In the instant case, the testimony that the witness had been recently twice convicted of a like offense to the one for which the defendant was on trial not only illustrated his estimate of the character of the defendant, but also tended to show a possible bias or interest on the part of the witness for the cause or offense for which the defendant was being prosecuted.

There was error in the reversal of the judgment of the trial court. Let the writ be granted, and the judgment of the Court of Appeals be reversed.

MCCLELLAN and MAYFIELD, JJ., concur in the opinion and result. ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur in the result only. SAYRE, J., dissents.

SOMERVILLE, J. (concurring). It was of course not competent to impeach the character of defendant's character witness by showing that he had been convicted of violations of the prohibition law, since, as properly held by the Court of Appeals, that kind of crime does not involve moral turpitude. Nor do I think that the fact of such convictions could be shown for any purpose, except on cross-examination, as in the instant case.

But, as illustrative of the mental and moral attitude of the witness towards the offense for which the defendant was on trial, and so, as suggestive of his possible or probable bias against the state in this particular case, I think the trial judge cannot be put in error for allowing him to be interrogated on cross-examination as to his own repeated commission of the same offense. It fairly

permits an inference of bias, of more or less value according to appearances that may be presented to the judge and jury, but not revealed to or cognizable by an appellate court; and hence it cannot be affirmed that its admission was an abuse of the broad discretion that may be exercised by the trial judge. As said by Mr. Wigmore:

"The range of external circumstances from which probable bias may be inferred is infinite. Too much refinement in analyzing their probable effect is out of place. Accurate concrete rules are almost impossible to formulate, and where possible are usually undesirable. In general these circumstances should have some clearly apparent force, as tested by experience of human nature, or, as usually put, they should not be too remote." 2 Wigmore on Ev. § 949.

The case of *Stahmer v. State*, 125 Ala. 72, 76, 27 South. 311, referred to in the opinion of Justice THOMAS, exhibits an application of the rule in question which, in my opinion, cannot be distinguished from the circumstances of the instant case.

For these reasons, I concur in the conclusion that the action of the trial judge was not revisable or reversible error, and that the judgment of conviction should, as for this ruling, have been affirmed.

ANDERSON, C. J., and GARDNER, J., concur in the foregoing views.

(199 Ala. 310)

WALKER, Superintendent of Banks, et al. v. BAKER. (3 Div. 275.)

(Supreme Court of Alabama. Feb. 8, 1917.)

1. ACKNOWLEDGMENT §20(3) — MORTGAGE — CAPACITY OF OFFICER.

A mortgage of the homestead to a bank, the wife's separate acknowledgment of which was taken by an officer and stockholder of the bank, is invalid against direct attack.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 108-110.]

2. CANCELLATION OF INSTRUMENTS §24(2) — OFFER TO DO EQUITY — PRE-EXISTING INDEBTEDNESS.

A mortgagor can maintain a suit in equity to cancel an invalid mortgage given to pay a pre-existing indebtedness without offering to pay such indebtedness.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 34-38.]

Appeal from Chancery Court, Escambia County; Oscar S. Lewis, Chancellor.

Suit by J. W. Baker against A. E. Walker, as Superintendent of Banks, and another. Decree for complainant, and defendant Walker appeals. Affirmed.

Bill by appellee against A. E. Walker, as superintendent of banks, and the People's Bank & Trust Company of Atmore, Ala., seeking to have canceled as a cloud on title a mortgage and foreclosure deed executed by complainant and his wife to the said bank and trust company. The bill shows that on January 12, 1914, complainant owned and occupied as a homestead the real estate in the town of Atmore described in the bill, and

that he is still in possession of said property as his home; that on the above-named date he and his wife, Rebecca Baker, made a mortgage to the Peoples' Bank & Trust Company (a copy of which is made an exhibit to the bill), and that the acknowledgment to same was taken by one Lamont, a notary public in Escambia county, who was an officer and stockholder in said bank, which fact it is alleged makes the mortgage illegal and void. It is further alleged that at the time of the execution of the mortgage no money was advanced by said bank to complainant, but the mortgage was to secure a past-due indebtedness in the sum of \$600. The bill then shows the insolvency of said banking company, alleging that its affairs had been transferred to the superintendent of banks, and are now in course of liquidation in all respects as provided by law, and that said superintendent foreclosed the mortgage under the power of sale therein contained, advertised the property for sale, bid it in himself for the state, and had deed executed to him as state superintendent of Banks. The demurrer to the bill takes the point that there is no equity in the bill, and that complainant does not offer to do equity by repaying the amount of said indebtedness. The demurrer was overruled, and from this decree the appeal is prosecuted; leave of the chancellor having been obtained by the superintendent of banks to prosecute this appeal.

Page & McMillan, of Brewton, for appellant. Powell & Hamilton, of Greenville, and John D. Leigh, of Brewton, for appellee.

GARDNER, J. [1] The bill in this case shows that the separate acknowledgment of the wife to the mortgage sought to be canceled as a cloud on title was taken by one who was an officer and stockholder of the corporation to which the mortgage was executed. It has been held by this court that on direct attack such a mortgage will be declared invalid. *Hayes v. So. B. & L. Ass'n*, 124 Ala. 663, 26 South. 527, 82 Am. St. Rep. 216.

[2] It is also well settled that as a general rule one seeking the cancellation of such a conveyance as a cloud on title will be required, under the maxim that "he who seeks equity must do equity," to return any money advanced or paid upon the faith thereof. *Grider v. Am. Freehold L. & M. Co.*, 99 Ala. 281, 12 South. 775, 42 Am. St. Rep. 58. Many authorities recognizing this equitable maxim are cited in the recent case of *Coburn v. Coke*, 193 Ala. 364, 69 South. 574. The bill in this case, however, specifically alleges that at the time of the execution of the mortgage no money was advanced, but that the mortgage was given to secure a past-due indebtedness. In the case of *Jenkins v. Jonas Schwab*, 138 Ala. 664, 35 South. 649, this court, in speaking of such a situation and of the application of this maxim, said:

"From all that appears the consideration may have consisted entirely of a past-due indebtedness, and hence there is now no room for application of the maxim."

Counsel for appellant in their brief concede, as we understand it, that their contention in the instant case would require that the opinion in the Jenkins Case, supra, be overruled. We are cited to no authority which has questioned the soundness of that decision, and we are unwilling to depart therefrom. It must therefore result that the bill was sufficient, and the decree of the chancellor is accordingly affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and SAYRE, JJ., concur.

(199 Ala. 280)

DENT et al. v. CITY OF EUFULA et al.  
(4 Div. 682.)

(Supreme Court of Alabama. Feb. 8, 1917.)

1. SCHOOLS AND SCHOOL DISTRICTS  $\Leftrightarrow$  97(4)—  
BOND ISSUES—ORDINANCES—SUFFICIENCY.

Acts Sp. Sess. 1909, p. 188, § 2, as amended by Act Feb. 20, 1915, p. 110, § 1, provides for bonds extending, enlarging, improving, repairing, or securing the more complete use and enjoyment of any building or improvement owned, purchased, or constructed by the municipality, for equipping and furnishing the same. Const. 1901, § 222, authorizes the Legislature to provide for school bond issues, and provides that the ballot used at such election shall contain the words: "For \* \* \* bond issue," and "Against \* \* \* bond issue" (the character of the bond to be shown in the blank space). Ordinances provided for issuance of bonds to construct or acquire public schoolhouses and required the ballots to contain the words "for public schoolhouse bonds" and "against public schoolhouse bonds." The ballots prepared read "for city of E. public school bond issue" and "against city of E. public school bond issue." Held, that the ballots and advertisement and ordinances were sufficiently in accord to validate the election.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 226.]

2. SCHOOLS AND SCHOOL DISTRICTS  $\Leftrightarrow$  97(4)—  
BOND ISSUE—ORDINANCES—SUFFICIENCY.

Under an ordinance providing for an election at which the ballots should read "for public schoolhouse bonds" or to the contrary, mere omission of the word "house" did not affect the validity of the election.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 226.]

Appeal from Circuit Court, Barbour County; J. S. Williams, Judge.

Suit by George H. Dent and others against the City of Eufaula and others. Decree for defendants, and complainants appeal. Affirmed.

George W. Peach, of Clayton, and Jones, Thomas & Field, of Montgomery, for appellants. A. H. Merrill & Sons and McDowell & McDowell, all of Eufaula, for appellees.

SAYRE, J. In this cause complainants (appellants), as taxpayers of the city of

Eufaula, seek to enjoin the issue of municipal bonds. The municipal authorities proceeded under the authority of the act approved August 26, 1909, which authorizes the holding of municipal elections for the issue of bonds for public purposes (Acts Special Session 1909, p. 188), section 2 of which (amended in some respects by the act approved February 20, 1915, p. 110), to quote its relevant parts, provides for bonds (2) "for extending, enlarging, improving, repairing or securing the more complete use of and enjoyment of any building or improvement owned, purchased or constructed by the municipality, for equipping and furnishing the same," and (9) "for erecting \* \* \* public schoolhouses and buildings to be used in connection with the same." These laws were passed in pursuance of section 222 of the Constitution, which grants to the Legislature authority to do so, and provides that, "The ballot used at such election shall contain the words: 'For \* \* \* bond issue,' and 'against \* \* \* bond issue' [the character of the bond to be shown in the blank space]." The ordinance, under which the election for these bonds was held, provided for an election on the proposition to issue "fifteen thousand dollars in the bonds of said city for the purpose of constructing, providing, acquiring, or improving public schoolhouses, and the buildings to be used in connection with the same," that the ballots should be in the form prescribed by the Constitution and should contain the words "For public schoolhouse bonds" and "Against public schoolhouse bonds," and that the election "and the purpose for which the bonds are to be issued" should be advertised as required by the statute. The advertisement gave notice of an election on the proposition to issue "fifteen thousand dollars in the bonds of said city for the purpose of constructing, providing, acquiring, or improving public schoolhouses and the buildings to be used in connection with the same," and that the ballots would contain the words "For public schoolhouse bond issue" and "Against public schoolhouse bond issue." The official ballots prepared for and used at said election stated the proposition in these words: "For city of Eufaula public school bond issue" and "Against city of Eufaula public school bond issue." The contention most strongly urged on the part of complainants comes to this in substance: That the election, at which a conceded majority of votes was cast in favor of bonds, was a nullity for that the question proposed in identical terms by the ordinance and the notice was not the question submitted to the electorate upon the face of the official ballot.

So far as the requirement of the Constitution is concerned, and apart from any effect that must needs be assigned to the variance which has been indicated, the validity of these bonds is sustained by the clear authori-

ty of the decisions in *Ryan v. Mayor and Council of Tuscaloosa*, 155 Ala. 479, 46 South. 638, and *Thomason v. Commissioners*, 184 Ala. 28, 93 South. 87. It will be observed that, aside from other differences which no one has considered to be of any materiality, the official ballot used at the election varied from that which the ordinance provided and of which the advertisement gave notice in that it omitted the word "house." The argument against the bonds is that the ballot submitted a broader question than the ordinance contemplated. If this variance, the alleged defect in the ballot, was unsubstantial, and may be classed as a mere irregularity, then they did not render the election void. *Realty Investment Co. v. Mobile*, 181 Ala. 184, 61 South. 248; *Coleman v. Eutaw*, 157 Ala. 327, 47 South. 703.

[1, 2] It appears from the foregoing statement of the proceedings for a bond issue that the municipal authorities asked leave to issue bonds for "constructing, providing, acquiring, or improving schoolhouses and the buildings to be used in connection with the same." Under the provisions of the act they had a right to ask for bonds for the "equipping and furnishing" of schoolhouses as well as for "constructing, providing, acquiring, or improving" the same; but they did not so express themselves in the ordinance. Hence the argument that in view of the language of the ordinance the word "house" became material and necessary to be used in the preparation of the ballot, and that its omission rendered the ballot, and per consequence the election, obnoxious to section 222 of the Constitution and the act of August 26, 1909, as amended February 20, 1915. The authorities cited above suffice in our judgment to dispose of the constitutional objection. As for the other, we are of opinion that it too cannot be sustained. We are privileged to look to the essential merit of the question. We assume that the purpose of the constitutional provision, which is to provide security for intelligence of choice and its easy expression, must be held to pervade the statute and all proceedings had under it. The ordinance has determined the uses to which the proceeds of these bonds may be put, and it is not to be presumed that they will be put to any other. The people of Eufaula, in virtue of the ordinance and its advertisement, were apprised of the uses designated by the ordinance, it may be presumed, and voted with a view to those uses. But if we may proceed upon the assumption that as matter of fact they were not apprised of the particular character of school uses to which these bonds would be applied, whether to the constructing, acquiring, or improving of schoolhouses or to their furnishing and equipping, how did the omission of the word "house" from the ballot affect the case? If we assume that the improvement of schoolhouses does

not include their furnishing and equipping—and the argument for appellants seems to assume as much—still schoolhouses are to be furnished and equipped, as well as constructed, provided, acquired, or improved, and we perceive no reason why the use of the word "house" on the ballot would have made any change in the voting. On the hypothesis of the argument the majority voted for bonds to be used for any school purpose, thus expressing their willingness that all the proceeds might be devoted to the purposes specified in the ordinance. This is the logic of the decision in the *Ryan Case*, supra, and the court thinks it sound. The court is therefore of the opinion that no harm can reasonably be supposed to have resulted from the difference between the form of the ballot prescribed in the ordinance and that used on the ballot, and therefore that the decree by which the circuit court sitting in equity sustained appellees' demurrer to the bill in this cause should be affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., concur.

(199 Ala. 312)

STATE ex rel. MATSON v. LAURENDINE,  
County Tax Assessor. (1 Div. 959.)

(Supreme Court of Alabama. Feb. 15, 1917.)

1. MANDAMUS  $\S$  71—REFUSAL OF ASSESSOR TO LIST PROPERTY.

Where a specific ministerial duty is imposed by law upon an officer, mandamus will lie to compel its performance in the absence of some other adequate remedy.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 133.]

2. MANDAMUS  $\S$  117—MINISTERIAL OFFICERS—ASSESSOR.

A county tax assessor in merely listing property for taxation is in the exercise of ministerial duties.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 249.]

3. TAXATION  $\S$  321—COUNTY TAX ASSESSOR—LISTING PROPERTY—DETERMINATION OF OWNERSHIP.

A county tax assessor, being a ministerial officer without the right to determine title to property, must assess property listed by one in possession claiming ownership.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 536, 537.]

4. TAXATION  $\S$  110—PROPERTY BOUGHT IN BY STATE AND AFTERWARDS SOLD—TAXABILITY.

Under Gen. Acts 1915, p. 481, § 255, property bought in by state at a tax sale becomes taxable after sale by state.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 143.]

Anderson, C. J., and McClellan, J., dissenting.

Appeal from City Court of Mobile; O. J. Semmes, Judge.

Petition in law and equity court by F. E. Matson for a writ of mandamus against E.

D. Laurendine, as Tax Collector for Mobile County. Writ denied, and plaintiff appeals. Reversed and remanded.

The petition sets up, in substance, that petitioner has been for more than four years a citizen and taxpayer in said county; that he was on October 1, 1915, and continuously since has been, the owner of certain real estate in the county of Mobile which is subject to taxation for state and county purposes; that the respondent was tax assessor for said county on said date, and is still in the exercise of the duties of that office; that on October 15, 1915, petitioner appeared before said tax assessor and informed him of his ownership of certain real estate, exhibiting deeds therefor, and demanded that said lands be assessed to petitioner for taxation for the year beginning October 1, 1915, and that said tax assessor refused to assess petitioner with said property; that petitioner presented to the assessor his averment of ownership duly filed and sworn to, but the assessor refused to accept same; that petitioner has no adequate remedy to compel the assessor to assess to him his said property and therefore resorts to the court for a mandamus.

The prayer of the petition is that the respondent be required to permit said property to be assessed for state and county taxes for the period of time stated.

Respondent in his answer sets up the fact that the real estate described in the petition was in the year 1911 duly assessed to one H. R. Fischer as owner, and that the taxes thereon became delinquent January 1, 1912; that said property was subsequently sold under decree of the court and bought in by the state, and that, not having been redeemed within the time fixed by law, it was sold on December 18, 1914, to the Exchange Land Company, a corporation, by which company it has been regularly returned for taxation; that respondent had duly assessed said company for 1915-16 taxes before the filing of this petition; and that respondent is without authority of law now to assess said lands to the petitioner.

The answer was subsequently amended by additional averments to the effect that the only title under which petitioner claimed this property was derived through R. H. Fischer by quitclaim deed of September 15, 1915.

The agreed statement of facts is in substantial conformity with those averred in the petition and set up in the answer thereto. Said statement further shows the assessment of the property to Fischer, with proper description thereof, and a sale under an incomplete description which is insisted by petitioner to be a void description. It was further shown that petitioner took possession of the said property after purchase and has continued in possession until the present time.

Upon a hearing of the cause the court below denied the writ of mandamus prayed for and hence this appeal.

Roach & Ward, of Mobile, for appellant. Joel W. Goldsby, of Mobile, for appellee.

GARDNER, J. By this proceeding a resident taxpayer of Mobile county seeks to have the tax assessor of said county required by law to assess to him certain real estate for state and county taxes, a proceeding lacking in direct analogy, so far as the diligence of counsel has been able to disclose. The defense interposed rested upon the proposition that another had previously assessed this property for the same tax year, and the assessor concluded that he was without authority to permit a second assessment, believing the first assessment to have been by the true owner.

That it is made the duty of the tax assessor to assess for taxation the property of every citizen is, of course, quite clear, as is also the duty of the citizen liable for taxation to return his property for such assessment. Acts 1915, p. 400 et seq. For the convenience of the citizen the assessor is required to have printed proper forms for listing property under oath, and the citizen making false return of his property for taxation is guilty of perjury. See Acts 1915, §§ 24, 31-37, 40, 45.

[1] "It is well settled that, where a specific ministerial duty is imposed by law upon an officer, board, or tribunal, with respect to the levy and assessment of taxes, mandamus will lie to compel its performance, unless some other adequate remedy is provided. Thus the writ will lie in a proper case to compel the levy of a special tax assessment and valuation of property subject to taxation in the manner required by law." 26 Cyc. 320.

[2] If the tax assessor in merely listing property for taxation is in the exercise of a ministerial duty imposed by law, it is clear that the petitioner is entitled to his writ. That the assessor in the exercise of this duty is in the performance of the ministerial functions of his office only, and that mandamus is the proper remedy, appears to be demonstrated by the following cases: *State v. Buchanan*, 24 W. Va. 362; *State v. Herrald*, 36 W. Va. 721, 15 S. E. 974; *State v. Graybeal*, 60 W. Va. 357, 55 S. E. 398; *Hyatt v. Allen*, 54 Cal. 353; *People v. Shearer*, 30 Cal. 645.

[3] We find no case which warrants the opinion that the assessor in accepting property for tax assessment has imposed upon him the duty or can exercise the right to determine for himself the title of such property and the true ownership as between contesting claimants. This is a matter with which he cannot be concerned. The assessment of property by one in possession claiming ownership may prove of evidential value in the event of litigation, and thus constitute an important right. Code 1907, §

2830. To deny the petitioner the right to assess his property would be to authorize the tax assessor to pass upon the title to the real estate and himself decide the true ownership. Such an anomalous situation was clearly not contemplated by the legislative department in the establishment of the office of tax assessor. There is nothing in section 2299 of the Code which would justify the action of the assessor in this case.

[4] If it be conceded, for the purposes of this case only, that when property is sold for taxes, under said Code provision, and bid in by the state, and not redeemed, but still held by the state, it need not be further assessed, yet such concession would avail nothing, as these provisions are without application to the instant case, this property having been sold by the state. Upon such sale by the state it is clearly the assessor's duty to enter the property on his lists for assessment. Gen. Acts 1915, p. 481, § 255. We therefore entertain the view that the petitioner, in possession of the property, claiming ownership under color of title (and we, of course, confine the decision to the situation thus presented), is clearly entitled, so far as the state is concerned, to have such property listed as assessed to him for taxation, and the assessor was without justification in denying him this privilege. Petitioner having a clear legal right and no other remedy by which it can be enforced, mandamus is clearly the proper proceeding (Board of Review, Shelby County, v. Farson, 72 South. 613), and it results that the judgment of the court below will be reversed, and one here rendered granting the relief prayed.

Reversed and rendered.

MAYFIELD, SAYRE, SOMERVILLE, and THOMAS, JJ., concur.

McCLELLAN, J. (dissenting). The order of the court below denying the writ of mandamus prayed was entirely justified by several considerations some only of which I think it necessary to state.

1. The petitioner sought the compulsory power of the writ of mandamus to compel the tax assessor to assess certain property described in this petition "for taxation for state and county taxes for the said year beginning October 1, 1915, ending September 30, 1916." The tax assessor is wholly without power or authority to now make an assessment of property for the tax year in which he is sought in this petition to be required to assess the property to the petitioner. See General Acts 1915, pp. 402, 403. The writ of mandamus will never issue to require the respondent to perform an act which he has no power to perform; nor will it issue to a wholly vain purpose. 26 Cyc. pp. 150, 156, 162, 163, 166, 167; Ex parte Shaudies, 66 Ala. 134, 136; Hall v. Steele, 82 Ala. 562, 566, 2 South. 650.

2. "The invariable test, by which the right of a party applying for a mandamus is determined is to inquire: First, whether he has a clear legal right; and, if he has, then, secondly, whether there is any other adequate remedy to which he can resort to enforce his right." *Murphy v. State*, 59 Ala. 639, 640; *Withers v. State*, 36 Ala. 252; *State ex rel. v. Waller*, 133 Ala. 199, 200, 32 South. 163; *State ex rel. v. Stone*, 69 Ala. 206, 208; *Ex parte S. & N. R. Co.*, 65 Ala. 600; *Ex parte Gilmer*, 64 Ala. 235.

It is elementary to say that the title to property is never triable in mandamus proceedings. *Commonwealth v. Rosseter*, 2 Bin. (Pa.) 360, 4 Am. Dec. 451; *Overseers v. Overseers*, 82 Pa. 275; *Gregory v. Blanchard*, 98 Cal. 311, 33 Pac. 199; *State v. Williams*, 54 Neb. 154, 157, 158, 74 N. W. 396.

If the act sought to be compelled by the writ as prayed was fully performed, its only effect would be to arm the petitioner with evidence that he claimed the property, which claim, along with evidence otherwise tending to show adverse possession by him (if such he has had for ten continuous years), would avail to contribute to the establishment of his asserted right. Certainly an act which has inherent in it so inconclusive, so uncertain, so problematical an effect, at best, should not be compelled to performance by mandamus. 26 Cyc. pp. 151, 153, 155.

According to section 34 of the act to provide for the assessment, etc., of property for taxation in this state (Gen. Acts 1915, pp. 403, 404), the only persons who may assess property for taxation are those who own property, or who have an interest in property, or who hold or serve as agent or trustee, on the 1st day of October of the tax year. So, if one may be said to have a right to assess property for taxation, he must be within one of the classes defined by the tax law. If so, and he desires the compulsory writ to compel the assessor to accept his assessment, he would be obliged to allege that he was so related to the property he proposed to assess as to entitle him to assess it. If he should allege in his petition for the writ that he was the owner of the property he proposed to assess, necessarily he would be required and entitled to sustain the averment. The obvious result would be that the proceeding by mandamus would be used to try the petitioner's title, interest, or control over the property for the purposes of assessment, thus offending the elementary rule of law that mandamus will never be employed to try any right or title to property. Authorities supra. Surely no court would grant the writ to compel an assessor to receive an assessment unless the petition showed that the party proposing to assess the property had a right to do so.

If the petitioner is, as he assumed to be, in the peaceable possession of the property in question, and there is no suit pending to try the title, he has an adequate, complete, and



simple remedy to quiet any title he has through the proceedings provided in Code, § 5443 et seq.

For these reasons—and others might be added—my opinion is that the order or decree appealed from should be affirmed.

ANDERSON, C. J., concurring in the foregoing.

(199 Ala. 318)

HODGE v. STATE. (4 Div. 637.)

(Supreme Court of Alabama. Feb. 8, 1917.)

CRIMINAL LAW §371(4)—HOMICIDE §166 (3)—MOTIVE—EVIDENCE—OTHER OFFENSES.

In prosecution for murder of police officer engaged in securing evidence of accused's alleged illegal sale of intoxicating liquors, evidence of such alleged illegal sales, and of accused's threats against police officers for interfering with his business, was admissible as tending to show motive.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830, 831; Homicide, Cent. § 323.]

Appeal from Circuit Court, Covington County; A. B. Foster, Judge.

Tom Hodge was convicted of murder, and he appeals. Affirmed.

A. Whaley, of Andalusia, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

GARDNER, J. Appellant was convicted of the murder of one S. L. Baker and sentenced to life imprisonment. The deceased was a deputy sheriff of Covington county, and located at Florala, Ala., where he formerly was a policeman.

The testimony for the state went to show that on Saturday night, September 18, 1915, the deceased was foully murdered at about 10:30 o'clock while in the street in front of the defendant's home in Florala, being shot by some one in ambush in the defendant's yard, and the evidence identified the defendant as the one who did the shooting.

One Crosson, a member of the Florala police force, testified to the effect that he was with the deceased at the time he was shot, the two having come together from a restaurant operated by the defendant; that he (Crosson) had a warrant for the defendant's arrest, the warrant being at the time of the trial in possession of one Lewis, chief of the police force; that he saw the defendant leaving the restaurant and told him not to go off, and that defendant replied, "I told you to go with me," and, with an oath, "Just come on if you want to." Witness stated that he and the deceased then started to the defendant's residence, about a quarter of a mile from the restaurant, and as they reached the sidewalk in front of the house the defendant, who was in the yard under a tree, ordered them to stop, saying with an oath, "Don't you come in here;" that deceased

turned and walked toward the middle of the street, the defendant cursing and calling out, "I told you if you come up here I would kill you," and the deceased replying, "You wouldn't shoot me, would you, Mr. Hodge? I haven't done you any harm;" that a woman about the house cried out, "Don't do that," and just then the shot was fired. Witness further stated that the deceased lived only about 30 minutes after being shot, and that the night was a bright moonlight night. Other witnesses testified to seeing the defendant with a gun under his arm coming out of his gate just after the fatal shot was fired and walking rapidly away. The evidence further tended to show flight on the part of defendant and his subsequent arrest in the state of Georgia.

The defendant offered evidence in rebuttal as to his identity as the person who did the shooting, claiming to have been elsewhere at the time, and also as to the condition of the night in question. Testifying in his own behalf, defendant insisted that he had nothing to do with the crime; that he was down in the business section of the town when the gun was fired; that he had made no threats against the deceased nor any other officer; that he never had any trouble with the deceased and no ill feeling whatever existed between them.

The state was permitted to prove, over the defendant's objection, that the warrant issued for defendant's arrest charged him with a violation of the prohibition law; and this warrant, which was identified by Chief of Police Lewis, was, as we construe the bill of exceptions, the same warrant which the witness Crosson testified he had at the time the deceased was shot. Lewis was permitted to testify that he had a warrant to search the defendant's place of business the night of the murder, and that he had given it to the defendant. The warrant was dated September 18, 1915. The state was permitted to show that this warrant was to search defendant's place of business for liquor, and that whisky was found; that the defendant was given the warrant and had it in his possession when he left his place of business on the night of the murder. The state also showed by the witness Price that about three-quarters of an hour before the killing he went into the defendant's place of business and asked for some beer, and defendant said he had none; that the deceased had "been out in front all day watching him, and he had no chance to get anything, and from the appearance of things they were fixing to raid his place that night; that he did not aim to be brought up before the courts any more for selling liquor, and when they came there to raid again there would be trouble." The state proved by the witness Roberts that at about sundown the day of the murder he had a conversation with the defendant while standing

near his place of business, and defendant asked him what the officers were doing caucusing, and if there was any warrant out for his place, saying, "They are going to keep monkeying around till they get the h— shot out of them," and that about that time he saw the deceased and Lewis and one Livings talking together on the streets, all three being officers. Witness Patrick testified for the state as to threats made by the defendant against the officers just a few days before the murder.

It is insisted by counsel for appellant that the trial court committed reversible error in allowing the introduction in evidence of the warrant for searching defendant's place of business and that for his arrest for violation of the prohibition law; that such evidence was irrelevant and tended to great prejudice of defendant, citing in support *Maxwell v. State*, 129 Ala. 48, 29 South. 981. The facts of that case, however, are not at all similar to those involved in the instant case, and we do not consider that it is here in point.

The defendant denied any part in the crime, insisting upon his defense of an alibi, and further testified that there had been no ill feeling between himself and the deceased.

The general rule as to inadmissibility of evidence of other crimes is well recognized, but to this rule there are many exceptions. That the evidence in this regard was admissible in connection with all other evidence in the case, together with defendant's threats against the officers as tending to show motive, is clear from the following authorities: *Underhill Cr. Ev.* (2d. Ed.) §§ 87, 88, 321-323; *Spicer v. State*, 188 Ala. 9, 65 South. 972; *Hawes v. State*, 88 Ala. 37, 7 South. 302; *Allison v. State*, 1 Ala. App. 206, 55 South. 453; note to *People v. Molineux*, 62 L. R. A. 193. An examination of these cases will disclose that there was no error in admitting this testimony, and we conclude that the citation of these authorities will suffice without further discussion.

No error being found in the record, the judgment is affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and SAYRE, JJ., concur.

(199 Ala. 287)

McGEHEE v. STATE ex rel. TATE, Solicitor.  
(6 Div. 456.)

(Supreme Court of Alabama. Dec. 21, 1916.  
On Rehearing, Feb. 15, 1917.)

1. STATUTES  $\S$  8½(2) — ENACTMENT — LOCAL ACTS—NOTICE—SUFFICIENCY.

Const. 1901, § 106, provides that no special, private, or local law, except as to liquor traffic, shall be passed unless notice of intention to apply therefor is published, which states the substance of the law, and that a law passed without such notice shall be void. Section 168 provides that where one or more precincts lie

within, or partly within, a city or incorporated town having more than 1,500 inhabitants, the Legislature may provide by law for the election of not more than two justices of the peace and one constable, for each of such precincts, or an inferior court for such precinct or precincts, in lieu of all justices of the peace therein. A notice of intention to apply for a local act stated that it would provide for an inferior court in lieu of justices of the peace in certain precincts and in lieu of all other courts created in lieu of justices of the peace in such precincts. Held, that such notice was sufficiently broad and definite to cover notaries exercising ex officio the powers and jurisdiction of justices of the peace.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 6.]

2. STATUTES  $\S$  8½(2) — ENACTMENT — LOCAL ACTS—NOTICE—SUFFICIENCY.

Since such notice did not purport to abolish the office of constable in the precincts named, it was no objection that it did not name the office of constable; for, if his office fell with the justice, the notice of abolition of the justices of the peace was sufficient, and, if it did not fall with the justice, no notice of any sort was required.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 6.]

3. COURTS  $\S$  180 — INTERIOR COURTS—SCOPE OF JURISDICTION.

Loc. Acts 1915, p. 231, creating an inferior court in lieu of justices of the peace, extends to such court only the jurisdiction theretofore possessed by justices of the peace.

4. STATUTES  $\S$  98(1), 102(4) — SPECIAL LAWS — INTERIOR COURTS—STATUTES—EXTENDING JURISDICTION.

Const. 1901, § 104, subd. 21, prohibiting increasing the jurisdiction and fees of justices of the peace, has no application to inferior courts established in lieu of justices of the peace specifically authorized by section 168.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 110, 114.]

5. STATUTES  $\S$  16(1) — ENACTMENT — FLOOR AMENDMENTS—EFFECT.

Const. 1901, § 64, providing that no amendment to bills shall be adopted except by a majority of the House wherein the same is offered, nor unless the amendment with the names of those voting for or against the same shall be entered at length on the journal of the House in which the same is adopted, does not prohibit amendments on the floor of the House after an amendment by the judiciary committee upon which the House voted and the names of those voting in favor of the amendment were entered at length.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 14.]

6. JUDGES  $\S$  3 — ELECTION — STATUTES — VALIDITY—RIGHT TO VOTE.

Const. 1901, § 168, provides that in each precinct not lying within, or partly within, any city or incorporated town of more than 1,500 inhabitants, there shall be elected by the qualified electors of such precinct not exceeding two justices of the peace and one constable, and that where one or more precincts lie within, or partly within, a city or incorporated town having more than 1,500 inhabitants, the Legislature may provide by law for the election of not more than two justices of the peace and one constable for each of such precincts, or an inferior court for such precinct or precincts, in lieu of all justices of the peace therein. Loc. Acts 1915, p. 232, § 2, provides that the judges of the inferior court created in lieu of justices of the peace shall be elected by the judges of the courts

of record. *Held*, that the act was a valid exercise of the legislative power, and the electors could not complain that they could note vote for the judges of the inferior court.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 4-10.]

7. STATUTES  $\S$  64(1)—PARTIAL INVALIDITY—EFFECT.

If a statute contains contradictory language, a part of which would render the act unconstitutional, it is the court's duty to give effect only to that part which would sustain the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58, 195.]

8. COURTS  $\S$  42(1) — CREATION — STATUTES — VALIDITY—LANGUAGE USED.

Loc. Acts 1915, p. 231, providing for inferior court in lieu of justices of the peace in certain precincts, is not invalidated by reason of naming some precincts by number and including others in a general designation, since it cannot be presumed that the Legislature was ignorant of the situation or of the effect of its language.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 163, 164, 181-183.]

9. JUSTICES OF THE PEACE  $\S$  2—JUSTICES EX OFFICIO—NOTARIES—RIGHT TO OFFICE.

Const. 1901, § 168, providing that the Governor may, except when otherwise provided by an act of the Legislature, appoint not more than one notary public with all of the powers and jurisdiction of a justice of the peace for each precinct in which the election of justices of the peace shall be authorized, does not give such an appointee a constitutional term, and the mere fact that he might not be removed except by impeachment did not prevent the Legislature from abolishing the office.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 2-4.]

On Rehearing.

10. COURTS  $\S$  42(1) — CREATION — INFERIOR COURTS—CONSTITUTIONAL PROVISIONS.

In Const. 1901, § 168, providing that where one or more precincts lie within, or partly within, a city or incorporated town having more than 1,500 inhabitants, the Legislature may provide by law for the election of not more than two justices of the peace and one constable for each of such precincts, or an inferior court for such precinct or precincts, in lieu of "all" justices of the peace therein, the word "all" refers to justices within the territory of the court to be created, and not to justices in all the precincts in the city where the court is established.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 163, 164, 181-183.]

11. CONSTITUTIONAL LAW  $\S$  70(3)—JUDICIAL QUESTION—WISDOM OF LEGISLATION.

The wisdom of legislation is not a judicial question.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 181.]

Appeal from Circuit Court, Jefferson County; C. B. Smith, Judge.

Proceeding by the State, on the relation of Joseph R. Tate, Solicitor, against B. E. McGehee. Decree for relator, and defendant appeals. Affirmed.

W. M. Woodall, of Birmingham, for appellant. Beddow & Oberdorfer, of Birmingham, for appellee.

SAYRE, J. This is an appeal from the judgment of the circuit court of Jefferson on

an information charging that appellant usurped, intruded into, and unlawfully held and exercised the office of notary public and ex officio justice of the peace in and for precinct 9 in Jefferson county. Appellant claimed in the court below, and renews his contention here, that the act establishing an inferior court for certain precincts in Jefferson county, lying within or partly within the city of Birmingham, in lieu of all justices of the peace and all notaries public exercising the powers of justices of the peace in such precincts, approved July 12, 1915 (Local Acts, p. 231 et seq.), was unconstitutional and void on numerous assigned grounds to be here noted and considered as far as need be.

Passing over some mere general assertions in the brief of counsel for appellant, we find this first among the propositions to be considered: That the notice of intention to apply for the passage of the local act in question failed of compliance with section 106 of the Constitution in various respects, to wit: It failed to give notice that the act proposed would abolish the office held at the time by appellant, viz. the office of notary public exercising the powers and jurisdiction of a justice of the peace in and for precinct 9, a precinct lying partly within the incorporated city of Birmingham; it failed to give notice that the act proposed would abolish the office of constable for said precinct 9; said notice failed to show that the court to be created by the act would have jurisdiction of all civil cases where the amount in controversy did not exceed \$100, except in cases of libel, slander, assault and battery, and ejectment, whereas the act does purport to confer such jurisdiction, including, as appellant construes it, jurisdiction of equity causes not involving amounts in excess of \$100; the notice was no notice, since it showed a purpose to apply for the passage of an act that would be unconstitutional for the reason that it would contravene subdivision 21 of section 104 of the Constitution, providing that the Legislature shall not pass any local law "increasing the jurisdiction and fees of justices of the peace or the fees of constables."

The court is of opinion that none of the foregoing objections to the act afford sufficient reason for declaring it unconstitutional.

On the general subject indicated by the first three objections noted above, section 106 of the Constitution, we have said that:

"The Constitution does not proceed upon the theory that all the details of every proposed law will be worked out in advance and without the aid of legislative wisdom. It requires only that the local public shall be advised of the substance of the proposed law, of its characteristic and essential provisions, of its most important features." *Christian v. State*, 171 Ala. 52, 54 South. 1001.

A narrow and literal construction would destroy all power of amendment in the legislative process, so that the Legislature would be required to accept, if at all, every local

bill in the exact terms of its proposal. Not being inclined to hamper legislation unnecessarily, this court has held that the Constitution was not intended to interfere with the right of the Legislature to shape up and work out the details of local legislation. *Ensley v. Cohn*, 149 Ala. 316, 42 South. 827; *State v. Williams*, 143 Ala. 501, 39 South. 276; *State ex rel. Hanna v. Tunstall*, 145 Ala. 477, 40 South. 135.

[1] The notice of this act was amply broad, and at the same time sufficiently definite, to reach and cover the case of notaries exercising the powers and jurisdiction of justices of the peace. Its language was that an act was to be passed providing for an inferior court "in lieu of justices of the peace in said precincts and in lieu of all other courts created in lieu of justices of the peace in said precincts." The policy and purpose of the Constitution is to permit the Legislature to supersede justices of the peace in the exercise of a petty jurisdiction and to consolidate such jurisdiction in populous communities where they have sometimes shown a tendency to degenerate into a cause of public inconvenience and detriment. The language of the Constitution, with a knowledge of which all men are charged, is:

"Where one or more precincts lie within, or partly within, a city or incorporated town having more than fifteen hundred inhabitants, the Legislature may provide by law for the election of not more than two justices of the peace and one constable, for each of such precincts, or an inferior court for such precinct or precincts, in lieu of all justices of the peace therein." Section 168.

No one, reading the notice in this case, bearing in mind the true intent and meaning of the constitutional authority, and remembering that the two classes of officers have and exercise the same jurisdiction and the same powers, could have any reason for supposing that the Legislature, while dispensing with justices of the peace strictly so called, would retain justices of the peace *ex officio*. Hence our conclusion, in keeping with the canon of construction heretofore applied to the constitutional requirement of notice, is that the objections taken to the notice in this case, and noted above, cannot be sustained.

[2] Responding to the objection that no notice was given that the office of constable for precinct 9 would be abolished, it will suffice to say that the act does not purport to abolish that office. If a constable, claiming to hold his office by virtue of the Constitution and the general laws of the state, is anything more than the executive officer of the court over which the justice of the peace in his precinct presides, and so for some purposes may be held to survive an act which, while abolishing the justice, says nothing of the constable, then the office of constable for precinct 9 in Jefferson county has for such purposes survived the act in question. Further on this point we need not go.

[3] The act clothes the inferior court which it sets up with "all the powers and jurisdiction now conferred or that may hereafter be conferred, both civil and criminal, upon justices of the peace," and specifically provides that:

"Said court shall have jurisdiction in civil cases where the amount involved does not exceed one hundred dollars, except in cases of libel, slander, assault and battery, and ejectment."

Nothing is said concerning equity jurisdiction. Whatever equity powers justices of the peace have, the inferior court has, no more, no less. As for this objection, the court is therefore in the strictest sense a court for the precincts within its jurisdiction "in lieu of all justices of the peace therein," as the Constitution provides, and in this respect the act follows the notice comprehensively and accurately.

[4] The constitutional inhibition against "increasing the jurisdiction and fees of justices of the peace" (subdivision 21, § 104) has no application to the "inferior courts" in lieu of justices of the peace authorized by section 168 of that instrument. We held in the recent case of *State v. Roden*, 73 South. 657, that where an inferior court is set up in lieu of justices of the peace—that is, justices are abolished and their powers and jurisdiction are conferred upon an inferior court—the jurisdiction of the inferior court in respect of subject-matter, like that of the justices of the peace whom it supersedes, may not be extended to cases of libel, slander, assault and battery, or ejectment, nor to any civil case where the amount in controversy exceeds one hundred dollars; but it was not decided that in every or any other respect the inferior court must be fashioned in the exact pattern of a justice's court. If it was so intended, no purpose would be served by the alternative of the Constitution which, to state its effect as we understand it, authorizes the consolidation of all the official functions of all the justices of the peace of a number of precincts in an inferior court the civil jurisdiction of which, as to subject-matter, shall not exceed the maximum of that jurisdiction which may be conferred upon justices of the peace. It is not to be supposed that the framers of the Constitution intended to speak of justices of the peace and the inferior court as one and the same thing, but rather that they provided for their creation as judicial institutions that might be made to differ except in respect of jurisdiction as to the subject-matter of civil causes. Conforming in this respect to the preliminary publication, the act in question creates an inferior court the judges of which are put upon a salary and its civil jurisdiction confined within constitutional limits. We find, therefore, no reason for declaring that the publication here shown by the journals of the House and Senate (*H. J.* vol. 1, p. 479; *S. J.* vol. 1, p. 1079) brought the act in question within the influence of the decision in

Alford v. Hicks, 142 Ala. 355, 38 South. 752, as giving notice of an intention to apply for the passage of an act that would offend against the Constitution in the respect here under consideration.

[5] It is urged in the next place that section 64 of the Constitution, providing that "no amendment to bills shall be adopted except by a majority of the House wherein the same is offered, nor unless the amendment with the names of those voting for or against the same shall be entered at length on the journal of the House in which the same is adopted," was not observed in the passage of this act. This is based upon the journal of the House of Representatives which shows (pages 1354-1360) that the Judiciary Committee reported an amendment which was entered at length on the journal. Two amendments to the committee's amendment were offered and adopted and are set out at length. Then the House voted by yeas and nays upon the committee's amendment as amended, and the names of those voting for the amendment—it appears affirmatively that there were none voting against—are entered at length upon the journal. After this statement of the facts, we need do no more than cite *State ex rel. Collman v. Pitts*, 160 Ala. 133, 49 South. 441, 686, 135 Am. St. Rep. 79, where a similar contention was decided, and on very clear grounds, to have no merit.

[6] Appellant further contends that the qualified electors residing within the territorial jurisdiction of the inferior court have a constitutional right to vote for the judges of the court, whereas the effort is made to deprive them of this right in section 2 of the act, which provides that the judges of this inferior court shall be elected by—at one place the act provides that the vacancies shall be filled by the appointment of—the judges of the courts of record in Jefferson county, not including the judge of the city court of Bessemer. Pertinent to this contention is this part of section 168 of the Constitution:

"In each precinct not lying within, or partly within, any city or incorporated town of more than fifteen hundred inhabitants, there shall be elected by the qualified electors of such precinct not exceeding two justices of the peace, and one constable."

But to continue the quotation, though we have already quoted this part of the section:

"Where one or more precincts lie within, or partly within, a city or incorporated town having more than fifteen hundred inhabitants, the Legislature may provide by law for the election of not more than two justices of the peace and one constable for each of such precincts, or an inferior court for such precinct or precincts, in lieu of all justices of the peace therein."

We do not anxiously look about for limitations upon the legislative power of the State in obscure interpretations of the Constitution. The arrangement of the language we have quoted leads us to conclude that the judges of inferior courts created under the permit of the section need not be elected as

justices of the peace must be. The effect of the second alternative provision, as we read it in connection with what precedes it, is to say that the Legislature may provide by law an inferior court in lieu of all justices, thus, as we have heretofore indicated, leaving the constitution and powers of inferior courts created in lieu of justices of the peace to be determined by legislative wisdom, except in respect of their jurisdiction as to the subject-matter in civil cases. *Ex parte Roundtree*, 51 Ala. 42, cited by appellant in this connection, was written under a different Constitution.

[7] Said the Legislature in section 2 of the act:

"Each of said judges shall be a resident of the city of Birmingham, Alabama, learned in the law and shall reside within the city of Birmingham, or within said precincts during the term of his office."

Appellant construes this to mean that residents within the territorial jurisdiction of the inferior court, but without the corporate limits of the city of Birmingham, are ineligible to the judgeships created for the court. If necessary to the constitutional validity of the act, we would hold that it makes no such discrimination against appellant and others in like case with him—within the jurisdiction of the court, but without the city—for, of the contradictory language employed, it would be the duty of the court to give effect to that part which would sustain the act.

[8] We are unable to assign any peculiar significance to the fact that in the title and body of the act, after designating precincts 21, 37, 10, 34, 42, and 46 by numbers, appellant's precinct and two others should have been brought under the jurisdiction of the inferior court by such an expression of general inclusion and definite exclusion as "all other precincts lying within, or partly within, the city of Birmingham, Alabama, except precincts 45, 52, and 29." The definite effect of this language is to include the whole of precinct 9, since it lies partly within the city, and it is hard to find in it a snare for legislators who, it seems to be suggested, might have objected had they known, for instance, that by far the larger part of appellant's precinct lay without the city. It cannot be presumed that the Legislature was ignorant of the situation with which it was dealing or the effect of the language used as applied to that situation.

[9] A provision of section 168 of the Constitution is:

"The Governor may, \* \* \* except where otherwise provided by an act of the Legislature, appoint not more than one notary public with all of the powers and jurisdiction of a justice of the peace for each precinct in which the election of justices of the peace shall be authorized."

Appellant held office under this provision. He held an office which was subject to the power of the Legislature. His office was statutory to this extent: Its continuance depended upon the legislative will. Appel-

lant had no constitutional term. The fact that he may not have been removed except by impeachment after trial did not prevent the Legislature from abolishing the office, and with the office went appellant's term. As this court said in *Oldham v. Mayor*, 102 Ala. 357, 14 South. 793, where it was speaking of a statutory office:

"Offices are abolished, it may be presumed, without reference to the incumbents or their conduct—though that might, properly, be a consideration—but because they are no longer necessary. Such statutory offices are not to be retained for the benefit of those who fill them, but alone for the public good."

So, we think, this case falls within the analogy of the rule that the Legislature may destroy what it may create. *Hawkins v. Roberts*, 122 Ala. 130, 27 South. 327. The case for legislative authority is even stronger here, for in this instance the Legislature has express constitutional authority to destroy the office held by appellant, nor is there exception or reservation in favor of the term of the incumbent.

Our conclusion is that the case was correctly decided in the court below.

Affirmed. All the Justices concur; McCLELLAN, J., concurring in the conclusion only.

ANDERSON, C. J. (concurring). As I understand the act in question, it does not contain the vice as to excessive jurisdiction as to civil cases as was embraced in the Dallas county act recently decided in the case of *State v. Roden*, 78 South. 657; but it is perhaps, subject to one of the objections advanced in the opinion of the writer but which were merely my individual views and was in no sense the opinion of the court. Indeed, an examination of the opinion in the *Roden Case*, supra, will disclose that a majority of the court failed to agree upon any one point or points upon which the act should be condemned. Hence it can hardly be regarded as an authority either in support of or opposed to the present holding. A majority of the court are of the opinion that the act in question is not subject to the attack made upon same, and while my individual views heretofore expressed in the *Roden Case*, supra, are not entirely in line with the present holding, yet a dissent upon my part can serve no good purpose, and I therefore yield to the majority and concur.

McCLELLAN, J. (concurring). It appears from the petition that the petitioner (McGehee) is a notary public and ex officio justice of the peace appointed by the Governor in virtue of the authority conferred on the Executive by Code, § 5175. He is of the class of justices of the peace described in these provisions of section 168 of the Constitution of 1901:

"The Governor may appoint notaries public without the powers of a justice of the peace, and may, except where otherwise provided by

an act of the Legislature, appoint not more than one notary public with all of the powers and jurisdiction of a justice of the peace for each precinct in which the election of justices of the peace shall be authorized."

A reading of the whole of section 168 of the Constitution readily discloses that notaries public ex officio justices of the peace are not of the class of justices of the peace whose offices can only be abolished by the creation of an inferior court within the terms of that section. In short, the office claimed by the petitioner is an office the Legislature may constitutionally abolish without reference to the creation of any substitutionary office or tribunal. Furthermore, the provision of the Constitution relating to the character of office this petitioner claims to occupy is plain to the effect that no notary public ex officio justice of the peace can be appointed in a precinct in which the election of justices of the peace is not authorized.

Hence the existence of the petitioner's office, which was expressly undertaken to be abolished by the local act approved July 12, 1915 (Local Acts 1915, pp. 231-240), must and does depend upon the complete invalidity of that local act, because if the act is constitutionally invalid in some of its parts and valid in others (including the abolition of petitioner's office), and the invalid may be stricken from the local act without impairing the force and effectiveness of the valid portions thereof, the petitioner must fail.

Of the many grounds of constitutional objection to the local act presented for this petitioner, the only one that, in my opinion, possesses merit, is predicated of those provisions of section 168 of the Constitution by which the Legislature is empowered to establish an inferior court in lieu of justices of the peace in precincts lying within or partly within a city or incorporated town having more than 1,500 inhabitants.

The Judiciary Committee of the Constitutional Convention of 1901, in reporting to the Convention, said this:

"The article reported makes no change in the office or jurisdiction of justice of the peace, but provides that the Legislature may create inferior courts, *with the jurisdiction of the justice of the peace*, for any precinct or precincts lying within or partly within any incorporated town or city having a population of more than twenty-five hundred inhabitants, to supersede and take the place of all the justices of the peace in such precincts, whenever such courts may be deemed by the General Assembly to be wise. [Italics supplied.]" *Journal Constitutional Convention 1901*, p. 810.

At pages 1131-1138 of this Journal may be found the several proposed amendments to section 29 (now section 168 of the Constitution) of the article reported by the Judiciary Committee. It will be there seen that Mr. Reese, of Dallas county, offered an amendment in the following words:

"And the jurisdiction of such superior [inferior] court shall extend over and include all precincts next contiguous thereto."

This amendment was voted down by the Convention. In the excerpts from the official report of the debates reproduced in the opinion of Justice Thomas in the case of the State v. Israel Roden, it appears that the Convention's intention with respect to the jurisdiction of the inferior court provided for in section 168 was in strict accord with the purpose expressed in the above quoted extract from the report of the Judiciary Committee.

In my opinion, the report of the Judiciary Committee, the proceedings of the Convention with respect to the amendment of section 29 of that report, the official report of the debates relating to that section, and the language of section 168, are clear to the point that the limitation fixed by that section requires that, as a condition precedent to the abolition of justices of the peace through the creation of an inferior court, the jurisdiction conferred on an inferior court shall be the same jurisdiction as that conferred by law on justices of the peace in this state. Hence, where an act of the Legislature undertakes to abolish justices of the peace through the creation of another court, and in so doing undertakes to confer upon such court jurisdiction beyond that enjoyed by justices of the peace, the enactment would offend section 168 in that particular, and to that extent would be void as measured by the provisions of section 168; the other provisions of the local act being referred to the general power of the Legislature to create a court of the character defined in this act.

As I understand the opinion of Justice Thomas, in which Justice Sayre concurred, and the opinions of Justice Mayfield and Chief Justice Anderson in the case of the State v. Israel Roden, their interpretation in this regard of section 168 of the Constitution is that I have undertaken to summarily state.

Sections 9, 12, and 21 of the local act approved July 12, 1915, creating the municipal court of Birmingham, Ala., confer thereon greater jurisdiction than that enjoyed by justices of the peace under the laws of this state. In consequence, it is my opinion that the act under consideration is void to the extent and in the particulars that it undertook to abolish justices of the peace in the precincts mentioned therein. However, since in section 41 of this act it is provided that, "should any section or part of this act be held invalid or unconstitutional, it shall not affect any other part of this act," and since the invalid provisions of the act are separable and may be stricken therefrom without invalidating the whole act (State ex rel. v. Montgomery, 177 Ala. 212, 240-242, 59 South. 294; see, also, opinion of McClellan and Somerville, JJ., in State v. Roden, supra), the provisions of the local act abolishing the office claimed by petitioner are valid and effective to that end, as well as in the respect

it creates additional judges to serve the court thereby created.

MAYFIELD, J. (concurring). I concur in the opinion and decision in this case, but deem it necessary to say that, after a more careful and thorough study of the questions involved, I am of the opinion that subdivision 21 of section 104 of the Constitution does not apply to bills or acts creating inferior courts in lieu of justices of the peace as authorized by section 168 of the Constitution; that any jurisdiction may be conferred on the court so created, which is not by the Constitution expressly inhibited to justices of the peace; that the jurisdiction conferred on such a court, and the fees and compensation of its officers, are not by the Constitution required to conform with those of all other courts of justices of the peace, or even with those of such courts as are thereby abolished; and that the provisions of the Constitution as to uniformity of jurisdiction and of compensation of justices of the peace do not apply to such courts or their officers; but that the express inhibitions of the Constitution against conferring jurisdiction on justices of the peace are, and should be, the only limitations on the power of the Legislature, as to the jurisdiction to be conferred upon such courts so created.

If anything heretofore written by me or decided by the court, on the subject, is in conflict with what is written and decided in this case, I am of the opinion that it should be hereby expressly overruled.

#### On Rehearing.

PER CURIAM. [10, 11] On rehearing, for the first time, appellant contends that the exception of three precincts, within, or partly within, the city of Birmingham, from the territorial jurisdiction of the inferior court in lieu of justices of the peace, had the effect of taking the act creating the court without the authority of section 168 of the Constitution. The argument is that such inferior courts must have jurisdiction over all the precincts within or partly within the city or incorporated town where they are established.

"Every enactment is presumptively constitutional, and therefore valid, and he who assails it assumes the obligation to demonstrate beyond a reasonable doubt its violation of the fundamental law." State ex rel. v. Greene, 154 Ala. 249, 46 South. 268.

The court refers the word "all," where it occurs in the phrase "in lieu of all justices of the peace therein," to the justices of the peace within the territory of the court to be created rather than to the justices of the peace in all the precincts within, or partly within, the city or incorporated town where the court is established. The court finds in section 168 of the Constitution no imperative language requiring that all precincts within,

or partly within, the city or incorporated town shall be included within the jurisdiction of any inferior court established in lieu of justices of the peace. The matter was thus, in the opinion of the court, left to be determined by the wisdom of the Legislature. If the Legislature may have acted unwisely in excepting precincts 45, 52, and 29 from the territorial jurisdiction of the inferior court established at Birmingham, that is a matter for the correction of which the court has no authority. All the Justices concur.

(199 Ala. 388.)

**HATFIELD v. RILEY. (3 Div. 251.)**

(Supreme Court of Alabama. Dec. 21, 1916.  
Rehearing Denied Feb. 15, 1917.)

**1. APPEAL AND ERROR ⇨750(3) — GENERAL ASSIGNMENT OF ERROR—TESTIMONY OF WITNESS.**

The general assignment of error that the court erred in admitting the evidence of a witness, there being no objection made to his testimony as a whole, and no motion being made in the court below to exclude it, did not bring up for review objections to one or two questions interposed on the examination of the witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3077.]

**2. APPEAL AND ERROR ⇨1005(4) — REVIEW —VERDICT.**

The Supreme Court will not set aside a verdict on conflicting evidence, because it does not correspond with its opinion as to the weight of the evidence; the presumption being in favor of the correctness of the ruling of the trial court denying motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3876, 3950.]

**3. APPEAL AND ERROR ⇨933(1) — PRESUMPTIONS FAVORING COURT BELOW—STATUTE.**

Such rule of presumption has not been changed by Acts 1915, p. 722, providing that no presumption in favor of the correctness of the judgment granting or refusing new trial shall be indulged by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3772.]

**4. APPEAL AND ERROR ⇨1070(1) — HARMLESS ERROR—CONDUCT OF JURY.**

The trial court's refusal to grant new trial on the ground that after adjournment the jury brought in a verdict for plaintiff, in the absence of counsel for defendant, which was not in proper form, and that the jury retired on the suggestion of the bailiff, and brought in a corrected verdict, was not reversible error, as it involved no question of substantial rights.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4231, 4233.]

Sayre, J., dissenting.

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Suit by George Riley against Henry Hatfield. From a judgment for plaintiff, defendant appeals. Transferred from Court of Appeals under section 6, p. 449, Acts 1911.

W. R. Brassell, of Montgomery, for appellant. L. A. Sanderson, of Montgomery, for appellee.

GARDNER, J. Suit in detinue for the recovery of a mule, the controversy growing out of a trade between plaintiff and defendant, wherein they exchanged mules as an "even swap," and for a rescission of the contract by plaintiff, on account of the alleged unsoundness of the mule received in the trade.

[1] The second assignment of error reads as follows: "The court erred in admitting the evidence of W. B. Holmes." There was no objection made to the testimony of the witness as a whole, and no motion in the court below to exclude the same. Such a general assignment will not suffice to bring up for review objections to one or two questions which seem to have been interposed upon the examination of this witness. The appellant, under this assignment of error, can therefore take nothing under the established rules of this court. *Kinnon v. L. & N. R. R. Co.*, 187 Ala. 480, 65 South. 397; *Ogburn-Griffin Co. v. Orient Ins. Co.*, 188 Ala. 218, 66 South. 434; *Craig & Co. v. Pierson Lbr. Co.*, 169 Ala. 548, 53 South. 803.

[2, 3] The remaining assignments of error seek a review of the action of the court in overruling the motion for a new trial. It is first insisted that a new trial should have been awarded, for the reason that the verdict was contrary to the evidence. The record has been carefully examined; and while it may be conceded that the preponderance of the evidence was favorable to the defendant, yet in a case of this character, where the evidence was in conflict, the court is not called upon to set aside the verdict because it may not correspond with its opinion as to the weight of the evidence. We deem it unnecessary to discuss the testimony, but after a careful review of it we are not persuaded, under the familiar rule announced in *Cobb v. Malone*, 92 Ala. 630, 9 South. 738, that a reversal should be rested upon this action of the court. The trial court had the witnesses before him, and had the advantage of observing their manner and demeanor on the stand. Under the long-established rule of this court in such circumstances, the presumption is in favor of the correctness of his ruling. This rule has not been changed by recent legislative enactment. Acts 1915, p. 722. The reasoning in the cases of *Hackett v. Cash*, 72 South. 52, and *Studebaker v. Finney*, 72 South. 54, applies to the above cited act.

[4] A new trial was asked upon the further grounds that the jury, in the absence of counsel for defendant, although it appears that defendant himself was present, and after adjournment of the court for that day, brought in a verdict for plaintiff, that the verdict was not in proper form, and that the bailiff directed the attention of the jury to its irregularity, with a suggestion as to the correct form, whereupon the jury retired and later brought in a corrected verdict. There



was submitted evidence to the effect that counsel for the respective parties had agreed that this should be done in the event the verdict rendered was improper in form (though this was a disputed fact), and that this agreement was made in the presence of, and consented to by, the court. All of this, it clearly appears, related solely to a mere matter of form in the verdict, and involved no question of substantial rights. Gary v. Woodham, 103 Ala. 421, 15 South. 840. There was clearly no reversible error in the action of the court declining to grant a new trial upon this ground.

Finding no reversible error, the judgment will be affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN, MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur. SAYRE, J., dissents.

(199 Ala. 433)

PRICE v. PRICE. (3 Div. 259.)

(Supreme Court of Alabama. Feb. 8, 1917.)

1. APPEAL AND ERROR §931(1)—REVIEW—PRESUMPTION IN FAVOR OF RULING OF TRIAL COURT.

The presumption on appeal is in favor of the correctness of the ruling of the trial court on an issue of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3762.]

2. APPEAL AND ERROR §931(1)—REVIEW—PRESUMPTION IN FAVOR OF RULING OF TRIAL COURT—STATUTES.

The rule that the presumption on appeal is in favor of the correctness of the finding of the trial court on an issue of fact has not been changed by Acts 1915, p. 722, providing that no presumption in favor of the correctness of a judgment granting or refusing new trial shall be indulged by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3762.]

3. WILLS §302(2)—GENUINENESS OF INSTRUMENT—SUFFICIENCY OF EVIDENCE.

On contest of probate of a will, contestant claiming that the instrument was not in fact the last will and testament of decedent, evidence held sufficient to sustain finding for contestant.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 701.]

Appeal from Probate Court, Conecuh County; F. J. Dean, Judge.

Contest by John T. Price of the probate of the will of David Price by C. W. F. Price. From a decree denying probate, proponent appeals. Affirmed.

Contest of probate of the will of one David Price, deceased. The cause was tried before the probate judge without the intervention of a jury, and decree rendered to the effect that the instrument offered for probate was not in fact the last will and testament of said deceased, and probate thereof was denied. From this decree proponent appeals.

The testimony for the proponent, C. W. F. Price, a brother of the deceased, was to the

effect that the alleged will was executed by David Price in the town of Brewton on Christmas day, 1915, and that it was witnessed by R. L. Ingram and C. J. Stokes in the post office at Brewton at about the noon hour of that day. The home of deceased was at Castleberry, a town distant about 17 miles by rail from Brewton.

The attesting witnesses each testified positively as to the execution of the will on Christmas day, and proponent and his wife testified that David Price had dinner at their house the same day. Ingram, a brother of proponent's wife, testified to signing the will as a witness, and that he had said nothing about the execution of the will to his sister or her husband until some time after the death of David Price—"two or three weeks, maybe a month." Stokes also testified that he did not mention the execution of the instrument to C. W. F. Price until after the will was found. Mrs. Price testified that she carried the deceased's clothes to her home after his death, and that when, some time in June, she went to wash them, she found the will in the watch pocket of one of the trousers, this being the first she knew of his making a will; that her brother, said Ingram, had never said a word to her about it, nor had anyone else, before she found it.

The alleged will reads as follows:

"This is to certify that I am the shorter liver, this shall be my will: C. D. Price, J. T. Price, W. T. Price, and J. B. Price, Laura Sullivan, Branch Nan Palmer and Minnah White shall receive \$1.00 each. My brother C. W. F. Price is to have the balance of my money, personal property and real estate. If my brother C. W. F. Price should die before me, then this is void. This is to be my last and only will.

"D. Price.

"R. L. Ingram.

"C. J. Stokes.

"Signed in the presence of the above witnesses, this the 25th day of December, 1915."

There was evidence for the contestant, who is a nephew of the deceased, to the effect that said David Price was in Castleberry the entire day of Christmas, 1915, and was not in Brewton on that day. This was testified to by a number of witnesses, and several also testified that Ingram's general reputation for truth and veracity was bad in the neighborhood. Some of these witnesses go more or less into detail as to where they saw David Price in Castleberry on said Christmas day, and as to the hour and place he ate dinner. There was also evidence that David Price was in Brewton on the day before Christmas; but witnesses for contestant were positive that he was in Castleberry the entire day of Christmas, 1915. There was evidence that Ingram, in a conversation after Price's death, had indicated that he knew nothing about a will having been made. There was also testimony that deceased's clothing was thoroughly searched by three persons at his home in Castleberry just after his death, and that no such paper was then in any of the

pockets, each of which were "turned wrong side outwards."

The testimony showed that David Price died on April 27, 1916, and that on May 13, 1916, proponent, C. W. F. Price, filed his petition in the probate court of Conecuh county for letters of administration on his brother's estate, in which it was alleged that the deceased left no will and testament, so far as believed by the petitioner.

Contestant offered proof to statements made by the deceased after December, 1915, and a short time—a week or ten days—before his death, to the effect that he had made no will and never expected to make one.

Proponent testified that at the time he filed petition for letters of administration the will had not been found, and that he knew nothing of its existence; that his wife had found the will; that his deceased brother visited him often, and was at his house for dinner on Christmas day, 1915.

Page & McMillan, of Brewton, for appellant. Hamilton & Stallworth, of Evergreen, for appellee.

**GARDNER, J.** The foregoing statement of the case suffices for a general outline of the proof offered before the probate judge, who tried the case upon oral testimony and without the intervention of a jury. The appeal presents only a question of fact as to whether the finding of the court below on the issue of fact thus presented should be here disturbed.

[1, 2] A discussion of the testimony would serve no good purpose. Suffice it to say that it has been carefully considered. The trial court had the witnesses before him, and the advantage of observing their demeanor on the stand, and under the long-established rule of this court in such circumstances, the presumption is in favor of the correctness of his ruling. We have held that this rule has not been changed by Acts 1915, p. 722. *Hackett v. Cash*, 72 South. 52; *Finney v. Studebaker*, 72 South. 54; *Hatfield v. Riley*, 74 South. 380.

[3] Upon careful consideration of the evidence, we are not persuaded that the finding of the court below should be disturbed, and the decree is accordingly affirmed.

**Affirmed.**

**ANDERSON, O. J., and McCLELLAN and SAYRE, JJ., concur.**

(199 Ala. 453)

**LOUISVILLE & N. R. CO. v. WILLIAMS.**  
(8 Div. 864.)

(Supreme Court of Alabama. Dec. 21, 1916.  
Rehearing Denied Feb. 16, 1917.)

**1. MASTER AND SERVANT §88(1)—INJURIES TO SERVANT—SERVANT OF INDEPENDENT CONTRACTOR—"EMPLOYÉ"**

Where plaintiff's intestate in his work as foreman of laborers in repair of a bridge by an

independent contractor was under the control and orders of the defendant railroad's civil engineer, the intestate was an employé of defendant, and not a mere licensee, in so far as the question of defendant's liability for his death caused by one of its trains was concerned.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 144, 151.]

For other definitions, see *Words and Phrases*, First and Second Series, *Employé*.]

**2. PLEADING §34(1)—CONSTRUCTION.**

The character of a pleading is to be determined from the facts averred.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 66, 67, 71.]

**3. MASTER AND SERVANT §259(7)—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT.**

A complaint averring that defendant operated a line of railroad which crossed a creek on a bridge then undergoing repair by a construction company at both ends of the bridge, and under the supervision of defendant's civil engineer, the laborers operating under the superintendence of plaintiff's intestate, and that intestate while crossing the bridge in discharge of his duty with defendant and in a place where it was necessary for him to be was killed by one of defendant's passenger trains, and that defendant's employés in charge of such trains owed intestate the duty to keep a lookout, and, failing to keep such lookout, they failed to discover him in time to avoid injuring him, held sufficient to bring the case under *Employers' Liability Act* (Code 1907, § 3910, subd. 5), making an employer liable for injury to servant as though a stranger when such injury is caused by negligence of a coemployé who has control of a locomotive, etc.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 842.]

**4. MASTER AND SERVANT §256(31)—INJURY TO SERVANT—QUESTION FOR JURY.**

In an action for death of railroad employé while on track on railroad bridge in performance of his duties, whether those in charge of the train which killed deceased exercised due care in keeping a lookout held for the jury, and hence the affirmative charge was properly refused.

**5. MASTER AND SERVANT §137(4)—INJURY TO SERVANT—EMPLOYÉS WORKING ON TRACKS—DUTY TO KEEP LOOKOUT.**

Where plaintiff's intestate was engaged in superintendence of laborers repairing a railroad bridge, and his duties took him upon the tracks, it was the duty of those in charge of an approaching train to keep a lookout.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 269, 270, 274, 277, 278.]

**6. MASTER AND SERVANT §289(29)—INJURY TO SERVANT—QUESTION FOR JURY.**

Whether deceased was guilty of contributory negligence held for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1121.]

**7. MASTER AND SERVANT §289(29)—INJURIES TO SERVANT—INSTRUCTIONS.**

An instruction predicating a verdict for defendant if intestate stepped upon defendant's tracks without first stopping, looking, and listening was misleading, where the evidence tended to show that at the time intestate started across the bridge the train was not in sight.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1121.]

**8. MASTER AND SERVANT §289(29)—INJURIES TO SERVANT—INSTRUCTIONS.**

An instruction charging intestate with contributory negligence as a matter of law if intestate stepped upon defendant's tracks without

first stopping, looking, and listening was misleading for the same reason.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1121.]

**9. MASTER AND SERVANT**  $\Leftrightarrow$  278(18)—INJURY TO SERVANT—EVIDENCE—SUFFICIENCY.

Evidence held to support a verdict for plaintiff, as against a motion for new trial on the ground that it was against the great weight of the evidence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 971.]

McClellan and Mayfield, JJ., dissenting.

Appeal from Circuit Court, Morgan County; R. C. Brickell, Judge.

Action by P. E. Williams, as administrator of the estate of W. M. Williams, deceased, against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Eyster & Eyster, of New Decatur, for appellant. Tennis Tidwell, of New Decatur, and Sample & Kilpatrick, of Cullman, for appellee.

GARDNER, J. Appellee, as administrator of the estate of W. M. Williams, deceased, brought this suit against the appellant for recovery of damages for the death of his intestate caused by his being run over by one of the trains operated by appellant.

There were originally five counts in the complaint, but the fifth count went out on demurrer, and counts 1, 2, and 3 were charged out by the court on request of the defendant. The case therefore went to the jury on count 4. This count shows that on August 19, 1912, the defendant was engaged in operating a line of railway through Morgan county; that at a certain point said railway track crossed a creek on a bridge then undergoing repairs by the Williams Construction Company; that said repair work was in progress on each side of the creek at the ends of the bridge, being under the supervision and direction of defendant's civil engineer, one C. A. Ligon; and that the construction company commenced their work on the morning of August 19th, the laborers operating under the superintendence of plaintiff's intestate.

The count further alleges that plaintiff's intestate started across the bridge to look after the work progressing at the northern end; that in so doing he was "in the discharge of his duty with the defendant, and in a place where it was necessary for him to be in the discharge of his said duty." It is then averred that while plaintiff's intestate was thus walking on the bridge one of defendant's passenger trains, approaching from the south, ran upon and killed him. It is further averred that the agents or servants of the defendant in charge of said train owed the intestate the duty to keep a lookout, and that, failing to keep such lookout, they failed to discover him in time to avoid injuring him.

[1-3] This count was not subject to any of the assignments of demurrer addressed thereto. Plaintiff's intestate in his work was under the supervision and orders of the defendant's civil engineer. Under the following authorities the intestate was an employé of the defendant, in so far as the question here involved is concerned: *Dallas Co. v. Townes*, 148 Ala. 146, 41 South. 988; *Townes v. Dallas Co.*, 154 Ala. 612, 45 South. 696; *Harris v. McNamara*, 97 Ala. 181, 12 South. 103; *T. C. & I. Co. v. Hayes*, 97 Ala. 204, 12 South. 98; *Lookout Mt. Co. v. Lea*, 144 Ala. 169, 39 South. 1017; *Warrior-Pratt Co. v. Shereda*, 183 Ala. 118, 62 South. 721. The character of pleading is to be determined from the facts averred. 4 Mayf. 447; *Rogers v. Brooks*, 99 Ala. 31, 11 South. 753. The facts averred are sufficient, as against any assignments of demurrer interposed, to bring the case under subdivision 5 of the Employers' Liability Act.

Appellant's counsel insist that the count shows that plaintiff's intestate was a mere licensee, and that the defendant owed him no duty to keep a lookout for him, citing *Elliott on Railroads*, vol. 3, § 1250. This author's treatment of the question in the said section is without application here. In the same volume, in section 1265b, speaking of the duty due by those operating trains to persons lawfully at work on the track, it is said:

"The law does not require persons at work on the track to maintain a constant lookout for approaching trains and at the same time pursue their labor, but it does require of the operatives of trains the exercise of an active vigilance to avoid injuring such persons and that they should give reasonable danger signals to attract the attention of men so employed so as to enable them to get out of the way before it is too late."

To the same effect is the language of Mr. Thompson, in his work on *Negligence*, §§ 1839-1840, which read in part as follows:

"Persons lawfully at work in repairing a railway track, or in repairing a highway where it crosses a railway track, cannot be expected to pursue their labors and at the same time maintain a constant lookout for an approaching train. They are passive, and are not a source of danger to the train. Those who are driving the train are active, and are handling and in control of the instrument of danger and mischief. The obligation of reasonable care which the law puts upon the railway company under these circumstances therefore demands nothing less than an active vigilance in favor of persons thus lawfully at work upon the track, and the giving of seasonable danger signals to arouse their attention and enable them to get out of the way before it is too late.

"A person employed by one who has entered into a contract with the railroad company to do a job of work upon its road is obviously entitled to this measure of care. \* \* \* A person thus employed by an independent contractor is neither a servant of the railroad company nor a trespasser on its track, and, if free from contributory negligence, is entitled to recover for injuries inflicted upon him by the negligence of the servants of the company."

See, also, 33 Cyc. 764, where it is said:

"Where one is engaged on or about railway tracks or cars in work which is mutually beneficial to himself and the railroad company, and his work requires him to go on such tracks or cars, his going thereon when required is generally held to be by the express or implied invitation of the railroad company, and he is neither a trespasser nor a mere licensee."

The New York court in a somewhat similar case, replying to the argument of counsel that the deceased was a mere licensee, said:

"The defendant insisted \* \* \* it owed the deceased no duty of due care, for the reason that he was a licensee; whereas he was not a licensee, but was there by the express invitation and agreement of the defendant with his employer engaged in doing work for the defendant on its tracks." *Froehlich v. Interborough Transit Co.*, 120 App. Div. 474, 104 N. Y. Supp. 910.

See, also, in this connection, *L. & N. R. R. Co. v. Thornton*, 117 Ala. 274, 23 South. 778; *A. G. S. Ry. v. Skotzy*, 71 South. 335, and 41 Cent. Dig. "Railroads," § 1225.

The evidence for plaintiff tended to show that, while this track was used by the defendant company, the contract for the repair of the bridge was between the Williams Construction Company, a corporation, and the South & North Alabama Railroad Company, but payment for the work was guaranteed by the defendant railroad company; that the work was to be done under the supervision and direction of defendant's said civil engineer, Ligon, and that plaintiff's intestate was merely superintending the laborers engaged; that Ligon was with the intestate on the bridge giving him directions in regard to the repairs, the two walking together from the south to the north end, but that deceased returned to the south end, where he remained for a few minutes watching the laborers at work just beneath the bridge; that intestate again proceeded to cross the creek, on the bridge, towards the north, to oversee the workers there. The bridge is shown to have been about 160 feet in length and about 15 feet wide.

The evidence for the plaintiff further tended to show that at the time his intestate started to return to the north end of the bridge the train was not in sight nor within hearing, and that he walked in the center of the track; that the train which struck him was a passenger train, approaching from the south and moving at a speed of 40 or 45 miles an hour; and that the track south of the bridge was straight for three-fourths of a mile. Some of the witnesses for the defendant gave the length of straight track as one mile. The evidence further tended to show that the deceased had been walking on the bridge a minute and a half and had gotten about halfway across before the train reached it.

The evidence of the engineer placed the deceased as "two-thirds of the way towards the north end." No signal of approaching was given; the engineer testifying, "I never gave any signal at all before the train was

stopped." He insisted that he had kept a constant lookout on the track, and that he did not see deceased until he got within a short distance of him, when deceased stepped from behind an upright brace of the bridge and when it was too late to do anything to save him. The engineer further testified that the track was straight and level, and that if deceased had been in the center of the rails of the track he would have seen him. The accident occurred at about 9:30 o'clock in the morning.

[4] In view of the evidence for plaintiff tending to show the distance the deceased had walked down the bridge, and the time consumed therein, with the track straight and level for a mile toward the south, and of the evidence of the engineer that had deceased been in the center of the track he could have seen him, it was a question for the jury whether those in charge of the approaching train exercised due care in keeping a lookout.

[5] The evidence tended to show that the deceased was rightfully on the track in the discharge of his duty; and, under the authorities above quoted, those in charge of the approaching train were under the duty to keep a lookout. It was admissible for the jury to infer from the evidence that had the engineer kept a lookout he could and would have discovered the deceased on the track in time to give a warning signal, and have had an opportunity to avert the accident. The affirmative charge was therefore properly refused the defendant.

[6-8] We deem it unnecessary to treat in detail each of the refused charges. Several which assumed that the deceased was either a trespasser or a mere licensee were properly refused. Whether deceased was guilty of contributory negligence was for the jury to determine. Other refused charges predicated a verdict for defendant, or charged the intestate with contributory negligence as a matter of law, "if he stepped upon defendant's tracks without first 'stopping, looking, and listening.'" These charges were misleading, for that the evidence for plaintiff shows (and there seems to be none to the contrary) that at the time intestate started across the bridge the train was not in sight nor within hearing. If the charges had reference to the testimony of the engineer to the effect that deceased stepped suddenly upon the track from behind one of the braces of the bridge, this phase of the case was not only covered by the general charge of the court, but by special charges given at defendant's request. Some of the refused charges were evidently intended to refer to the theory of the case presented by count 1, which rested for recovery upon subsequent negligence, and which was afterwards charged out by the court. This had special reference to refused charge numbered 8. Refused charge numbered 11 was substantially cov-

ered by charges given at the request of the defendant. The defendant reserved an exception to the general charge of the court, but its objection, as we gather from the brief of appellant's counsel, related only to that particular phrase "if plaintiff's intestate was an employé of defendant"; the insistence being that the evidence shows that the intestate was an employé of an independent contractor. The remaining portion of the oral charge excepted to does not seem to have met with objection.

What we have herein stated with reference to the complaint suffices to show that we find no error in that portion of the oral charge excepted to.

[9] Upon a careful examination of the record we are not persuaded that a reversal could be properly predicated on the refusal of a new trial on the ground that the verdict was contrary to the great weight of the evidence.

The judgment of the court below is affirmed.

Affirmed.

ANDERSON, C. J., and SAYRE, SOMERVILLE, and THOMAS, JJ., concur. McCLELLAN and MAYFIELD, JJ., dissent.

MAYFIELD, J. I am constrained to dissent in this case because I am convinced that both the opinion and the decision are wrong. In my judgment, count 4, the sole count which went to the jury, was not in law or in fact, nor intended by the pleader to be, a cause of action under the Employers' Liability Act, but was intended to state a cause of action under section 2486 of the Code, known to us as the homicide statute. It is perfectly clear and certain that it was treated by the trial court and the defendant as being under the homicide statute, because the trial court charged the jury that the only damages recoverable were punitive, and not actual or compensatory. I submit that there is not a trial judge in this state nor an attorney in this state who ever brought or defended, or tried, actions under these two statutes who does not know that this court has held throughout the history of these two statutes, in scores, if not in hundreds, of cases, that the recoverable damages under the two statutes were entirely different. If the action is under the Employers' Liability Act (Code, § 3912), the damages recoverable are purely and solely compensatory and go to the dependents of the deceased; and if it be shown that deceased left no dependents or next of kin, then the damages are merely nominal; and in the absence of proof of earning capacity, expectancy, and what his dependents would probably have received but for his wrongful death, only nominal damages are recoverable. If, however, the action is under the homicide statute (section 2486), then the damages are purely punitive, not actual or

compensatory, and evidence to show the latter class is not admissible.

The trial court in this case instructed the jury that the damages recoverable were purely punitive and left to their discretion. Neither party excepted to this part of the charge, thereby conclusively showing that the attorneys for both plaintiff and defendant, and the trial court, treated the count as being under the homicide statute, and not under the Employers' Liability Act.

I submit that under the practice in this state counts under the Employers' Liability Act have become in a number of respects stereotyped, in following the language of the statute, so as to show under which subdivision of the statute the action is brought. Not a one of these stereotyped phrases is to be found in count 4. While the negligence alleged is imputed to the servants in charge or control of an engine, this is purely incidental; and I submit that the thought never entered the mind of the pleader that he was drawing a count under the fifth subdivision of the Employers' Liability Act. The uniform practice in such cases is to allege the name of the agent or servant who was in charge or control of the engine, or to allege that his name is unknown to the pleader, and thus allege directly and specifically that such named person was by the defendant intrusted with such control, and that, while so in charge or control, he was guilty of the negligence complained of. This must be made an issuable fact, as well as the negligence vel non of such person.

If the count could be said to state a cause of action under the Employers' Liability Act, then there is no evidence, and no tendency of any part of the evidence, to support this verdict under such count. There is not a word of evidence showing or tending to show any element of compensatory damages. There were no data from which the jury could possibly have ascertained the amount of damages recoverable. There was no evidence as to the age, habits, earnings, or earning capacity of the deceased, nor as to any other element. Therefore there was not a scintilla of evidence to support a verdict for more than nominal damages. This proposition is self-evident, and the authorities in support of it are too numerous to warrant the attempt to cite them.

Counts under the fifth subdivision of the Employers' Liability Act are not intended to charge, and do not charge, negligence of the master, but negligence of the particular servant in charge of the engine, tram car, etc. They must show that such particular servant was guilty of actionable negligence as to the plaintiff or servant injured; that is, a breach of duty owing by one servant to the other, not a breach of duty owing by the master to the injured servant. The servant in charge of the engine, etc., must be liable to the injured servant, or the master is not

liable under this subdivision, though he might be liable at common law or under other subdivisions of the statute. The only negligence attempted to be alleged in this count was the failure of the engineer to keep a lookout for the deceased. No facts are alleged or attempted to be proven to show that this engineer on the engineer in charge of this train to keep a lookout for the deceased or any other person at the place of the injury. Nothing is alleged or proven to show that this engineer had any reason to suspect that deceased or any other person would be on this bridge. The defendant, or some agent or servant of the defendant, may have been guilty of negligence in failing to notify the engineer that deceased and other servants were working on the bridge, or would be likely to be on or near it, and to be on the lookout for them; yet without such warning or notice to the engineer no duty rested on him to keep a lookout at the time and place of the injury.

It may be true that deceased was not a trespasser, and not a licensee, and had a right to be where he was so far as the defendant was concerned; but it is equally true that, unless the engineer knew of his presence or of the probability of his presence or the presence of some other person on the track at the time and place of the injury, he was under no duty to keep a lookout for deceased on the bridge at the time and place of the injury.

The insufficiency of counts in this respect has been frequently pointed out by this court. A complaint framed under subdivision 5 of the statute, counting upon the negligence of a fellow servant in charge of an engine, must aver that such engineer knew, or had reason to believe, that the act in question would be likely to injure plaintiff, or that plaintiff was then within the line of danger from such act. *Louisville & N. R. Co. v. Bouldin*, 110 Ala. 185, 200, 20 South. 325. Otherwise it shows no breach of duty on the part of the defendant. *Southern Railway Co. v. Goins*, 1 Ala. App. 373, 56 South. 253. Where the negligence or wrong relied upon is alleged to have been that of the engineer in charge of the train, in that he "negligently failed to ring the bell or blow the whistle on said locomotive, or to otherwise give warning that he was ready and about to start said cars," the count is insufficient in that it fails to show a duty on the part of the engineer to warn intestate that he was ready to move the train. It is also bad in that it alleges in the alternative that the engineer failed to "ring the bell" or "blow the whistle, or to otherwise give warning." *Lacy-Buek Iron Co. v. Holmes* 164 Ala. 101, 51 South. 236. This would be, clearly, an attempt to charge the engineer with a failure to perform the statu-

tory duties required by section 5473 of the Code of 1907. This section has been held by this court not to apply to cases like the one under consideration. *Lacy-Buek Iron Co. v. Holmes*, 164 Ala. 101, 51 South. 236. See, also, 7 Mayfield's Dig., p. 571.

It is very true that an action will lie against the master for the wrongful death of his servant, under the homicide statute, as well as under the Employers' Liability Act, and that counts may be joined, one declaring under each of the statutes; but if the action is under either subdivision of the Employers' Liability Act, then it cannot be under the homicide statute. An action under each cannot be joined in one count, because the damages recoverable are entirely different.

If the count in this case should be treated as stating a cause of action against the master at common law, it must fail, because the only negligence attempted to be proven was that of a fellow servant in the common employment with the deceased, for which negligence the master is not liable. In such cases it requires no special plea to raise this issue; it may be raised by the general affirmative charge. *Chamblee's Case*, 171 Ala. 188, 54 South. 681, Ann. Cas. 1913A, 977; *Mansell's Case*, 138 Ala. 548, 36 South. 459.

The only possible theory upon which there can legally be recovery of substantial damages under count 4 is to treat it as a count under the homicide statute, as counsel for plaintiff and defendant and the trial court treated it. I do not mean to say or intimate that there should be a recovery if the count be good under that statute; but I do say that there cannot lawfully be a recovery of punitive damages under the Employers' Liability Act. If the count be under this act, how can it be said that it was not error for the court to charge the jury, not only that punitive damages were recoverable, but that only such damages could be recovered?

Of course, we would not reverse on this appeal on account of the charges, because appellant requested the court to so charge. This, however, I submit, is conclusive to show that counsel for plaintiff and defendant correctly treated the count as being under the homicide statute, and not under the Employers' Liability Act.

If this case is to become a precedent, then "confusion worse confounded" will necessarily follow. Trial courts and counsel cannot follow it without coming in conflict with every decision of this court heretofore rendered on the subject. If we are not to follow a long line of decisions construing statutes, which have time and time again been re-adopted, with that construction placed upon them, how can we hope to ever have dependable consistency of decision?

(199 Ala. 321)

STATE ex rel. GASTON v. BLACK. In re  
TATE. STATE ex rel. TATE v. FORT,  
Judge. (6 Div. 506, 508, 509.)

(Supreme Court of Alabama. Feb. 15, 1917.)

1. DISTRICT AND PROSECUTING ATTORNEYS ⇨  
2(5) — CIRCUIT SOLICITOR — DESTRUCTION OF  
OFFICE.

The circuit solicitor, like the circuit judge, is a constitutional officer, and his office cannot be destroyed, nor an incumbent legislated out of it, except as the Constitution itself may authorize; but to require that a part only of his duties shall be performed and discharged by another officer, as the county solicitor, a statutory officer, does not directly or indirectly destroy his office.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 6, 7.]

2. COURTS ⇨45 — JUDICIAL CIRCUIT.

Counties of certain populations, and containing property of certain assessed valuations, now—since the Constitution of 1901—may alone constitute a judicial circuit.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 178-180.]

3. DISTRICT AND PROSECUTING ATTORNEYS ⇨  
7(1) — CIRCUIT SOLICITOR — DESTRUCTION OF  
OFFICE—CONSTITUTION.

If the Legislature had attempted to confer upon the county solicitor of Jefferson county the exclusive right and duty to prosecute in the circuit court of Jefferson, the only county in the circuit, the attempt would have been violative of the Constitution, establishing the office of circuit solicitor.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. § 84.]

4. DISTRICT AND PROSECUTING ATTORNEYS ⇨  
7(1) — CIRCUIT SOLICITOR — DESTRUCTION OF  
OFFICE—CONSTITUTION.

Acts 1915, p. 823, § 10, providing that in circuits of one county, having more than three judges, and having a county solicitor elected by the qualified electors of the county, such solicitor shall be, until the first Monday after the second Tuesday in January, 1919, the chief prosecuting officer of the county, thus rendering the circuit solicitor his assistant, is not unconstitutional as destroying the constitutional office of circuit solicitor of Jefferson county, its effect being merely to preserve a state of affairs, which had prevailed for several years, so long as the present terms of the two officers continue, while the Constitution does not prohibit the Legislature from creating another solicitor to the circuit.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. § 84.]

5. DISTRICT AND PROSECUTING ATTORNEYS ⇨  
2(1) — CIRCUIT SOLICITOR.

Under Const. 1901, § 187, providing that a solicitor for each judicial circuit or other territorial subdivision shall be elected by the qualified electors of those counties in such circuit or other territorial subdivision in which such solicitor prosecutes criminal cases, the circuit solicitor is not elected solicitor of the circuit court, but is elected solicitor of the circuit of that territorial jurisdiction, not being a judicial officer of the circuit court, nor elected as such, but a ministerial officer of the territory composing the circuit.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. § 2.]

6. DISTRICT AND PROSECUTING ATTORNEYS ⇨  
7(1) — COUNTY SOLICITORS.

The county solicitor is not by the Constitution required to be solicitor for any particular

court or courts in the county, but for the territorial subdivision known as the county, and the Legislature may assign him duties to perform in any or all of the special courts of the county in which solicitor's duties are to be performed, it being the office and function of statutes and not of the Constitution to prescribe the courts in which constitutional or statutory solicitors shall prosecute, and the rights, character, and nature of the office being purely ministerial, subject to the Legislature's direction and control.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. § 34.]

7. CONSTITUTIONAL LAW ⇨87 — PERSONAL  
AND PROPERTY RIGHTS—RIGHTS OF OFFICE-  
HOLDER.

Neither the office of county solicitor nor the rights, duties, or powers pertaining thereto are property or personal rights secured to the incumbent by the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 156-171.]

8. DISTRICT AND PROSECUTING ATTORNEYS ⇨  
3(1) — CIRCUIT SOLICITOR—APPOINTMENT OF  
DEPUTIES—STATUTE.

The last proviso in the General Solicitors' Bill (Acts 1915, p. 817), attempting to make the county solicitor first prosecutor in circuits of one county until 1919, does not nullify the preceding proviso authorizing the circuit solicitor to appoint assistants or deputy solicitors, the intent being only to except local laws of such a county as to county solicitors from repeal until January, 1919.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 10-12.]

9. STATUTES ⇨250 — SUSPENSION OF OPERA-  
TION.

The Legislature, by exception or proviso, may suspend the operation or going into effect of an entire act or of any portion until a future date, or until the happening of a future contingency, and there is no constitutional objection to a proviso or exception in a general statute fixing different dates in the future at which it shall become effective in the repeal of other laws, as by providing the repeal of one statute to take effect at a given date, and the repeal of another statute at another, or even by providing a repeal of the same statute to take effect at one date, and a part at another.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 331.]

10. DISTRICT AND PROSECUTING ATTORNEYS  
⇨7(1) — CIRCUIT SOLICITOR—STATUTES.

The proviso of Acts 1915, p. 823, § 10, that in circuits of one county having more than three judges, and having a county solicitor elected by the qualified electors, such solicitor, until 1919, shall be the chief prosecuting officer of the county, does not take away the rights of the circuit solicitor of Jefferson county under Code 1907, § 7781 et seq., to prosecute in the circuit court, it making him the assistant prosecutor to the county solicitor.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. § 34.]

11. DISTRICT AND PROSECUTING ATTORNEYS  
⇨3(1) — COUNTY SOLICITOR—STATUTE.

Under Acts 1915, p. 823, § 10, providing that in circuits of one county, having more than three judges, and having a county solicitor elected by the qualified electors of the county, such solicitor shall be, until the first Monday after the second Tuesday in January, 1919, the chief prosecuting officer of the county, the county solicitor of Jefferson county has all the right and power to appoint or obtain assistants and assistance which he lawfully had under the provisions of the local laws of the county in force when the bill was passed, September 25, 1915, and may

continue to exercise such powers until 1919, and abolishing the courts in which he and his assistants had theretofore prosecuted criminal cases did not take away the powers and rights of his assistants, and did not abolish his office.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 10-12.]

## 12. DISTRICT AND PROSECUTING ATTORNEYS

### §3(1)—ASSISTANTS TO COUNTY SOLICITOR.

Assistants appointed, in his discretion, by the county solicitor of Jefferson county, constituting a circuit by itself, are not officers of any kind, the law authorizing their appointment fixing no terms and no compensation, except such as may be agreed upon between them and the solicitor.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 10-12.]

## 13. DISTRICT AND PROSECUTING ATTORNEYS

### §3(1)—ASSISTANTS TO CIRCUIT SOLICITOR—STATUTE.

Assistants appointed by the circuit solicitor, under Acts 1915, p. 817, in a circuit of one county, are county officers.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 10-12.]

Sayre, J., dissenting.

Appeal from Circuit Court, Jefferson County.

Proceedings by the State of Alabama, on the relation of Zell Gaston against Hugo L. Black, and on the relation of Joseph R. Tate, against William E. Fort, as Judge, etc., wherein Joseph R. Tate, as Solicitor of the Tenth Judicial Circuit, makes a motion. Appeal affirmed, and applications for mandamus denied.

F. E. Blackburn, C. B. Powell, and Morris Loveman, all of Birmingham, for appellant Gaston. Richard V. Evans and Joseph R. Tate, both of Birmingham, for appellant Tate. Hugo L. Black, of Birmingham, pro se and for appellee Fort.

**PER CURIAM.** These three cases together present for decision these questions:

(1) Can the Legislature of this state provide two prosecuting attorneys, one for the judicial circuit and one for the county, where the circuit and the county embrace the same territory—one a circuit solicitor, a constitutional officer, and the other a county solicitor, a statutory officer but one expressly authorized by the Constitution?

(2) If so, can the Legislature make the county solicitor the chief prosecutor for the circuit and the county, in effect making the circuit solicitor an assistant to the county solicitor?

(3) If the Legislature can do both, has it in fact and in law done so as to the Tenth judicial circuit and Jefferson county, which embrace the same territory, and in which Joseph R. Tate is circuit solicitor and Hugo L. Black is county solicitor?

(4) Have both Black and Tate, as solicitors, the right and power to appoint deputies and assistants, the one, as is authorized in the act known as the General Solicitors' Bill (Acts 1915, p. 817), the other, under various

local acts for Jefferson county, as was authorized by law at the date of the passage of the General Solicitors' Bill (September 25, 1915)?

All of the first three of the above questions were answered in the affirmative by the trial courts. It is contended by the circuit solicitor, Tate, that, his office being a constitutional office, the Legislature cannot destroy it, nor legislate him out of the duties and powers to be exercised by such officer; and that to provide that a county solicitor, a statutory officer, shall be the chief prosecuting officer in his circuit, is to indirectly destroy the constitutional office and substitute a statutory one therefor.

[1] There is no doubt, of course, that the circuit solicitor, like the circuit judge, is a constitutional officer, and that the office cannot be destroyed, nor an incumbent legislated out of it, except as the Constitution itself may authorize; but to require that a part only of the duties which would otherwise be discharged by him shall be performed and discharged by another officer or solicitor, does not directly or indirectly destroy his office. Such was expressly held in Lusk's Case, 82 Ala. 519, 2 South. 140. In that case it was held to be perfectly competent for the Legislature to add to, or to take from, circuits, any number of counties within the constitutional limits (which were then different from present limitations), and thus abate the duties of the solicitor as to one or more counties, and transfer them to other solicitors; that the Legislature could, within its discretion, provide for county solicitors whenever and wherever desired; that the Constitution did not fix or attempt to fix the duties of either circuit or county solicitors; that the Legislature could fix the duties of both, and transfer the duties of the one to the other, as it might desire, and increase or diminish the duties of the one or the other, as it might deem best, except so far as the Constitution might by clear and undoubted implication prohibit, as there was no express prohibition against it. It was there expressly held that the duties of a county solicitor were not, by the Constitution, confined to other courts than the circuit courts, and that the Legislature could impose upon one such the duties of prosecuting officer in the circuit court of the county for which he was appointed, and take those duties as to one county only entirely away from the circuit solicitor. It was also decided in that case that the proviso in the Constitution authorizing the Legislature to provide county solicitors was to authorize such solicitors to prosecute in the circuit courts, for the reason that the county solicitor or county prosecuting officer had, before the proviso in the Constitution appeared, been authorized to prosecute in county and other inferior courts; so that its only effect was to authorize the county solicitor,



when provided, to prosecute in the circuit court, as well as in the county court. The part of the opinion in the Lusk Case claimed by appellants to support their contention is as follows:

"The power given the General Assembly to establish the system of 'county solicitors,' in connection with that of 'circuit solicitors,' was intended to be exercised within the discretion of that body, subject, it may be, to the limitation of section 4 of article 6, that 'no circuit shall contain less than three, nor more than twelve counties.' Until the counties of the circuit, in which the circuit solicitor is expressly permitted to discharge his customary and characteristic duties, are reduced below the number of three, there would seem to be no grievance of which he can justly complain. The power to take one or more counties from his circuit may be admitted, without leading to the conclusion that this power may be abused by indirectly abolishing the entire circuit. The Constitution, as we have shown, forbids this in clear and unmistakable language. It follows, further, from the foregoing views, that the lawmaking power may define the duties of these two classes of solicitors, by increasing or diminishing them, or by transferring the duties of the one to the other in any judicial tribunal," etc. 82 Ala. 525, 526, 2 South. 140, 144.

[2] The discretionary limitations upon the size of a circuit—the number of counties it might, and the number it should not, contain—were changed by the Constitution of 1901, and it is now allowable for counties of certain populations, and containing property of certain assessed valuations, to alone constitute a judicial circuit. Such a county is Jefferson, constituting the Tenth judicial circuit, of which Tate is the solicitor. As the county solicitor of Jefferson is attempted to be made the chief prosecuting officer in the circuit court of that county, it is claimed that the limitation fixed or made in the Lusk Case is exceeded, and that the attempt is therefore abortive.

[3] If the Legislature had attempted to confer upon the county solicitor the exclusive right and duty to prosecute in the circuit court of Jefferson (the only county in the circuit), as the statute did in the Lusk Case as to De Kalb county, then we would agree to appellants' contention, that the attempt would fail, because it would then be clearly and undoubtedly within the implied inhibition of the Constitution.

[4] The statutes under review in this case do not, as we construe them, attempt to do this, or what was done as to De Kalb county in the Lusk Case; it being provided and intended that both the circuit and the county solicitor shall prosecute in the circuit court of Jefferson county. Merely providing that one or the other of the two solicitors shall be the chief prosecutor in that court or in that county does not necessarily mean that the other shall not prosecute or have any duties to perform or powers to exercise in criminal or civil prosecutions in that court. There is no express provision prohibiting the circuit solicitor from performing any duties as to prosecutions in that circuit or county;

and—as we construe this statute in connection with the general provisions in the local statutes as to Jefferson county and the Tenth judicial circuit, and in connection with the general provisions in the Code defining the duties of circuit, county, or other solicitors, together with the constitutional provisions applicable to circuit and county solicitors—both solicitors are charged with duties to be performed and clothed with the powers to be exercised, as to prosecutions in the circuit court of the county of Jefferson.

The fact that the act, or the proviso of the act, in question (section 10, Acts 1915, pp. 817, 823) provides that the county solicitor shall be the "chief prosecuting officer of the county," necessarily implies that there are other solicitors; and it does not deny to such other solicitors all right, or relieve them of all duty, to prosecute in the circuit or county of Jefferson. If the act said in terms that the circuit solicitor should assist the county solicitor in prosecutions in the circuit or in the county, it unquestionably would not have been unconstitutional or objectionable. Such was, and had been, the effect of the provisions of the local statutes for Jefferson county for a number of years prior to the passage of the statute in question. It is true that the local statutes did not require the circuit solicitor to assist the county solicitor in prosecutions in the circuit court for Jefferson county, but in the criminal and possibly other courts; but there were then few, if any, criminal cases prosecuted in the circuit court, or probably all of the duties of the circuit solicitor were taken from him and the circuit court and transferred to the criminal court. But the duty and right of the circuit solicitor to prosecute the same, and like cases in the criminal court, were imposed upon him by the local statutes, and therein he was named as the assistant solicitor; and such were his rights and duties, and such were the rights and duties of the county solicitor, when both were elected in 1914, and when the general statute in question was passed (September 25, 1915).

The only effect as to the general statute in question as to these two officers was to preserve their status quo, as fixed by various local statutes, until the expiration of their terms of office, and until the first Monday after the second Tuesday in January, 1919. Both were elected in the same manner, on the same day, for the same terms of office, and by the same electorate; and their territorial jurisdictions were the same, and they prosecuted or performed all of their duties, or practically all of them, in the same courts. The circuit solicitor was not elected solicitor of the circuit court exclusively, but he was elected solicitor of and for the circuit, the same territory which composed the circuit court it is true; but his rights, powers, and duties were not confined to the circuit court by the Constitution or the statutes. Neither

was the county solicitor elected solicitor of the criminal, city, or county court; he was elected solicitor of the entire county. It is true that his duties were not by the local acts expressly extended to the circuit court, for the reason, as we have shown, that there were but few, if any, duties for any solicitor to perform in the circuit court for the Tenth circuit, because that court's jurisdiction in criminal cases had been conferred largely, though probably not solely, upon the criminal and other courts of Jefferson county. There was therefore no necessity or occasion for assigning duties to the county solicitor to be performed in that court; and even the local acts had required the circuit solicitor to assist the county solicitor in the criminal, and probably other courts of Jefferson county.

[5] Counsel for appellants have fallen into the error of supposing and arguing that a circuit solicitor is elected solicitor of the circuit court, instead of solicitor of the circuit; that is, that he has the same territorial jurisdiction as has the circuit court. He is solicitor of that territorial jurisdiction, and not of the court. He is not a judicial officer of the circuit court, nor elected as such, but is a ministerial officer of the territory composing the circuit. It is true that his duties are usually and chiefly confined to the circuit courts; but he may be assigned to other courts, and even to the courts of other circuits. The Constitution makes this plain, when it says:

"A solicitor for each judicial circuit or other territorial subdivision prescribed by the Legislature, shall be elected by the qualified electors of those counties in such circuit or other territorial subdivision in which such solicitor prosecutes criminal cases," etc. Section 187.

He is not elected solicitor for the circuit court of that particular circuit, but solicitor of the circuit or territorial subdivision prescribed by the Legislature.

[6] Likewise, the county solicitor is not by the Constitution required to be solicitor for any particular court or courts in the county, but for the territorial subdivision known as the county; and the Legislature may assign him duties to perform in any or all of the special courts in the county, in which duties for any solicitor are to be performed. These duties may be so confined by the Legislature to one court, or extended to all courts wherein criminal prosecutions are had. It is the office and function of statutes, and not, of the Constitution, to prescribe the courts in which constitutional or statutory solicitors shall prosecute. The Constitution names the circuit solicitor as a constitutional officer, and fixes his terms of office, the mode of his election by the qualified electors, the character (but not the amount) of his compensation—that is, that it shall be in the way of a salary and not that of fees or other compensation—and prohibits the increase thereof during the term for which he is elected; but it nowhere purports or at-

tempts to fix, name, or prescribe his duties. These it leaves to the judgment and discretion of the Legislature. As the only duties thus far enjoined upon solicitors are ministerial, it is perfectly competent for the Legislature to say what duties he shall perform, how and when he shall perform them, whether he shall perform them alone or with assistance, and whether he shall use his own discretion in the prosecutions of criminal cases, or whether he shall follow the advice and directions of other ministerial, judicial, or executive officers, so long as he is not deprived of his constitutional rights, or the constitutional office is not destroyed. The rights, character, and nature of his office have been held to be purely ministerial, and consequently may be directed and controlled by the Legislature.

In the case of *Diggs v. State*, 49 Ala. 311, 320, 321, the court, speaking through Brickell, J., in his first published opinion, says:

"If a county solicitor is not a ministerial officer, it would be difficult, if not impossible, to define his character; all the duties with which he is charged pertain to the protection of the state, and the general administration of the criminal laws. He attends on the grand jury, as their legal adviser, draws the indictments they may find, prosecutes all indictable offenses, and prosecutes or defends any civil action to which the state is a party, pending in the circuit court. R. C. § 856. No one of these duties involves executive or judicial functions. They are purely ministerial."

[7] No constitutional right of the solicitor is violated or invaded by statutes directing him how and when he shall perform the statutory duties enjoined upon him. Neither the office nor the rights, duties, or powers pertaining thereto are property or personal rights secured to him by the Constitution. The leading case on this subject is that of *Ex parte Lambert*, 52 Ala. 79, in which the court, again speaking through Brickell, then Chief Justice, said:

"The grant of legislative power by the Constitution of the state is a general grant of all the legislative powers residing in the people as a sovereign community, subject only to such limitations and qualifications as are expressed in the Constitution of the state, or in the federal Constitution. *Dorman v. State*, 34 Ala. 216; *Ex parte Dorsey*, 7 Port. 293. Within the legislative power rests the creation and abolition of public offices, the enlargement or diminution of the duties public officers are required to discharge, and the measure of compensation they may receive. In the absence of express inhibitions in the state Constitution, the legislative power is in this respect supreme. If the Constitution creates an office, prescribes its duties, and the mode of appointment, it is not competent for the Legislature to create another officer to discharge the same duties, and direct his appointment in a different manner, but it may increase or diminish the duties and compensation of the officer. *Warner v. People*, 2 Denio [N. Y.] 272, 43 Am. Dec. 740. The Constitution creates the office of 'commissioner of industrial resources,' prescribes the duties of the incumbent, but declares he shall be required 'to perform such other duties as the General Assembly may require.' It does not fix his compensation, but commits that to the legislative power. The office, unlike the offices known to the common

law, which, lying in grant, were deemed incorporeal hereditaments, has in it no element of property. It is not alienable or inheritable. It is a personal public trust, created for the benefit of the state, and not for the benefit of the individual who may happen to be its incumbent." 52 Ala. 81, 82.

This case has been frequently followed by this and other courts; its exact language has been copied into text-books, and our constitutional provisions and statutes on the subject have been frequently re-enacted with this construction placed upon them; so in this state, at least, it is well-recognized law.

We cannot hold that the proviso attached to the last section of the general solicitors' bill, which merely provides that until 1919, the county solicitor of a certain county forming a given circuit shall be the "chief prosecuting officer of the county," destroys or attempts to destroy the office of circuit solicitor for the same county; certainly not, when the effect thereof is merely to preserve the status quo which prevailed in the county, and had prevailed for several years and even before either of the solicitors was elected, and which status is preserved only so long as the present terms of the two officers continue. The sole and apparent intent and effect of the proviso was to preserve the status quo as to prosecutions in Jefferson county until the terms of the incumbent solicitors shall expire.

[8] It is true that other sections of the solicitors' bill of which the proviso in question is a part do authorize the circuit solicitor, at his discretion, to appoint deputies, not to exceed three, which power he did not theretofore possess. We are not of the opinion that the last proviso in the solicitors' bill, which attempts to make the county solicitor chief prosecutor, has the effect to nullify the preceding provision authorizing the circuit solicitor to appoint assistants or deputy solicitors. The proviso in question does not occur in the same section of the bill which authorizes the circuit solicitor to appoint assistants; and it does not appear to refer or to relate to the provisions for appointment, or to the section of the act which contains it; but it appears to refer or apply only to section 10 of the act, which deals with the repeal of existing local and special laws establishing the office of county solicitor; and consequently the intent was only to except the local laws of Jefferson county as to county solicitors, from repeal until January, 1919.

[9] It is not unusual, and is perfectly competent, for the Legislature, by exception or proviso, to suspend the operation or going into effect of an entire act, or of any portion thereof, until a future date, or even until the happening of a future contingency; and we know of no constitutional objection to a proviso or exception in a general statute which fixes different dates in the future at which the statute shall become effective in the repeal of other laws, as by providing the

repeal of one statute to take effect at a given date, and the repeal of another statute, at another; or even providing the repeal of a part of the same statute to take effect at one date, and a part at another date.

The statute in question is full of such provisions, and so are many other statutes of this and other states. This is even a favorite mode, used in the Constitution, to work the repeal of statutes, or the extension of the terms of office of incumbents, as was done or attempted to be done in the last clause and proviso or exception in the solicitors' bill in question. Acts 1915, pp. 817, 823. Section 1 of the act in question, by a similar proviso, in terms makes certain county and city court solicitors not only chief prosecuting officers of certain counties, but makes them sole circuit solicitors; this in cases in which no circuit solicitors resided in the circuit, and where the county or city court solicitor was elected by the qualified electors, so as to conform to constitutional requisites. Other sections and clauses of the same statute make county and city court solicitors deputy and assistant circuit solicitors until 1919; in the last proviso, appellee was made chief prosecuting attorney for the county, instead of sole solicitor, deputy solicitor, or assistant circuit solicitor. If the Legislature had the power to do the one, we see no reason why it could not do the other. We see no constitutional objection or prohibition against the Legislature's providing two or more circuit solicitors, if it see fit, and providing that one of them shall be the chief prosecuting attorney. While the Constitution expressly provides for but one solicitor to the circuit, yet it does not prohibit the Legislature from creating another. The language of the Constitution, as to the solicitor for each circuit, is very similar to, if not identical with, that providing for a judge of each circuit; and we have held that two or more judges could be provided for one circuit. The Legislature, on two or more occasions, provided for two judges of the Tenth judicial circuit, and the present statute provides for ten judges of the Tenth, and for two or more judges of several other circuits. Of course the passage of such other statutes as to circuit judges does not make the statute in question valid, but it does show repeated legislative construction of the constitutional provisions. And many were passed after decisions of this court upholding this class of enactments. The language of the Constitution as to circuit judges is as follows:

"Except as otherwise authorized in this article, the state shall be divided into convenient circuits. For each circuit there shall be chosen a judge, who shall, for one year next preceding his election and during his continuance in office, reside in the circuit for which he is elected." Section 142.

We have above set out the provisions of section 167 of the Constitution as to solicitors.

If two or more judges can be provided for

each circuit, we see no constitutional objection to providing two or more solicitors for each circuit. To hold that each judicial circuit could have but one judge and one solicitor, would practically destroy our present judicial system. Several of these statutes have been recently construed, to the upholding of the system to the extent that it is involved by this and like statutes; and we see no reason for declaring the present statute unconstitutional in whole or in any part involved on this appeal. We are constrained to hold that the proviso in question is valid, that it did not have the effect to deprive the circuit solicitor of his office, that both he and the county solicitor are prosecuting officers in the circuit and county in question, and that there is no constitutional inhibition against making the county solicitor the chief prosecuting officer, nor against authorizing him to supervise, direct, and control the prosecution, provided the enactment does not deprive the circuit solicitor of all or substantially all of his duties and powers as such solicitor. As before stated, it was expressly—and we hold correctly—decided that the Legislature could provide for two solicitors in the same circuit; and that merely providing that one shall be the chief prosecutor, with authority to direct and control prosecutions, does not deprive the other of his office, so long as there are duties and powers left for him to perform as such solicitor, and this is expressly done in the same act which makes the county solicitor chief prosecutor, among which is the power to appoint three assistants and deputies, if he so desires, and this power cannot be controlled by the county solicitor, and is not inconsistent with the county solicitor's being chief prosecutor.

[16] The general provisions in the Code (section 7781 et al.), as well as the statute in question, impose the duty and confer the right and power on both the circuit and the county solicitor to prosecute in the circuit and county for which they were elected, and we do not see how the proviso takes away this right from the circuit solicitor.

The Code provisions, in connection with the provision in question, with the act consolidating the courts in Jefferson county into a circuit court and transferring all criminal prosecutions from the criminal court of Jefferson county into the circuit court, and with the local statutes providing for a county solicitor for Jefferson county (which the proviso in effect says are not repealed until 1919), undoubtedly confer the right and impose the duty upon the county solicitor to prosecute in the circuit court until 1919.

These and other reasons lead us to hold that the proviso in question must be construed to make the county solicitor of Jefferson the chief prosecutor of criminal cases, in the circuit court until January, 1919. First, the proviso says in terms, that he is to be the "chief prosecuting officer of the

county." The statute, as a whole, was dealing with the subject of solicitors or prosecuting officers for the entire state. At that time a statute had been passed consolidating all the courts of record of the state, with some exceptions, into circuit courts. The local statutes for Jefferson county and the Tenth circuit, which were one and the same in territory, which provided prosecutions of criminal cases in that circuit and territory, provided that the county solicitor and the circuit solicitor both should prosecute in the criminal court, the county solicitor as chief and the circuit solicitor as assistant; but few, if any, criminal cases were brought or prosecuted in the circuit court; but in January, 1917, all of these courts in which the chief, in number and importance, of criminal cases were brought and prosecuted were to pass out of existence, and the work was thereafter to be done in the circuit court, for which ten judges were provided, two of whom were to preside over criminal matters, and all these criminal cases were to be transferred to the circuit court.

Surely the Legislature would not have said that the county solicitor should continue to be the chief prosecuting officer for the county of Jefferson, if it was not intended that he should prosecute in the court into which all of the then pending cases were to be transferred and subsequent ones were to be brought. There would be no work for him to do, nor duties to perform, except in such petty cases as might be brought in the inferior court. We therefore feel no hesitancy in holding that this proviso, if valid, enjoined the duty upon the county solicitor to prosecute in the circuit court after January, 1917, and until January, 1919, as he had theretofore done in the criminal court which was absorbed and consolidated in the circuit court. If the Legislature had not meant this, they would have said so, as they did, touching solicitors in other counties dealt with in the same act.

It is agreed by counsel for appellant that the local acts for Jefferson county under which the county solicitor claims to exercise his same power and discharge his same duties as prosecuting officer for the county did authorize, or enjoin the duty upon, the county solicitor to appear in or prosecute cases in the circuit court. It is true that none of these local laws, so far as we find, did expressly authorize or direct that the county solicitor should prosecute in the circuit court; but, as we have shown, such a provision was useless, because there were few, if any, criminal proceedings in the circuit court, in consequence of which fact the circuit solicitor was directed to assist the county solicitor in prosecutions; and these local statutes were not then, and are not now, the sole repository of authority over the functions and duties of the county solicitor. The general repository of such authority—authority over the duties and jurisdiction of all solicitors—

is to be found in the Criminal Code (vol. 3, c. 291, §§ 7778-7804). Section 7781 of the Code expressly makes it the duty of all county solicitors, as well as of circuit solicitors, to prosecute all criminal cases in the circuit court, at both general and special terms, and provides a penalty for failure to attend special terms had for the trial of criminal offenses. It also requires both circuit and county solicitors to prosecute, or defend, all civil actions in the circuit, or city court, in which the state is interested. The county solicitor is a county officer, expressly authorized and recognized by the Constitution, though one not required, as are circuit solicitors.

As was said in *Lusk's Case*, supra, the object and purpose of the proviso to section 167 of the Constitution, as to county solicitors, was to remove any doubt as to the right or power of the Legislature to transfer any of the duties of the circuit solicitor to any other officer, or, in other words, to permit any county solicitor to be authorized to prosecute in the circuit courts, otherwise, the court demonstrated, that proviso as to county solicitors would perform no office; that before the adoption of the proviso, there was, and could be, no doubt as to the power of the Legislature to provide such a county officer, and to authorize or require him to prosecute in the county courts, for such had been done from time immemorial. So there could be no doubt that at the passage of the solicitors' bill, both the circuit solicitor and the county solicitor had both constitutional and statutory warrant to prosecute crimes in all the courts of Jefferson county in which crimes were prosecuted, and this statutory authority by virtue of section 7781 of the Code. This section applies to both officers, and does not attempt to limit either to any given court in which crimes are prosecuted, though it does, as to civil cases, limit both to the city court and the circuit court.

We are of the opinion that it was not the intention to take from either of the present officers the rights, powers, or duties conferred and imposed, to prosecute in the circuit court until 1919. It is merely provided that until 1919 the county solicitor shall be the chief prosecutor for the county, just as he was at the passage of the act; and it is expressly provided that until 1919 he shall continue to exercise the same powers which he was then exercising. Neither did this proviso take from the circuit solicitor any of the powers or rights which he then had, unless it had the effect to place him under the supervision and control of the county solicitor, in the circuit court, as he had theretofore been, in the criminal court. Technically speaking, this change was probably effected by the proviso; but practically the proviso wrought no material change.

We therefore hold that both the circuit solicitor, Tate, and the county solicitor,

Black, are authorized to prosecute criminal cases in the circuit court for Jefferson county—the Tenth judicial circuit—until 1919; that the county solicitor is made chief prosecutor for the county of Jefferson, which includes all of the Tenth circuit, and also for the circuit court provided for that circuit; and that, because the proviso of section 10 of the act in question, together with section 7781 of the Criminal Code, authorizes the county solicitor to prosecute in such circuit court; that making the county solicitor chief prosecutor does not deprive the circuit solicitor of his office, and is not subject to any other constitutional objection; that the circuit solicitor now has the right and power to appoint deputy solicitors, as is authorized by section 6 of the act of September 25, 1915 (p. 817); that such deputies, when so appointed by the circuit solicitor, have the right to prosecute criminal cases in the circuit court, as is provided in that act, and are subject to the orders and directions of the circuit and county solicitors, as is authorized by the act, and by such other general acts relating to deputy solicitors as are not in conflict with the act of September 25, 1915, which provides for their appointment.

[11, 12] We further hold that the county solicitor has all the right and power to appoint, or obtain, assistants and assistance, which he lawfully had under the provisions of the local laws of Jefferson county in force when the general solicitors' bill was passed (September 25, 1915), and may continue to exercise such powers until 1919; that abolishing the courts in which he and his assistants had theretofore prosecuted cases did not take away the powers or rights of the county solicitor or his assistants—they not being officers of the court so abated—and that his office was not abolished by the abolishing of some or all of the courts in which he prosecuted; that his assistants were not officers of any kind, the law authorizing their appointment fixing no terms, and no compensation except such as might be agreed upon between them and the solicitor; that the county solicitor can appoint them for as long, or for as short, a time as he may desire, limited only by his own tenure of office or his will; that he may also pay them whatever he deems proper, the law only providing a county fund, out of which the compensation should be paid on the order of the county solicitor; that the county solicitor is not obliged to employ any assistants or assistance, the law leaving this to his discretion.

[13] There is, therefore, this difference between the assistants which the circuit solicitor appoints, and those appointed by the county solicitor: The former are made officers, while the latter are not; but the propriety or necessity of appointing any or all authorized by law is left in both instances to the officer authorized to appoint. Whether this is wise or unwise legislation, of course,

is not for the courts, but is the responsibility of the Legislature. Whether the circuit or the county will have too many, or too few, assistant solicitors, is of course in a measure left to the discretion of the appointing power, as well as the matter of the character or efficiency of the appointees. Upon the propriety of such legislation the court cannot and does not pass.

There are quite a number of specific objections urged to the constitutionality of section 10 of the act of September 25, 1915, as well as separate ones to the proviso of that section, and also specific objections to some of the local laws of Jefferson county conferring powers and authorities upon the county solicitor; such as, that section 45 of the Constitution was violated in their attempted enactment, and that section 10 and the provision were in effect passing a local law in violation of our Constitution as to the passage of local laws.

Neither these questions nor the arguments relating to them have been overlooked; but it would extend the opinion to too great length to treat them separately. Suffice to say, we find no constitutional objection urged, to be well taken.

It therefore results that the appeal in the quo warranto proceeding is affirmed, and that the applications for mandamus are denied.

ANDERSON, O. J., and McCLELLAN, GARDNER, and THOMAS, JJ., concur. SOMERVILLE, J., concurs in conclusion. SAYRE, J., dissents.

(15 Ala. App. 567)

**NORRIS v. STATE.** (3 Div. 247.)

(Court of Appeals of Alabama. Feb. 6, 1917.)

**1. CRIMINAL LAW** §749—SENTENCE.

The question of proper punishment within statutory limitations after conviction is a matter for the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1723.]

**2. CRIMINAL LAW** §957(1)—NEW TRIAL—GROUNDS—AFFIDAVITS OF JURORS—ADMISSIBILITY.

An affidavit of a juror is not admissible to impeach the verdict on motion for new trial after conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2392.]

Appeal from Circuit Court, Lowndes County; A. E. Gamble, Judge.

Charlie Norris was convicted of an offense, and appeals. Affirmed.

R. Alston Jones, of Montgomery, and R. L. Goldsmith, of Hayneville, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

**PELHAM, P. J.** [1, 2] The motion to set aside the verdict and grant the defendant a new trial was properly overruled by the

trial court. No evidence was offered in substantiation of any ground set out except by the affidavit of a juror undertaking to impeach the verdict as having been rendered on an understanding between the members of the jury as to the punishment that would be imposed that was not carried out. The question of the proper punishment within the statutory limitations was a matter for the court. The court was right in not considering the affidavit seeking to impeach the verdict. An affidavit of a juror is not admissible in this state, under the rulings of the Supreme Court, for the purpose of impeaching the verdict on motion for a new trial. *Birmingham Ry., L. & P. Co. v. Moore*, 148 Ala. 115, 42 South. 1024, and cases collected and cited on page 130; *Continental Casualty Co. v. Ogburn*, 186 Ala. 398, 403, 64 South. 619.

The rulings of the trial court on the evidence are free from error that would authorize a reversal, and do not, we think, require discussion to demonstrate their freedom from reversible error.

An examination of the entire record does not disclose prejudicial error in the rulings of the court below, and an affirmance of the judgment of conviction is ordered.

Affirmed.

BRICKEN, J., not sitting.

(15 Ala. App. 568)

**BROWN v. STATE.** (4 Div. 475.)

(Court of Appeals of Alabama. Feb. 6, 1917.)

**1. CRIMINAL LAW** §753(3)—TRIAL—PROVINCE OF JURY—WEIGHT OF EVIDENCE.

Under Code 1907, § 5362, prohibiting the court from charging on effect of evidence, unless required to do so by a party, and section 5364, requiring charges moved for by either party to be in writing, an oral general affirmative charge in behalf of the state given on oral request, being a charge on the effect of the evidence, was erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1723, 1729.]

**2. CRIMINAL LAW** §747—TRIAL—PROVINCE OF JURY—WEIGHT OF EVIDENCE.

A general affirmative charge cannot be given in favor of the state where the testimony of defendant and his wife makes a material conflict in the evidence, in which case it is for the jury to determine the weight of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1714, 1727.]

Appeal from Law Court, Pike County; T. L. Borum, Judge.

William T. Brown was convicted of an offense, and he appeals. Reversed and remanded.

W. E. Griffin, of Troy, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

**PELHAM, P. J.** The complaint on which the defendant was tried charged the defendant in three different counts with violations

of the prohibition laws. It affirmatively appears from the recitals in the record that the court, at the oral request of the state's counsel, orally gave the jury the general affirmative charge in behalf of the state on each count of the complaint. To this action of the court an exception was duly reserved by the defendant.

[1] The court is not permitted, under the statute law of this state, to charge upon the effect of the evidence, unless required to do so by one of the parties (Code 1907, § 5362), and charges moved for, or required to be given, by either party, must be in writing (Code 1907, § 5364). The court's oral charge, not given on written request, was a charge on the effect of the evidence and erroneous. Code 1907, §§ 5362, 5364; *Fidelity & Dep. Co., etc., v. Art Metal, etc., Co.*, 162 Ala. 323, 327, 50 South. 186.

[2] If the instruction had been duly and properly requested in writing, under the evidence on the trial, it could not have been properly given, as the evidence given by the defendant and his wife, as well as other witnesses introduced in behalf of the defendant, made a material conflict in the evidence as to the guilt of the defendant of the offenses charged against him, and it was for the jury and not the court to determine the weight to be accorded this evidence, and pass upon its sufficiency or failure to overcome the prima facie case made out by the state's evidence. See *King v. State*, 151 Ala. 12, 44 South. 200; *Brewer v. State*, 113 Ala. 106, 21 South. 355; *Wright v. State*, 156 Ala. 108, 47 South. 201.

Reversed and remanded.

(15 Ala. App. 704) =====

# HEARIL v. STATE. (7 Div. 418.)

(Court of Appeals of Alabama. Feb. 10, 1917.)  
CRIMINAL LAW §=1092(4)—APPEAL AND ERROR—BILL OF EXCEPTIONS—TIME FOR FILING.

In a criminal case, a bill of exceptions, not presented to the trial judge for signature within the 90 days required by law, will be stricken on motion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2847-2849, 2851.]

Appeal from City Court of Gadsden; James A. Bilbro, Judge.

Ernest Hearil alias, etc., was convicted of crime, and he appeals. Affirmed.

Thomas H. Stephens and J. D. Giles, both of Gadsden, for appellant. W. L. Martin, Atty. Gen., for the State.

BRICKEN, J. On motion of the Attorney General, it is ordered that the bill of exceptions in this case be stricken because not presented to the trial judge for signature within the 90 days required by law.

No error appearing on the record, the judgment appealed from is affirmed.

Affirmed.

(15 Ala. App. 569)

# JAMES v. STATE. (3 Div. 264.)

(Court of Appeals of Alabama. Feb. 6, 1917.)

# 1. RECEIVING STOLEN GOODS §=8(4)—EVIDENCE—WEIGHT.

In a prosecution for receiving stolen property, to sustain a conviction, it must be shown beyond a reasonable doubt that the property in question had been feloniously taken and carried away, and that the defendant did buy, receive, conceal, or aid in concealing the identical property knowing that it had been stolen, etc.

[Ed. Note.—For other cases, see *Receiving Stolen Goods*, Cent. Dig. § 18.]

# 2. RECEIVING STOLEN GOODS §=8(3) — EVIDENCE—SUFFICIENCY.

In a prosecution for receiving stolen property, evidence held insufficient to sustain a conviction.

[Ed. Note.—For other cases, see *Receiving Stolen Goods*, Cent. Dig. §§ 16, 17.]

# 3. RECEIVING STOLEN GOODS §=9(1) — EVIDENCE—AFFIRMATIVE CHARGE.

In a prosecution for receiving stolen property, where there was no evidence of the corpus delicti, the court was in error in refusing a written request for the affirmative charge.

[Ed. Note.—For other cases, see *Receiving Stolen Goods*, Cent. Dig. § 19.]

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Will James was convicted of receiving stolen property, and he appeals. Reversed and remanded.

Wm. R. Brassell, of Montgomery, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

BRICKEN, J. The indictment in this case contained two counts; one for grand larceny, and the other for buying, receiving, concealing, or aiding in the concealing, of stolen property, the property alleged in each count of the indictment being a cow belonging to one Bill McKee. On the trial of the case, the defendant, Will James, was convicted by the verdict of the jury as follows: "We, the jury, find the defendant not guilty on the first count." "We, the jury, find the defendant guilty of receiving stolen property as charged in the second count."

[1, 2] The propositions of law involved in this case are too well settled to require discussion here. Before the judgment of conviction could be properly had, the evidence must have shown: First, that the cow in question had been feloniously taken and carried away, and the evidence must have shown this fact beyond a reasonable doubt; second, that the defendant did buy, receive, conceal, or aid in concealing, this identical cow, knowing that it had been stolen, etc. These facts must also have been shown by the evidence beyond a reasonable doubt. We are constrained to say, that after a careful study of the entire record, we are unable to find any evidence to sustain either of the propositions. First, there is no evidence on the part of any witness that the cow of Bill McKee had been

stolen; and, second, no evidence of any nature to show that the defendant had received any cow from any one, or that he concealed, or aided in concealing, the cow in question, knowing that it was stolen. *Jeffries v. State*, 7 Ala. App. 144, 62 South. 270.

[3] There was no evidence proving or tending to prove the corpus delicti and the court was in error in refusing the affirmative charge requested by the defendant in writing. For this error the judgment of the court below must be reversed, and the cause remanded.

Reversed and remanded.

(15 Ala. App. 571)

Ex parte McMILLAN et al. (1 Div. 225.)

(Court of Appeals of Alabama. Feb. 6, 1917.)

1. EVIDENCE  $\Leftrightarrow$  48—JUDICIAL NOTICE—ACTS OF THE FEDERAL GOVERNMENT.

The court judicially knows that about June 18, 1916, the President of the United States called for the mobilization of the National Guard of the United States on the Mexican border, and that under a resolution of the federal Congress passed July 1, 1916 (Act July 1, 1916, c. 211, 39 Stat. 339), the President was authorized to, and did, draft into the military service of the United States, under the provisions of the National Defense Act June 3, 1916, c. 134, 39 Stat. 166, the organized militia of the state of Alabama, and that under the provisions of such act of Congress, from such date the members of the National Guard of Alabama are discharged from militia service for the state, and are subject to the laws and regulations of the Army of the United States, as far as applicable to the volunteer army, and in conformity to the above-mentioned provisions, Company M of the First Regiment of the Alabama National Guard was transferred, as a part of the volunteer forces of the United States, to the Mexican border, and its members are now outside of the jurisdiction of the state courts and on the border as members of the volunteer army of the United States, subject only to the commands of the officers of the United States government and federal authorities.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 70.]

2. HABEAS CORPUS  $\Leftrightarrow$  42 — JURISDICTION OF STATE COURTS—PERSONS HELD BY AUTHORITY OF LAWS OF UNITED STATES.

In view of Regulations for United States Army, art. 72, which is the law of the land, the state courts have no authority to grant a writ of habeas corpus for the discharge of members of the state militia which has been drafted into the military service of the United States under the National Defense Act.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 40-42.]

3. HABEAS CORPUS  $\Leftrightarrow$  113(2)—REVIEW—MOOT CASE.

Where members of the state National Guard had been drafted into the military service of the United States, under the National Defense Act, and hence are beyond the jurisdiction of state courts, the appellate court will not consider the question whether they were properly mustered into the service of the state, as the case has become a moot case, and the courts will decline to pass upon appeals in such cases.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 103.]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Petition by W. F. McMillan and others for a writ of habeas corpus. From a decree of the chancery court dismissing the petition, the petitioners appeal. Writ denied, and appeal dismissed.

Granade & Granade, of Chatom, for appellants. W. L. Martin, Atty. Gen., and Lawrence E. Brown, Asst. Atty. Gen., for appellee.

PELHAM, P. J. This is an appeal from a decree of the chancery court of Mobile, dismissing the petition of appellants for habeas corpus to secure a release of the petitioners from the custody of the captain of Company M, First Regiment, of the Alabama National Guard, on the ground that the petitioners were not regularly and properly mustered into the service of the state as members of the Alabama National Guard.

[1] The court judicially knows that on or about the 18th day of June, 1916, the President of the United States called for the mobilization of the National Guard of the United States on the Mexican border. The court also judicially knows that under a resolution of the federal Congress passed July 1, 1916, the President was authorized to, and did, draft into the military service of the United States, under the provisions of what is known as the National Defense Act (approved June 3, 1916), the organized militia of the state of Alabama; and that under the provisions of said act of Congress, from the said date of being drafted, the members of the National Guard of Alabama stand, and are, discharged from militia service for the state, and are subject to the laws and regulations of the Army of the United States, as far as applicable to the volunteer army. The court further judicially knows that, in conformity to the above-mentioned provisions, Company M of the First Regiment of the Alabama National Guard was, several months ago, transferred, as a part of the volunteer forces of the United States, to the Mexican border for service, and as such its members are now outside of the jurisdiction of the state courts on the border as members of the volunteer army of the United States performing duties as such, and subject only to the commands of the officers of the United States government, and federal authorities.

[2, 3] The rules and regulations of the United States Army are the law of the land (*Root v. Stevenson*, 24 Ind. 115); and, whatever authority the state courts have under state laws to grant writs of habeas corpus, it does not apply to discharge from custody of persons held by authority of the laws of the United States. Regulations for U. S. Army, art. LXXII; *In re Royal*, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868.

The following authorities will be found to



support our holding of what the court may take judicial knowledge: *M. & C. R. R. Co. v. Bromberg*, Adm'r, 141 Ala. 258, 282, 37 South. 395; *L. & N. R. R. Co. v. Holland*, 173 Ala. 690, 55 South. 1001; *Ensley v. Simpson*, 166 Ala. 383, 52 South. 61; *Drake, Ex'r, v. Lady Ensley, etc., Co.*, 102 Ala. 501, 506, 14 South. 749, 24 L. R. A. 64, 48 Am. St. Rep. 77; *Clifton Iron Co. v. Dye*, 87 Ala. 468, 471, 6 South. 192; *Wall v. State*, 78 Ala. 417, 418; *Gordon, Rankin & Co. v. Tweedy*, 74 Ala. 282, 237, 49 Am. Rep. 813.

From what we have said it will be seen that there is no necessity for this court to enter into a consideration, and reach a determination, on the question sought to be presented, as the case has become a moot case, and the writ must be denied. *Ex parte Perryman*, 156 Ala. 625, 46 South. 866. Appellate courts will never consider moot cases, for the reason that no end could be accomplished by any judgment rendered, and the court will decline to pass upon appeals in such cases. *Montgomery County et al. v. Montgomery Traction Co.*, 140 Ala. 458, 37 South. 208.

Writ denied and appeal dismissed.

(15 Ala. App. 573)

**BLACK v. WILLIAMSON & YOUNG.**  
(4 Div. 473.)

(Court of Appeals of Alabama. Feb. 10, 1917.)

**JUDGMENT ¶126(1) — DEFAULT JUDGMENT — PROOF OF CAUSE OF ACTION.**

In an action on the common counts, where there was no indorsement on the summons or complaint that the account sued upon was verified by affidavit as required by Acts 1915, p. 609, amending Code 1907, § 3970, to make it competent evidence of the correctness of the account, a default judgment rendered without showing a compliance with the statute, or the execution of a writ of inquiry, or that there was on file an itemized statement verified by a competent witness which would dispense with writ of inquiry under section 3971, was erroneous, and must be reversed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 223, 224, 228.]

Appeal from Geneva County Court; J. A. Campbell, Judge.

Suit by Drs. Williamson & Young, a partnership, against A. B. Black. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

W. O. Mulkey, of Geneva, for appellant. J. N. Mullins, of Hartford, for appellees.

**PELHAM, P. J.** The transcript in this case shows that suit was brought in the county court, declaring on the common counts, by the appellee partnership against the appellant to recover a sum certain. There was no indorsement on the summons or complaint that the account sued upon was verified by affidavit, as required by statute to make it competent evidence of the correctness of the account. Act approved September 17, 1915,

amending section 3970 of the Code of 1907 (Acts 1915, p. 609).

Judgment by default was rendered against the appellant, and the judgment entry recites:

"And this suit being based on an itemized verified statement of account now on file in this court, and plaintiffs' damages therefore being certain, it is ordered and adjudged that the plaintiffs have and recover of the defendant," etc.

The judgment was rendered without showing a compliance with the statute or the execution of a writ of inquiry, and was erroneous and must be reversed. *Parsons Lumber Co. v. West Steagall G. & M. Co.*, 163 Ala. 594, 50 South. 1034; *Greer & Walker et al. v. Lipfert Scales Co.*, 156 Ala. 572, 47 South. 307. There is nothing in the recital of the judgment entry that would fairly import a finding by the court of the existence of facts showing that there was on file with the clerk of the court an itemized statement of the account sued on, verified by the affidavit of a competent witness, made before and certified by a proper officer having authority under the laws of this state to take and certify affidavits, to bring it under the influence of those cases holding that such recitals in the judgment entry, under the provisions of section 3971 of the Code, dispense with the necessity of a writ of inquiry.

Reversed and remanded.

(15 Ala. App. 574)

**AUTREY v. STATE.** (1 Div. 218.)

(Court of Appeals of Alabama. Feb. 6, 1917.)

**1. CRIMINAL LAW ¶829(1)—REFUSAL OF REQUESTED INSTRUCTION—CURE BY OTHER INSTRUCTIONS.**

Refusal of a requested instruction is not erroneous, where the subject is substantially covered by other portions of the charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

**2. CRIMINAL LAW ¶785(14)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.**

An instruction in a larceny case that if certain state witnesses had been impeached their evidence does not justify conviction without corroborating evidence indicating defendant's guilt was properly refused as misleading and partly abstract as applied to the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1784.]

**3. CRIMINAL LAW ¶785(12)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.**

A requested instruction in a larceny trial that testimony of witnesses known to be unworthy of belief or impeached in any other manner is insufficient, etc., was properly refused because allowing the jury to determine their credibility from matters outside the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1892.]

**4. ROBBERY ¶27(1)—INSTRUCTIONS—DEFINING OFFENSE.**

Where accused was indicted for robbery and convicted of larceny, an instruction that he had no right to commit a breach of peace in taking

the money, although his victim was not lawfully in possession of it, was not erroneous.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 38, 40.]

**5. INDICTMENT AND INFORMATION**  $\S$ 191(9)—**CONVICTION FOR LARCENY UNDER ROBBERY CHARGE.**

Under an indictment for robbery, accused may be convicted of larceny.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 619.]

Appeal from Circuit Court, Monroe County; Ben D. Turner, Judge.

Matthew Autrey was convicted of larceny, and appeals. Affirmed.

The evidence tended to show that Matthew Autrey, Frank Smith, and others were engaged in a game of "skin," and that Matthew Autrey became broke, and, drawing his pistol, pointed it at Smith's head and forced him to lay down on the bench near by \$4 in silver, which defendant took and carried away. Defendant's testimony tended to show that he had \$4 in his pocket, and that after the game he went to sleep, and while asleep Smith stole \$4 from him, and, on awakening and discovering the theft, he told Smith he had better give up his money, and that Smith gave him the money; that he did not have a pistol, and did not point it at his head. The following charges were refused to defendant:

(1) The affirmative charge. "(11) You must believe beyond a reasonable doubt that the property involved in the prosecution was the property of Frank Smith before you can convict."

"(E) If you believe that Frank Smith and Theophilus Stallworth had been impeached in this case, their evidence is not sufficient to justify a conviction without corroborating evidence, and such corroborating evidence, to avail anything, must be facts tending to show the guilt of defendant."

"(R) The testimony of witnesses for the prosecution, who are known to be unworthy of belief, or who are impeached in any other manner, is not sufficient to justify a conviction without corroborating evidence, and such corroborating evidence, to avail anything, must be facts tending to show the guilt of defendant."

Hybart & Biggs, of Monroeville, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

**PELHAM, P. J.** Refused charge No. 1 requested in behalf of the defendant (the general charge) was properly refused as the evidence set out in the bill of exceptions shows that the question of the defendant's guilt of the greater offense charged against him, or of one of the lesser offenses included, was for the jury.

[1] Charge No. 11 was substantially covered by the written charges given at the request of the defendant and the oral charge of the court.

[2] Charge E is misleading and in part abstract as applied to the facts, and was well refused.

[3] Charge R predicates a finding by the

jury on a knowledge of the unworthiness of belief of witnesses outside of the evidence.

[4] That part of the oral charge of the court, to the effect that the defendant has no right to commit a breach of the peace in taking the money, although the person was not lawfully in possession of it, was free from error. *Danzey v. State*, 126 Ala. 15, 28 South. 697.

[5] The court properly charged the jury that under the indictment for robbery a conviction could be had for larceny. Each of the lesser offenses of assault with intent to rob, assault, and battery, simple assault, or larceny are included in the greater offense. *Rambo v. State*, 134 Ala. 71, 32 South. 650; *Smith v. State*, 11 Ala. App. 153, 65 South. 693.

We have examined the whole record, and find no error, or other question that requires discussion.

Affirmed.

(15 Ala. App. 576)

**PILLAR v. STATE.** (8 Div. 389.)

(Court of Appeals of Alabama. Feb. 6, 1917.)

**1. CRIMINAL LAW**  $\S$ 336—**EVIDENCE—ADMISSIBILITY.**

Facts and circumstances which, when proven, are incapable of affording any reasonable presumption or inference in regard to the material facts are not admissible in evidence; therefore, in a prosecution for assault with intent to murder, it was not erroneous to sustain objections to questions to the injured party as to what witnesses had sworn upon another trial, in a case before a justice of the peace, which had no connection with the prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 768, 875.]

**2. HOMICIDE**  $\S$ 300(7)—**TRIAL—JURY QUESTIONS.**

In a prosecution for assault with intent to murder, where it appeared that when the difficulty started accused was in a buggy on a public road several miles distant from his home, a charge on self-defense which explained the duty of retreating is proper, being applicable to the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 622.]

**3. CRIMINAL LAW**  $\S$ 804(6)—**TRIAL—INSTRUCTIONS.**

Where the court, having read to the jury all the written charges asked by defendant, stated that they were not to be taken to explain, vary, or contradict the general charge, but to be taken in connection with it, the statement was not improper as a qualification of the written charges.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1951, 1952.]

Appeal from Circuit Court, Lauderdale County; C. P. Almon, Judge.

Jim Pillar, alias Jim Tank, was convicted of assault with intent to murder, and he appeals. Affirmed.

W. L. Martin, Atty. Gen., for the State.

**BRICKEN, J.** [1] The indictment in this case charged the defendant with the offense of assault with intent to murder. He was

convicted as charged, from which judgment of conviction the defendant appeals, and insists that the court erred in sustaining state's objection to questions propounded to Joe Rainey, the injured party, by defendant. These questions sought to inquire into matters absolutely foreign to the issues in this case, and related to what certain witnesses had sworn upon another trial and in a case before a justice of the peace, which case had no connection whatever with the case at bar and in no manner related thereto. The general rule is clear and well defined that facts and circumstances which, when proven, are incapable of affording any reasonable presumption or inference in regard to the material facts or inquiry involved are not admissible in evidence. This rule is elementary. What a witness swore upon another and different trial, and whether he swore the same thing that another witness swore, are matters that are entirely foreign to the issue, and do not tend to shed any light on the questions or issues involved in this case. Therefore there was no error in the court's ruling on this question. The objections interposed by the state were properly sustained. *Twitty v. State*, 168 Ala. 59, 53 South. 308; *Cheek v. State*, 3 Ala. App. 646, 57 South. 108; *Wray v. State*, 2 Ala. App. 139, 57 South. 144.

[2] The next insistence of error is that the court, in charging the jury on the law of self-defense, referred to and explained the third element thereof, the question of retreat, it being insisted that this phase of self-defense was not involved, as it was contended that the defendant was under no duty to retreat; it being claimed that the defendant was at his own home. We are of the opinion that there is no merit in this contention under the evidence in this case, for without conflict it was shown that the defendant lived more than a mile from the scene of the difficulty, and at the time the difficulty started he was in a buggy on the public road and was going from the city of Florence, which was several miles distant, to his home. It was shown by the testimony without conflict that the house nearest to the scene of the difficulty had been rented by the defendant, and that his sister, Della Sharpton, was living in it. Some of the testimony described the house as having been 40 feet from the place of shooting. There is no conflict in the testimony as to the defendant remaining in his buggy all during the difficulty in the public road, and, further, the evidence is without conflict that the defendant shot the injured party, Joe Rainey, in the back, firing four shots at him and striking him twice. It was shown that the four shots fired by defendant were fired with great rapidity, some of the witnesses expressing it, "about as fast as a pistol could shoot." There was some conflict in the testimony as to who started the difficulty; but it would appear from a fair construction of all the tes-

timony that both parties were at fault, in bringing on the difficulty, and that both parties to the transaction were more or less under the influence of liquor. There was testimony to the effect that defendant, earlier in the day, had threatened Rainey; and the trend of all the testimony on the question appears to have shown that bad feeling existed between the parties. Under all these circumstances, and from all the testimony in this case, it would appear that all these questions were properly submitted to the jury for its consideration and determination, and the court did not err in its rulings in so doing.

[3] The only remaining question in controversy as disclosed by the record must be decided adversely to the defendant, for there was no error in the court's statement to the jury, after the court's having read to the jury all of the written charges asked by the defendant, "that the written charges are not to be taken by you to explain, vary, or contradict the general charge of the court, but are to be taken in connection with it." This statement by the court is not a qualification of the written charges, but an explanation to the jury that the written charges were to be taken in connection with the court's oral charge as the law in the case. The instructions of the court are not fragmentary. The charge given by the court *ex mero motu* and the charges which may be given on request are an entirety, and must be so taken and construed. *Martin v. State*, 104 Ala. 71, 16 South. 82.

We find no error in the record, and the judgment of the court will be affirmed.

Affirmed.

(15 Ala. App. 579)

#### GREEN v. STATE. (7 Div. 421.)

(Court of Appeals of Alabama. Feb. 6, 1917.)

#### INDICTMENT AND INFORMATION — 19 — DEMURRER—THINGS OF VALUE.

In a prosecution for burglary, an indictment, following practically Code 1907, p. 664, form 27, and reading that defendant, with intent to steal, broke into and entered the store of one named in which goods, merchandise, or clothing, things of value, were kept for use, sale, or deposit, was sufficient, as against an attack by demurrer on the ground that the "things of value" as averred or set out in the indictment is not disjunctively used, or separated by the word "or," as related to the specified things or articles kept for use, sale, or deposit, since the words, "things of value" as used are descriptive of "clothing."

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 91.]

Appeal from Circuit Court, Cleburne County; Hugh D. Merrill, Judge.

Charlie Green was convicted of burglary, and he appeals. Affirmed.

Johnson & McMahon, of Heflin, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

PELHAM, P. J. The indictment upon which the defendant was tried was for bur-

glary, and practically follows the code form. Code 1907, p. 664, form 27. Omitting formal stating parts, the indictment reads that:

"Charlie Green, with intent to steal, broke into and entered the store of W. A. Brown, in which goods, merchandise, or clothing, things of value, were kept for use, sale, or deposit."

The indictment was demurred to on the ground that the "things of value" as averred or set out in the indictment is not disjunctively used, or separated by the word "or," as related to the specified things or articles kept for use, sale or deposit. It is insisted that the indictment is defective and subject to demurrer for this reason, and that the cases of *Hawkins v. State*, 8 Ala. App. 234, 62 South. 974, and *Ashmon v. State*, 9 Ala. App. 29, 63 South. 754, are determinative on the proposition favorable to defendant's contention.

The question of the sufficiency of the indictment on attack by demurrer was not presented in the *Ashmon* Case, supra, and was not dealt with in the opinion of that case. The question there discussed, in this connection, was the restricted meaning that must be accorded to the words, "things of value" in the connection in which they are used in an indictment following the code form for burglary (form 27, p. 664 of the Criminal Code) under the holding of the Supreme Court in *McCormick v. State*, 141 Ala. 75, 37 South. 377. The proposition under consideration in the *Ashmon* Case being a question of variance between the evidence and the averments, or charge, as preferred by the allegations of the indictment, the case is not in point, and has no bearing on the question here as to the validity or sufficiency of the indictment on attack by demurrer in not alleging "things of value" disjunctively.

The indictment of this case not alleging "things of value" in the alternative, as did the indictment under discussion in *Hawkins' Case*, supra, the holding in that case is rather an authority for than against the validity of the indictment as against the attack made on it by demurrer in the instant case. The holding in that case was that as the indictment did allege "things of value" in the alternative, proof could have been made and a conviction had on anything of value shown to have been in the store, whether or not they were such things as are within the contemplation of the general terms used in the statute (Code, 6415) to cover other things belonging to the same class as those which are designated. No such question is presented in the present case. The words, "things of value," as used in the averment of the indictment in this case, are descriptive of "clothing." *McCormick v. State*, 141 Ala. 75, 37 South. 377.

The indictment substantially follows the form, and was good as against the attacks made against it by demurrer. *Norman v. State*, 13 Ala. App. 337, 340, 69 South. 362;

*Kelly v. State*, 72 Ala. 244; *Henderson v. State*, 70 Ala. 23, 45 Am. Rep. 72. See, also, *Hankinson v. State*, 2 Ala. App. 110, 57 South. 61.

No other question is presented by the record, and the judgment of conviction appealed from is ordered affirmed.

Affirmed.

(15 Ala. App. 581)

# HANKINS v. STATE. (8 Div. 496.)

(Court of Appeals of Alabama. Feb. 6, 1917.)

## CRIMINAL LAW §807(1)—TRIAL—INSTRUCTIONS.

In a prosecution for the illegal sale of intoxicating liquors, a requested instruction that it is a principle of law that justice should be tempered in mercy was properly refused, as it embodies no proposition of law and is argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1806, 1959, 1960.]

Appeal from Circuit Court, Colbert County; C. P. Almon, Judge.

Andrew Hankins was convicted for violation of the prohibition law, and he appeals. Affirmed.

James Jackson, of Tuscumbia, for appellant. W. L. Martin, Atty. Gen., for the State.

BRICKEN, J. The defendant was indicted for the violation of the prohibition law, in that he sold, offered for sale, kept for sale, or otherwise disposed of, spirituous, vinous, or malt liquors, contrary to law, etc. To this indictment the defendant interposed a plea of not guilty; but after the state had introduced its evidence and had made out its case as required by law, the defendant obtained permission of the court to withdraw his plea of not guilty, and thereupon entered a plea of guilty as charged in the indictment.

The only assignment of error disclosed by the record is the court's refusal to give at request of the defendant, the following written charge:

"Gentlemen of the jury, it is a principle of law that justice should be tempered in mercy."

There was no error in refusing this charge, as it embodies no proposition of law and is argumentative, and the court was under no duty to give it.

Finding no error, the judgment of the trial court must be affirmed.

Affirmed.

(15 Ala. App. 532)

# SUTTLES v. STATE. (7 Div. 370.)

(Court of Appeals of Alabama. Feb. 10, 1917.)

## 1. CRIMINAL LAW §1156(1) — MOTION FOR NEW TRIAL—REVIEW.

Prior to Acts 1915, p. 722, a motion for a new trial in a criminal case was a matter to be determined by the trial court, and was entirely within its discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3067.]

## 2. CRIMINAL LAW §448(11)—EVIDENCE—ADMISSIBILITY.

In a prosecution for homicide, a question to a witness as to whether the conduct of deceased was objectionable was improper because seeking for the witness' conclusion as to what constituted objectionable conduct, and was not admissible under the rule allowing a witness to testify as to a collective fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1041.]

## 3. CRIMINAL LAW §753(2) — TRIAL — AFFIRMATIVE CHARGE.

The general affirmative charge cannot be given when the evidence affords an inference adverse to accused who requests it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1727, 1729.]

## 4. CRIMINAL LAW §789(18)— TRIAL — INSTRUCTIONS.

In a homicide case, a charge that if one fact inconsistent with the guilt of accused has been proven to the reasonable satisfaction of the jury they could not convict is improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1922, 1960, 1967.]

## 5. CRIMINAL LAW §829(1) — TRIAL — INSTRUCTIONS—REFUSAL.

The refusal of charges covered by those given is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

Appeal from Circuit Court, De Kalb County; W. W. Haralson, Judge.

Orbe Suttles, alias, etc., was convicted of manslaughter and he appeals. Reversed and remanded.

The person killed was one England, alleged to have been stabbed with a knife. The evidence was in conflict as to who did the stabbing, and as to who brought on the difficulty. Charge 2, refused to defendant, is as follows:

"If one fact inconsistent with the guilt of defendant has been proven to your reasonable satisfaction, then you cannot convict this defendant."

"(3) If you believe from the testimony that the weight of evidence is against the theory of the state that defendant conspired with Delas Campbell to kill or do Joe England, some bodily harm, you will find defendant not guilty."

(4) Practically same as 3.

Hunt & Wolfes and Isbell & Scott, all of Ft. Payne, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

BRICKEN, J. [1] The defendant, under an indictment for murder in the first degree, was convicted of manslaughter in the first degree; and from this judgment of conviction he appeals. The ruling of the court in refusing a motion for a new trial in this case is not revisable here, the case having been tried prior to the act (Acts 1915, p. 722) which became effective September 22, 1915; hence said act is not applicable to this case. Prior to said act supra, a motion for

a new trial in a criminal case was a matter to be determined by the trial court, and was entirely within its discretion. *Burrage v. State*, 118 Ala. 108, 21 South. 213; *Cooper v. State*, 88 Ala. 107, 7 South. 47; *Smith v. State*, 165 Ala. 58, 51 South. 610.

[2] The defendant objected to the following question, propounded by the state to witness Wade:

"Just tell the jury the conduct of England [deceased]; was his conduct there such as was objectionable?"

The court overruled said objection, and the witness was permitted to answer "that it was all right; he had good conduct there that night." We are of the opinion that the question was clearly objectionable, in that, it called for a conclusion on the part of said witness and a conclusion based upon witness' standard as to what constitutes objectionable conduct, or good conduct, by which the defendant could, in no manner, be bound. The rule making it permissible under some circumstances for a witness to testify to what is termed a "collective fact" is not applicable here, for a collective fact is distinguishable and very different from a bare, arbitrary conclusion of a witness. The trial court erred in overruling the objection to said question and in permitting the witness to answer. *Carney v. State*, 79 Ala. 14.

[3] There was no error in refusing charge 1, which was the general charge in favor of the defendant. It has been repeatedly held in this state that the general affirmative charge cannot be given when the evidence affords inference adverse to the party requesting the charge. In such a case, the question becomes one for the determination of the jury. *Hargrove v. State*, 147 Ala. 97, 41 South. 972, 119 Am. St. Rep. 60, 10 Ann. Cas. 1126; *Turner v. State*, 97 Ala. 57, 12 South. 54.

[4] Charge 2 was bad, and hence was properly refused. This charge was condemned by the Supreme Court in *Pippin v. State*, 73 South. 340, and in *Davis v. State*, 184 Ala. 26, 63 South. 1010. This charge was condemned as being invasive of the province of the jury, and also as misleading.

[5] There was no error in refusing to give charges 3 and 4, as these charges were substantially covered by given charge 12. The trial court commits no error in refusing to give charges requested which are mere repetitions of charges already given, or contain substantially the same propositions involved in the charges already given. *Koch v. State*, 115 Ala. 99, 22 South. 471.

For the error pointed out, the judgment is reversed, and the cause remanded. The defendant must remain in custody until discharged by due course of law.

Reversed and remanded.

(15 Ala. App. 503)

**BRIDGEFORTH v. STATE.** (3 Div. 380.)(Court of Appeals of Alabama. July 10, 1916.  
On Rehearing, Aug. 1, 1916.)**1. INTOXICATING LIQUORS**  $\S$  215 — **CRIMINAL PROSECUTIONS—SUFFICIENCY OF COMPLAINT—“OTHERWISE DISPOSE OF.”**

A complaint under Acts Sp. Sess. 1909, p. 90,  $\S$  29½, that defendant sold, etc., or “otherwise disposed of,” liquors, is sufficiently certain, since section 31 defines the quoted words as including any method by which liquors pass unlawfully.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig.  $\S$  258-260.

For other definitions, see Words and Phrases, First and Second Series, Otherwise.]

**2. INDICTMENT AND INFORMATION**  $\S$  19 — **CRIMINAL PROSECUTIONS—STATE’S POWER TO PRESCRIBE FORM OF INDICTMENT.**

The Legislature has power to prescribe the form and scope of indictments for intoxicating liquor offenses.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig.  $\S$  91.]

**3. INTOXICATING LIQUORS**  $\S$  210 — **CRIMINAL PROSECUTIONS—SUFFICIENCY OF COMPLAINT.**

A complaint that defendant sold, etc., or otherwise disposed of, liquors contrary to law, includes the unlawful transportation for another.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig.  $\S$  250.]

**4. INTOXICATING LIQUORS**  $\S$  167 — **CRIMINAL PROSECUTIONS—AIDING SALE—SUFFICIENCY OF EVIDENCE.**

While a defendant to be guilty of aiding a liquor law violation must contribute to the result, it is sufficient if by prearrangement with the principal he is present to render assistance if it should become necessary.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig.  $\S$  182, 183.]

**5. INTOXICATING LIQUORS**  $\S$  236(4) — **CRIMINAL PROSECUTION — SUFFICIENCY OF COMPLAINT.**

Evidence held to sustain a conviction for aiding a liquor law violation, although the principal was arrested before accused rendered actual assistance.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig.  $\S$  305, 306.]

**6. INTOXICATING LIQUORS**  $\S$  233(1) — **CRIMINAL PROSECUTIONS—ADMISSIBILITY OF EVIDENCE.**

In prosecution for aiding a liquor law violation, evidence that defendant approached a railroad station by a circuitous and dimly lighted route was admissible, where the state claimed he was to transport the liquor from the station.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig.  $\S$  293, 294, 296, 297.]

**7. CRIMINAL LAW**  $\S$  763, 764(3, 4) — **INSTRUCTIONS—LACK OF EVIDENCE.**

A requested instruction, in a liquor law violation case, that there is no evidence of a given fact, may be refused without error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  1731, 1763.]

**On Rehearing.****8. INTOXICATING LIQUORS**  $\S$  236(4) — **CRIMINAL PROSECUTIONS — SUFFICIENCY OF EVIDENCE.**

Evidence held to show a conspiracy between defendant and a state’s witness for violating the liquor law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig.  $\S$  293, 294, 296, 297.]

**9. CRIMINAL LAW**  $\S$  1169(4) — **HARMLESS ERROR—ADMISSIBILITY OF EVIDENCE.**

Any error in admitting the declaration of a state’s witness that he expected defendant to meet him is harmless, where a conspiracy between the two for violating the liquor law was subsequently proved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  754, 3140.]

**10. INTOXICATING LIQUORS**  $\S$  236(4) — **CRIMINAL PROSECUTIONS — SUFFICIENCY OF EVIDENCE.**

Evidence held to sustain a finding that a state’s witness was guilty of transporting liquor along a public street so as to authorize defendant’s conviction for aiding and abetting the crime.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig.  $\S$  293, 294, 296, 297.]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Robert Bridgeforth, Jr., was convicted of a liquor law violation, and appeals. Judgment affirmed, and application for rehearing overruled.

Certiorari denied by Supreme Court, 74 South. 1005.

W. L. Martin, Atty. Gen., for the State.

BROWN, J. The affidavit or complaint on which the defendant was tried charges in the language of the statute then in force that he “sold, offered for sale, kept for sale, or otherwise disposed of spirituous, vinous, or malt liquors, contrary to law.” Acts Spec. Sess. 1909, p. 90,  $\S$  29½.

[1] The demurrer takes the point that the alternative averment, “or otherwise disposed of,” is so indefinite and uncertain in meaning as not to charge an act denounced by the statute with that certainty required by good pleading. There is some force in this point, and the demurrer would be well taken if the statute did not define the meaning and scope of the averment when used in the connection here shown to include “any manner of disposition by which said liquors and beverages may pass unlawfully from one person to another.” Acts 1909, Spec. Sess. p. 91,  $\S$  31; Arrington v. State, 18 Ala. App. 359, 69 South. 385, affirmed by the Supreme Court, 70 South. 1012; Bush v. State, 12 Ala. App. 260, 67 South. 847; Burt v. State, 72 South. 266.

[2] That the Legislature has the power to prescribe the form of indictment and define the scope of such indictments is not an open question in this state. Noles v. State, 24 Ala. 672; Jones v. State, 136 Ala. 125, 34 South. 236. The demurrers were properly overruled.

[3] The charge in the affidavit covers the

charge of unlawfully transporting prohibited liquors for another. *Arrington v. State*, supra; *Burt v. State*, supra.

[4, 5] The important question presented arises from the refusal of the affirmative charge requested by the defendant; that disposed of, the difficulty of disposing of the other questions disappears. The evidence tends to show that the witness Dean by prearrangement with "a white man" went to Cullman and purchased the liquors seized by the sheriff when defendant was arrested, and that this white man agreed to have some one meet Dean at the station with a vehicle to assist him in carrying the liquors away from the station; and the tendency of the evidence was sufficient to afford an inference that defendant was at the station with his conveyance waiting to assist Dean, and that Dean had knowledge of this and, when he left the train with the liquors, he started toward defendant's vehicle, when he was arrested. Other than this, the evidence has no tendency to connect the defendant with the transaction. Section 7363 of the Code 1907 provides:

"Any person who makes, aids, or abets, or who counsels or procures an unlawful sale or unlawful purchase or unlawful gift or other unlawful disposition of spirituous, vinous, or malt liquors or other liquors prohibited by law from being sold, given away, or otherwise disposed of \* \* \* must, on conviction, be fined not less than fifty \* \* \* nor more than five hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county for not more than six months, and a conviction may be had for a violation of this section under an indictment for selling spirituous, vinous, or malt liquors \* \* \* contrary to law."

While to be guilty of aiding and abetting the commission of an offense the person charged must contribute to the result, no particular acts are necessary if by prearrangement or with the knowledge of the principal he is present to render assistance should it become necessary. *Raiford v. State*, 59 Ala. 106; *State v. Talley*, 102 Ala. 25, 15 South. 722; *Jones v. State*, 174 Ala. 56, 57 South. 31; *Swope v. State*, 12 Ala. App. 297, 68 South. 562. The complaint, which not only charges a sale, but charges other unlawful disposition is comprehensive enough to cover any one of the several related offenses specified in the statute, and the evidence was sufficient to require the submission of the case to the jury. *Johnson v. State*, 172 Ala. 432, 55 South. 226, Ann. Cas. 1913E, 296; *Rayfield v. State*, 167 Ala. 94, 52 South. 833; *Darrington v. State*, 162 Ala. 60, 50 South. 396; *Bush v. State*, supra. The declaration of Dean in the presence of the defendant "that he was expecting the defendant's hack to meet him" not only tended to show that defendant was there by prearrangement, but tended to show Dean's knowledge of defendant's presence at the time and place for the purpose of rendering assistance to Dean. *James v. State*, 167 Ala. 14; 52 South. 840.

[6] It was permissible for the state to show that defendant, in coming to the station, followed a more circuitous and less frequented route, and approached the station on the opposite side from where passengers usually alighted, as circumstances tending to show that he was there to meet Dean and aid him, and the defendant's objections to testimony tending to show these facts were not well taken.

[7] No duty rests upon the trial court to charge that there is no evidence of a given fact. Such, as has been repeatedly held, assert no proposition of law and may be refused without error. *Kirk v. State*, 10 Ala. App. 219, 65 South. 195; *Anderson v. State*, 160 Ala. 76, 49 South. 460. The unnumbered refused charge was of this class.

We find no error in the record, and the judgment must be affirmed.

Affirmed.

#### On Rehearing.

[8, 9] On this application the appellant questions the statement in the original opinion: "The evidence tends to show that the witness Dean, by prearrangement with a 'white man,' went to Cullman and purchased the liquors seized by the sheriff when defendant was arrested, and that this white man agreed to have some one meet Dean at the station to assist him in carrying the liquors away from the station"—the appellant asserting that the declaration of Dean to the effect "that he (Dean) was expecting the defendant's hack to meet him," made at the time of the seizure of the liquors and the arrest of Dean, is the only evidence tending to show the facts stated. Able counsel for appellant in making this assertion in the application undoubtedly overlooked the fact that Dean was examined as a witness, and testified:

"That a white man had sent him to Cullman to buy the liquor and that he would have a hack to meet him on west side upon his return, and, seeing the defendant's hack there, that he thought that was the hack that was to be sent to meet him."

The defendant was there when the train arrived on the "west side," and when Dean left the train he started to defendant's vehicle. These facts clearly authorize the statement made in the opinion, aside from Dean's declaration. Moreover, in passing on the refusal of the affirmative charge, all the evidence both of the defendant and the state was subject to review. The evidence stated above *prima facie* shows a conspiracy, and, if it was error to admit the declaration of Dean at the time it was admitted, injury was averted by the testimony subsequently offered showing such conspiracy.

[10] It is further insisted that there was no evidence to show that Dean was guilty of transporting liquor for another along a public street or highway, and that therefore the defendant could not be convicted for aid-

ing or abetting. Dean's own evidence shows that the liquors were not his, that he bought them for a white man, and that he had been convicted and was serving a sentence, as the jury had a right to find from his evidence, for this identical offense. The defendant testified:

"Before turning off to go to the depot, I was going along Moulton street from the west to the east, and turned out into a road which at that time ran through a field from Moulton street down to New Decatur depot. This was a public road, and as I got opposite the New Decatur depot Mr. McCulloch told me to stop, and about that time we heard the whistle blow for the incoming accommodation train. If Mr. McCulloch had not stopped me, I was going to follow this road down to the street which crosses the Louisville & Nashville Railroad a block further south of the depot and then come up the track to where the depot stands. When Mr. McCulloch told me to stop, I did so, and in a very few minutes the accommodation train came. Charley Dean got off the train on the west side carrying a valise in each hand and started in our direction, when McCulloch halted him and arrested him."

McCulloch's testimony shows that the defendant drove his hack on the west side of the tracks at the depot and stopped. This evidence afforded an inference that when Dean alighted from the train he started in the direction of defendant's hack along this public road traveled by the defendant when he stopped, and if the jury found this to be true, even though he only took one or more steps along the road, he would be guilty of transporting the liquors along the highway. The evidence also afforded an inference that the liquors were being transported by Dean for another, to wit, the "white man," and if defendant was at the depot with Dean's knowledge, or by prearrangement with Dean and the white man, on the principles discussed in the original opinion he was properly convicted. The application is therefore overruled.

Application overruled.

(140 La. 982)

No. 21321.

ALLAIN v. FRIGOLA.

(Supreme Court of Louisiana. Feb. 12, 1917.  
Rehearing Denied March 12, 1917.)

(Syllabus by the Court.)

LANDLORD AND TENANT §167(2)—INJURY TO ONE ON PREMISES—LIABILITY.

The owner is bound to know whether his building is safe for the purposes for which he rents it or authorizes its use, or is rotten and unsafe, and is answerable, in damages, to those who, being lawfully therein, are injured by reason of its defects, whether of original construction or caused by failure to make proper repairs.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 669, 679.]

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Action by Edmond J. Allain against August Frigola. Judgment for defendant, and

plaintiff appeals. Judgment annulled, and judgment rendered in favor of plaintiff.

Charbonnet & Gauche, of New Orleans, for appellant. K. V. Richard and Sidney F. Gautier, both of New Orleans, for appellee. Joseph A. Breaux and James Wilkinson, both of New Orleans, amici curiæ.

#### Statement of the Case.

MONROE, C. J. Plaintiff has appealed from a judgment rejecting his demand for damages for personal injury resulting from his falling through a wharf belonging to defendant, a stringer of which broke while plaintiff and others were carrying a piano over it.

The facts of the case are as follows:

In April, 1913, plaintiff and others, members of an unincorporated club, rented from defendant a "camp," consisting of a wooden building, situated on, or in, Lake Ponchartrain, at a distance of 209 feet, or more, from the shore, with which it was connected by a wharf, between 3 and 4 feet wide, built on piles, eight feet three inches distant from each other, with stringers nailed to them, and planks laid across the stringers. The camp was first rented for April, May, and June, and, then, by the month, for July and August, when the club gave it up, but left within it a small upright piano weighing only 466 pounds, of which they were the owners. Thereafter, at different times, defendant requested the president of the club to have the piano removed, and on October 12, 1913, he was notified that they were ready to move it, and he accompanied the president and five other members, including plaintiff from the city to the lake in order to facilitate them in so doing by opening the building; but he made no suggestions as to the manner of the removal and gave no warning that it would be unsafe for them to carry it over the wharf, instead of rolling it, or getting it out in some other way. They undertook to carry it out—two of them, including plaintiff, taking the upper end, and four, the lower end, which, latter, contained the machinery, and about two-thirds of the weight, the piano being held horizontally, on its side, with its top to the front. Moving in that way, plaintiff and his fellow carriers had passed on to the third section of the wharf while the four men behind were still on the second section, or, perhaps, at the line between the two, when one of the stringers broke, and plaintiff and his mate, with the piano, were precipitated into the water, leaving the others where they were, with the result, as to plaintiff, that he suffered a complete fracture of one of his shoulder blades, by reason of which he was laid up for a week, was obliged to carry his arm in a sling for nearly a month, suffered a great deal of pain, and was still suffering, more or less, and somewhat disabled in Feb-



ruary, 1915, when the case was tried. It is shown that the stringer that broke was rotten; that if it, and the other timbers, had been sound, the wharf should readily have supported several times the weight that was thus imposed upon it; that the wharf had been built several years before; and it is not shown that it had ever been inspected or repaired. It is further shown that the previous tenant (defendant's nephew) had a piano there which was removed by defendant, himself, and, though it appears that only three men were employed to take it in, and out, and hence that they rolled it, it does not appear that defendant, who saw plaintiff and his friends carrying their piano out, made any suggestion to them that rolling would be the safer way. Quarrella, a witness called by defendant, testifies that he owns nine camps, and rents them, furnished or unfurnished; that it is customary to take pianos over the wharves; that they generally roll them, but that he would not allow any one to roll a piano over a wharf of his, unless he were notified. He does not say, nor does any one else, whether rolling or carrying is better for the wharf. Being asked what is the usual life of such wharves, he replied, "Well, every year, I go over mine; sometimes, every six months." On the other hand, the most that defendant could say about his wharf was that he thought it had been built in 1911, but was not sure; that it was built of fine lumber; that no one notified him that there was anything the matter with it, and he did not know that it was rotten.

#### Opinion.

The owner is bound to know whether his building is safe for the purposes for which he rents it, or authorizes its use, or is rotten and unsafe, and is answerable, in damages, to those who, being lawfully therein, are injured by reason of its defects, whether of original construction or caused by failure to make proper repairs. Whether, at the time of the accident, plaintiff enjoyed the rights of a tenant, is immaterial, for he and the other members of the club were lawfully on the premises, engaged, at defendant's repeated request, in removing their piano, in a manner to which defendant, who was present, made no objection and which is not shown to have been more unsafe (as to the wharf) than any other manner. According to the law and the jurisprudence, defendant is liable for such amount as will compensate plaintiff for the pecuniary loss and physical injury that he has suffered by reason of the accident. C. C. 670, 2322; Tucker v. I. O. R. Co., 42 La. Ann. 115, 7 South. 124; Lawson v. Shreveport Waterworks Co., 111 La. 73, 35 South. 390; Schoppel v. Daly, 112 La. 201, 36 South. 322; Cristadoro v. Von Behren's Heirs, 119 La. 1025, 44 South. 852, 47 L. R. A. (N. S.) 1161; Baucum v. Pine Woods Lum-

ber Co., 130 La. 39, 57 South. 577; Wise v. Lavigne, 138 La. 218, 70 South. 103. And we fix that amount at \$1,000.

It is therefore ordered and decreed that the judgment appealed from be annulled, and that there now be judgment in favor of plaintiff and against defendant in the sum of \$1,000, with legal interest thereon from judicial demand until paid, and all costs.

(73 Fla. 289)

ST. JOHNS COUNTY v. TRIAY et al.

(Supreme Court of Florida. Feb. 8, 1917.)

#### (Syllabus by the Court.)

#### 1. EQUITY $\S$ 311 — BILL — SIGNATURE OF COUNSEL.

The rules of the circuit courts in equity actions require counsel for the complainant to annex his signature to the bill of complaint, that it may be considered as an affirmation on his part that upon the instructions given to him and the case laid before him, there is good ground for the suit in the manner in which it is framed. Rule 27.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 613.]

#### 2. INJUNCTION $\S$ 118(4) — PLEADING — DENIAL OF APPLICATION.

An application for injunction, based upon a bill of complaint which states no ground for equitable relief, should be denied.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 236-238.]

#### 3. DRAINS $\S$ 1 — CONSTRUCTION — TITLE AND POSSESSION OF OWNERS.

Proceedings by county commissioners to establish a public ditch or drain through certain lands, under the provisions of chapter 16 of the General Statutes of Florida 1906, which comprises sections 950-960, and as amended by chapter 6457, Laws of Florida 1913 (Comp. Laws 1914, §§ 950-960e), do not deprive the owners of lands, through which it is proposed to construct the ditch or drain, of their title or possession to such land.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 1.]

Appeal from Circuit Court, St. Johns County; George Couper Gibbs, Judge.

Bill for injunction by St. Johns County, Fla., against Francis Triay and others. From an order denying the application for injunction, St. Johns County appeals. Order affirmed.

MacWilliams & Bassett, of St. Augustine, for appellant. Cockrell & Cockrell, of Jacksonville, for appellees.

ELLIS, J. In February, 1914, a petition was presented to the county commissioners of St. Johns county by certain landowners who deemed it necessary to establish a public ditch or drain through their lands and the lands of others who were not parties to the petition. The petition was presented and the proceedings which followed were under the provisions of chapter 16 of the General Statutes of Florida 1906, comprising sections 950-960, as amended by chapter 6457, Laws of Florida 1913 (Comp. Laws 1914, §§ 950-960e).

The general course of the proposed ditch as shown by the petition was west from the northeast corner of section 24, township 8 south, range 28 east, and along the northern line of sections 24, 23, 22, 21, and 20 to a creek in the northwest quarter of the latter section. The appellees owned lands along the route of the proposed ditch. Theodore Triay owned the east half of the northeast quarter of section 20; Francis Triay owned the southwest quarter of the southwest quarter of section 16; and J. A. Cody owned the southeast quarter of the southwest quarter of section 16, all in the same township and range. These men, appellees here, were not parties to the petition.

The board of county commissioners, after publishing all the notices required by the statute and otherwise complying with its requirements, declared its intention to construct the ditch or canal along the route or course named in the petition, no objection or reasons having been filed with the board why the ditch should not be constructed, and proceeded to let the work of constructing the ditch out upon a contract. The contractor to whom the work was let employed laborers and made all preparations to commence work, and did begin work, after giving a bond for the proper construction of the canal or ditch within five months.

The appellees then began to threaten the contractor and his employes with prosecutions for trespass if they entered upon the lands of appellees for the purpose of digging the aforementioned ditch, and have refused to allow the contractor and its employes to enter upon their lands for the purpose of constructing the ditch.

The county commissioners thereupon filed their bill against the appellees, alleging that their conduct will cause the contractor to "suffer irreparable injury and damages and be and become liable on his bond without default on his part." The appellant's conception of its equity is expressed in the words of the last paragraph but two of the bill, the substance of which is:

"In order that the canal may be dug" and the contractor may comply with the terms of his contract an injunction is expedient and necessary to restrain the appellees and their agents, servants, and employes from interfering with the construction of the canal. In accordance with this idea an injunction was prayed for to restrain the appellees "from interfering with the digging and construction of the canal over, upon and through" the E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  of section 20, the S. W.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  and the N. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of section 16, T. 8 S., R. 28 E.

[1] This bill is not signed by any one as complainant or solicitor as the record shows. Rule 27 of the rules of circuit courts in equity actions requires counsel to affix his signature to the bill, that it may be considered as an affirmation on his part that upon the instructions given to him and the case laid before him there is good ground for the suit in the manner in which it is framed.

In making up the transcript probably the clerk overlooked the signatures of the county commissioners and their solicitor. It may also be noticed that in the prayer there is an error of description of part of the lands owned by appellees; the northeast quarter of the southwest quarter of section 16, is not alleged to belong to either one of the appellees, nor according to the described course of the canal will it come within 400 yards of that land.

The chancellor denied the application for an injunction, from which order an appeal was taken.

[2, 3] It is unnecessary to discuss the constitutionality of the statute under which the ditch is proposed to be constructed, nor the application of section 12 of the Declaration of Rights providing that private property shall not be taken without just compensation and due process of law, nor whether section 29 of article 16 of the Constitution is applicable, providing that no private property nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner, or first secured to him by deposit of money, etc.

The bill of complaint fails to show any equity in the complainant or in the contractor in whose interest it seems to have been filed. If the complainant has a right to enter upon the land the bill fails to show it, because nothing in the proceedings relating to the determination by the county commissioners to construct the ditch has deprived the appellees of their title or possession. So much was admitted by appellant's solicitor in the argument, but he insists that appellees were estopped by the proceedings from denying to the county the right to use part of the land for a right of way, because they failed to appear before the county commissioners and show cause why the ditch should not be constructed. Even if such was the case, the law affords an adequate remedy against any form of violence by which persons seek to unlawfully interfere with another's rights to the latter's injury. The bill does not show in what the alleged irreparable injury to the county from appellees' conduct consists. The allegation is a mere conclusion of law, and seems to have been made in behalf of the contractor who does not appear to be complaining. 22 Cyc. 762.

The bill alleges that when the canal is completed it will drain all the lands in certain sections in the immediate territory, and will be of great assistance and benefit to a majority of those owning the greater part of the lands through which the proposed canal runs. There are ten sections involved, the appellees are alleged to be the owners of 160 acres, but we cannot perceive how this circumstance creates any equity in the county to restrain the appellees from threatening to bring suits against the contractor for tres-

pass upon their lands. We see nothing in this record which affords a basis for interference by injunction against the appellees; nothing which shows the existence of any recognized ground for equity interference.

So we think the order should be affirmed, and it is so ordered.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and WHITFIELD, JJ., concur.

(73 Fla. 345)

**SLOAN v. SLOAN.**

(Supreme Court of Florida. Feb. 10, 1917.)

(Syllabus by the Court.)

**WILLS** §—587(1) — RESIDUARY LEGACY—"ALL MY OTHER PERSONAL PROPERTY"—INSURANCE POLICY.

An insurance policy, made payable to the insured, "his executors, administrators and assigns," may be bequeathed as a part of a general residuary legacy of "all my other personal property."

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1279, 1285-1287.

For other definitions, see Words and Phrases, All My Personal Property and Estate.]

Error to Circuit Court, Duval County; George Couper Gibbs, Judge.

Suit by Susan M. Sloan against Charles B. Sloan. Judgment for defendant, and plaintiff brings error. Affirmed.

Marion & Waybright, of Jacksonville, for plaintiff in error. Baker & Baker, of Jacksonville, for defendant in error.

**WHITFIELD, J.** The declaration herein is as follows:

"Susan M. Sloan, by her attorneys, Marion & Waybright, sues C. B. Sloan, of Duval county, state of Florida:

"(1) For that the said defendant on, to wit, the 16th day of May, A. D. 1913, was indebted to the plaintiff in the sum of \$1,472.47, money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff.

"(2) And in a like sum for money lent by the plaintiff to the defendant.

"(3) And in a like sum for money found to be due from the defendant to the plaintiff on accounts stated between them.

"(4) And for interest at the rate of 8 per cent. per annum upon the said sum of \$1,472.47 from the said 16th day of May, A. D. 1913.

"Wherefore this plaintiff brings this action and claims damages in the sum of \$3,000."

The pleas filed by the defendant, C. B. Sloan, are:

"(1) That he was never indebted as alleged.

"(2) That the several supposed causes of action in said declaration mentioned are one and the same, to wit, the supposed cause of action in the first count mentioned, and not different causes of action; that the money alleged to have been had and received by and lent to the defendant was the proceeds of a policy of life insurance in the Washington Life Insurance Company on the life of one Joseph B. Sloan, deceased, the late husband of the plaintiff; that said policy was payable to the said Joseph B. Sloan, his executors, administrators, and assigns, by the terms thereof; that the said Joseph B. Sloan died, leaving his last will and

testament, since duly probated and admitted to record in the county judge's court in and for Duval county, Fla., and that in and by said last will and testament the said Joseph B. Sloan devised and bequeathed to his wife one-third share or part of, in and to all his property, real and personal, and devised and bequeathed the remaining two-thirds thereof to certain other persons named therein, to be equally divided between them; all of which will more fully appear by and from a copy of the last will of Joseph B. Sloan, hereto attached and made a part hereof, and hence so bequeathed and disposed of the proceeds of said life insurance policy in like manner as he bequeathed other personal property, and as he had a lawful right to do according to the statute in such case provided; and this defendant as the duly qualified executor of said will received and holds the proceeds of such life insurance as a part of the assets of the estate of said Joseph B. Sloan for distribution, and does not hold such proceeds under such circumstances as to come within the implied premises and undertakings of the several supposed causes of action sued upon."

The will referred to in the 2d plea is as follows:

"I, Joseph B. Sloan, of Jacksonville, Duval county, Florida, being of sound and disposing mind, do make this my last will and testament, hereby revoking all wills by me at any time heretofore made.

"After the payment of all my just debts and funeral expenses, I give, devise and bequeath as follows:

"1. I give, devise and bequeath to my wife, for and during the term of her natural life, my residence in the city of Jacksonville, Duval county, Florida, described as lot three (3) in block thirty-two (32), East Jacksonville, at the southeast corner of Palmetto and Ashley streets, and also all the household goods and furniture of which I shall die possessed; and at her death the same shall be divided equally between my nephew Charles Lawton Sloan, my sister Mrs. B. H. Prouty and my sister-in-law Lillian G. Sloan, all of Duval county, Florida, and said property shall vest in them absolutely; but in the event of the death of my said sister or my said sister-in-law, or both of them, before the death of my wife, said interest of my said sister, or my said sister-in-law, or both, as the case may be, shall vest in my said nephew, his heirs and assigns forever.

"2. I give, devise and bequeath to my wife one-third interest in all other real estate for and during the term of her natural life, and said interest shall be divided, at the time of her death, between my said nephew, sister and sister-in-law, share and share alike; but in the event of the death of my said sister or sister-in-law, or both of them, before the death of my wife, such interest of my said sister or sister-in-law, or both, as the case may be, shall vest in my nephew, his heirs and assigns, forever. The other two-thirds interest in said real estate, besides the life estate hereby provided for my said wife, shall be divided equally between my said nephew, sister and sister-in-law, at the time of my death; but in the event that either my said sister or sister-in-law shall die prior to my death, such interest of the one so dying shall vest absolutely in my said nephew, his heirs and assigns, forever.

"3. I give and bequeath a one-third interest in all my other personal property to my wife, and the remaining two-thirds shall be divided equally between my said nephew, sister and sister-in-law; but in the event that either my said sister or sister-in-law shall die prior to my death, such interest of the one so dying, or both, shall vest absolutely in my said nephew, his heirs and assigns forever."

A demurrer to the second plea was overruled, and judgment rendered for the defendant at a hearing before the court under a stipulation. The plaintiff took writ of error.

The statute (Comp. Laws 1914, § 3154) provides that:

"Whenever any person shall die in this state leaving insurance on his life the said insurance shall inure exclusively to the benefit of the child or children and husband or wife of such person in equal portions, or to any person or persons for whose use and benefit such insurance is declared in the policy; and the proceeds thereof shall in no case be liable to attachment, garnishment, or any legal process in favor of any creditor or creditors of the person whose life is so insured, unless the insurance policy declares that the policy was effected for the benefit of such creditor or creditors: Provided, however, that whenever the insurance is for the benefit of the estate of the insured or is payable to the estate or to the insured, his or her executors, administrators, or assigns the proceeds of the insurance may be bequeathed by the insured to any person or persons whatsoever or for any uses in like manner as he or she may bequeath or devise any other property or effects of which he or she may be possessed, and which shall be subject to disposition by last will and testament."

The plea avers that the insurance policy "was payable to the said Joseph B. Sloan, his executors, administrators and assigns." Under the statute above quoted an insurance policy so made payable "may be bequeathed by the insured to any person or persons whatsoever or for any uses in like manner as he or she may bequeath or devise any other property or effects of which he or she may be possessed."

If such an insurance policy "may be bequeathed by the insured" "in like manner" as he may bequeath "any other property or effects," it may be included in a general residuary bequest of personalty and in this case was included in the bequest by the insured of "all my other personal property," made in the third subdivision of his will.

It does not appear from the plea that the insurance policy was merely a power of appointment or assignment; but the policy referred to in the plea may be classed as property that may be bequeathed in like manner as any other property or effects.

As the bequest made of the policy was authorized by law, the judgment is affirmed.

**BROWNE, C. J., and TAYLOR, SHACKLEFORD, and ELLIS, JJ., concur.**

(73 Fla. 357)

**STATE, for Use of SUWANNEE COUNTY, v. BARTON.**

(Supreme Court of Florida. Feb. 12, 1917.)

(Syllabus by the Court.)

**BAIL §77(1) — PROCEEDINGS TO ESTREAT BOND—VARIANCE.**

In proceedings to estreat a bail bond there is no fatal variance between notice of a bond conditioned "to appear at the spring term, A. D. 1915," and a bond, offered in evidence, con-

ditioned to appear "on Monday the 21st day of June, A. D. 1915," it appearing that June 21, 1915, was a day in the spring term of the court to which an adjournment was had on the day the bond was executed.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 335-340, 379.]

**Error to Circuit Court, Suwannee County; M. F. Horne, Judge.**

Proceeding by the State of Florida, for the use and benefit of Suwannee County, against J. B. Barton, to estreat a bail bond. Judgment for defendant, and the State brings error. Reversed.

**T. F. West, Atty. Gen., C. O. Andrews, Asst. Atty. Gen., and Stafford Caldwell, State's Atty., of Live Oak, for plaintiff in error. C. D. Blackwell, of Live Oak, for defendant in error.**

**PER CURIAM.** In proceedings to estreat a bail bond the notice was of a bond given conditioned "to appear at the spring term, A. D. 1915, of the circuit court for Suwannee county and from day to day and term to term to answer a charge," etc. The bond offered in evidence was conditioned to appear "on Monday the 21st day of June, A. D. 1915, at 11 o'clock a. m., being a day of the next term of said court for Suwannee county, and from day to day and from term to term to answer a charge," etc. The court gave judgment for the defendants upon a ruling that there was a fatal variance between the notice and the bond. The state took writ of error.

It appears that the spring term of the court had been adjourned May 21, 1915, to June 21, 1915, and that the bond was executed on May 21, 1915, conditioned to appear "on Monday the 21st day of June, A. D. 1915." The notice of proceedings to estreat a bond conditioned "to appear at the spring term, A. D. 1915," did not show a variance upon the production of a bond conditioned as above stated, when a session of the spring term of the court began on June 21, 1915, in due course.

Reversed.

**BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.**

(73 Fla. 338)

**MCLEOD v. WILLIAMS et al.**

(Supreme Court of Florida. Feb. 10, 1917.)

(Syllabus by the Court.)

**1. TAXATION §734(1)—TAX PROCEEDINGS—VALIDITY.**

A failure to comply strictly with those provisions of tax laws which are intended for the guidance of officers in the conduct of business devolved upon them, designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected, will not usually render the proceeding void; but where the requisites prescribed are intended for the protection of the citizen, and to prevent a sac-

rice of his property, and a disregard of them might and generally would injuriously affect his rights, they cannot be disregarded, and a failure to comply with them will render the proceeding invalid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1408, 1470, 1471.]

## 2. TAXATION ⚡748—TAX DEED—EXECUTION.

An applicant for a tax deed who takes it when the authority to execute it has not been exercised, as required by mandatory provisions of law, does so at his peril.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1494, 1495.]

## 3. TAXATION ⚡788(3)—TAX DEED—BURDEN OF PROOF.

Where the prima facie effect given a tax deed by the statute is overcome, it is the duty of the party claiming under the tax deed to show its validity.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1559.]

## 4. TAXATION ⚡489—CORRECTION AND REVIEW—STATUTE.

The statute requires that the county commissioners at a meeting for correcting and reviewing the county assessment shall immediately thereafter ascertain and determine the amount of money to be raised by tax for county purposes, and authorizes the levy of a tax, and provides that every such determination and levy so made shall be entered at large upon the records of the board.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 870, 871.]

## 5. TAXATION ⚡338—ASSESSMENT—OWNER.

An assessment of lands in the name of a person who is not the owner or legal representative of the owner, or as unknown, or to the same owner as for the previous year when not returned for taxation by the owner, is not authorized by law.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 571, 577, 578.]

## 6. TAXATION ⚡686—TAX CERTIFICATE—SIGNATURE OF CLERK—STATUTE.

The statute contemplates that the clerk of the circuit court shall sign an indorsement of a tax certificate made by him.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1377-1379.]

## 7. TAXATION ⚡750—APPLICATION FOR TAX DEED—NOTICE.

Where the clerk of the circuit court does not give the notice of an application for a tax deed in substantial compliance with the statute, the tax deed is void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1497.]

## 8. TAXATION ⚡750—APPLICATION FOR TAX DEED—NOTICE—VALIDITY.

Notice of an application for a tax deed must be mailed to the owner of the lands or to the person last paying the taxes thereon, or else the tax deed will be ineffectual.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1497.]

Appeal from Circuit Court, Santa Rosa County; A. G. Campbell, Judge.

Ejectment by W. A. McLeod against W. J. Williams and others. Judgment for defendants on a directed verdict, and plaintiff brings error. Affirmed.

Clark & Thompson, of Milton, for plaintiff in error. McGeachy & Lewis, of Milton, and Watson & Pasco, of Pensacola, for defendants in error.

WHITFIELD, J. McLeod brought ejectment to recover possession of N. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  and N. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , Sec. 1, T. 3 N., R. 29 E., containing 80 acres. Trial was had upon a plea of not guilty. The plaintiff introduced a tax deed dated December 19, 1914, based upon a tax certificate issued to the state dated September 2, 1912, for unpaid taxes of 1911. A conveyance of the timber on the land dated September 28, 1910, executed by W. J. Williams, Sr., to the Yellow Pine Land Company, the rights under the conveyance to cease six years from January 1, 1911, was properly excluded by the court, it not being material to the issue.

The plaintiff rested and the defendant offered testimony to show the tax deed to be void on grounds that: (1) The county commissioners in making the tax levy for 1911 did not "ascertain and determine the amount of money to be raised by tax for county purposes," etc., as required by section 2, chapter 6157, Acts 1911; (2) the property was not assessed "in the name of the owner or legal representative of the owner, or as 'unknown,'" or "to the same owner as for the previous year" as required by sections 20 and 26, chapter 5596, Acts 1907; (3) the tax certificate was not assigned by the clerk's signature to the assignment indorsed thereon, as required by section 568, General Statutes of 1906; (4) notice of the issuance of the tax deed was not given as required by section 575, General Statutes of 1906.

At the conclusion of the testimony the court declared the tax deed to be void, and directed a verdict for the defendants, on which judgment was rendered, and the plaintiff took writ of error.

Tax deeds duly issued pursuant to the statute are "declared to be prima facie evidence of the regularity of the proceedings from the valuation of the land described \* \* \* to the date of the deed." But when a substantial defect in "the proceedings" that affect the validity of the tax deed is shown, the tax deed is ineffectual as title, unless the holder thereof sufficiently overcomes the showing made of the defect in the proceedings.

[1] A failure to comply strictly with those provisions of tax laws which are intended for the guide of officers in the conduct of business devolved upon them, designed to secure order, system, and dispatch in proceedings, and by a disregard of which the right of parties interested cannot be injuriously affected, will not usually render the proceeding void; but where the requisites prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property,

and a disregard of them might and generally would injuriously affect his rights, they cannot be disregarded, and a failure to comply with them will render the proceeding invalid.

[2] An applicant for a tax deed who takes it when the authority to execute it has not been exercised, as required by mandatory provisions of law, does so at his peril.

[3] Where the prima facie effect given a tax deed by the statute is overcome, it is the duty of the party claiming under the tax deed to show its validity. *Clark-Ray-Johnson Co. v. Williford*, 62 Fla. 453, 56 South. 938; *Starks v. Sawyer*, 56 Fla. 596, 47 South. 513.

[4] Section 2, chapter 6157, provides that:

"The board of county commissioners of every county, at a meeting for correcting and reviewing the county assessment, shall, immediately thereafter ascertain and determine the amount of money to be raised by tax for county purposes, including the current expenses, interest on bonded debt, bridges and county buildings, and to meet the expenses, they are hereby authorized to levy a tax of not more than five mills upon the dollar on the real and personal property of the county; and every such determination and levy so made shall be entered at large upon the records of the board of county commissioners."

The minutes of the board of county commissioners put in evidence show the following entries:

"According to advertisement, board met this date, notice having been given that they would be in session on Tuesday, August 1, 1911, to hear complaints and receive testimony as to the value of any property as fixed and assessed by the county assessor of taxes.

"The assessor presented his tax roll for the year 1911, and after examination the tax books showed that the valuation of all taxable property of the county to be \$4,689,058. The board therefore made the following levy for the year 1911, to wit:

"For general revenue 3 mills or thirty cents on the one hundred dollars of taxable property. For fine and forfeiture fund one-half mill, or five cents on the one hundred dollars. For road fund 3 mills or thirty cents on the one hundred dollars. For bridge and building fund one and a half mills, or fifteen cents on the one hundred dollars. For county schools six and a half mills, or sixty-five cents on the one hundred dollars of taxable property.

"The board of public instruction filed their estimate for the school year beginning July 1, 1911, and ending June 30, 1912, and asked that a tax of 6½ mills be levied, and on motion was allowed. \* \* \*

"There being no further business, board adjourned."

Manifestly, these entries do not show that the county commissioners did, as expressly required by the statute, "ascertain and determine the amount of money to be raised by tax for county purposes," etc. Nor do the entries show that such determination was entered at large upon the records of the board of county commissioners.

[5] The land was assessed in 1910 to W. A. McLeod, and in 1911 to the Yellow Pine Land Company. It does not appear that the latter company returned the land for assessment.

Sections 20 and 26, chapter 5596, Acts 1907, contain the following:

"The county assessor of taxes shall ascertain by personal inspection, where not already sufficiently acquainted therewith, the value of the lands and assess them at their full cash value in the name of the owner or legal representative of the owner, or as 'Unknown,' and set down in the assessment roll following and opposite the description of the lands the name of the owner or his or her legal representative, and when the land has not been returned for assessment on or before the first day of April in each year, by the owner or legal representative of the owner, the county assessor of taxes shall enter the word, 'Unknown,' in the column of the assessment roll provided for the name of the owner, or his or her legal representative."

"All assessments shall be legal which shall be assessed to the same owner as for the previous year: Provided, that the owner does not return it for taxation."

It appears that the land was conveyed to W. J. Williams, Sr., in 1910 by the Yellow Pine Land Company. Obviously the land was not assessed in 1911 to the owner W. J. Williams, Sr., or as unknown or "to the same owner as for the previous year," who was W. A. McLeod, since the assessment for 1911 was to the Yellow Pine Land Company who did not own the land, but did own the timber. The statute provides for assessing timber rights separate from the lands. The assessment was not made in accordance with the statute.

[6] Sections 568 and 573, General Statutes of 1906, contain the following:

"568. All tax certificates heretofore or hereafter issued, whether to the state or individuals, shall be transferable by indorsement at any time before they are redeemed, or a tax deed is executed therefor."

"573. Any person may purchase any certificate of land sold or certified to the state for taxes from the clerk of the circuit court of the county wherein such land is situated \* \* \* and the indorsement of such certificate by such clerk officially, with the date and amount received, shall be sufficient evidence of the transfer and assignment thereof."

The tax certificate on which the tax deed was based shows that the indorsement of the assignment to W. A. McLeod has no signature at all to it, the clerk's official seal and official designation appearing, but no signature. The statute necessarily contemplates the affixing of the name of the clerk to the assignment of the tax certificate.

[7] Section 575 of the General Statutes of 1906 mandatorily requires the clerk to mail a copy of the prescribed notice of application for tax deed to the owner of the lands or to the person last paying taxes on said property.

Where the clerk of the circuit court does not give the notice of an application for a tax deed in substantial compliance with the statute, the tax deed is void. *Hempel v. Consolidated Land Co.*, 69 Fla. 277, 67 South. 915.

[8] It appears that a copy of the notice was mailed to M. E. Wilson, an officer or agent of the Yellow Pine Land Company, but he is not shown to have been agent of the

owner of the land or that he was the person last paying taxes on the land. *Hightower v. Hogan*, 69 Fla. 86, 68 South. 669.

As the tax deed under which the plaintiff claimed title to the land was ineffectual to convey title because of the fatal defects in the proceedings constituting the assessment and the issue of the tax deed, there was no error in directing a verdict for the defendants, and the judgment is affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and ELLIS, JJ., concur.

(73 Fla. 374)

SZABO et al. v. SPECKMAN et al.

(Supreme Court of Florida. Feb. 15, 1917.)

(Syllabus by the Court.)

1. PARTITION ¶55(2)—SUFFICIENCY OF BILL.

Where a bill for partition does not in terms allege specifically the quantity and proportionate share held by each person interested in the lands sought to be partitioned, it will nevertheless be held sufficient on demurrer, if the allegations are sufficiently clear to enable the court to adjudicate fully the rights and interests of the parties and the quantity and proportionate share held by each in the lands.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 150, 152-153, 158, 182.]

2. EQUITY ¶148(7)—PLEADING—"MULTIFARIOUSNESS."

A bill for partition is not necessarily multifarious because there may be united in it several causes of action, if they grew out of the same transaction and all the defendants are interested in the same rights, even though the subject-matter of the controversy may be incumbered with conflicting claims, if the objection does not appear to be so grave as to interpose an obstacle to the proper administration of justice.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 864.

For other definitions, see Words and Phrases, First and Second Series, Multifariousness.]

3. EQUITY ¶39(1) — JURISDICTION — ENTIRE CONTROVERSY.

A court of equity, taking jurisdiction of a cause for one purpose, will proceed with the determination of all matters presented, where the purpose for which the court takes jurisdiction is the principal relief sought, and the other matters are incident thereto.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-109, 111, 114.]

4. EQUITY ¶264 — AVERMENTS OF ANSWER—MOTION TO STRIKE—STATUTE.

Under the provisions of chapter 6907, Laws of 1915, affirmative matter averred in an answer to a bill in chancery, if deemed to be insufficient, should be met by motion to strike such averments.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 538-540.]

5. GIFTS ¶59, 62(1) — CAUSA MORTIS — EXPECTATION OF DEATH—DELIVERY.

A gift causa mortis, to be valid, should be made in contemplation of the near approach of death from danger then impending. There should be actual or constructive delivery of the thing given, or the means of getting possession or enjoyment of it.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 108, 122, 123.]

6. GIFTS ¶60(2) — CAUSA MORTIS—BANK DEPOSIT—DELIVERY.

A valid gift causa mortis of money on deposit in bank, which is not a savings account, and which is subject to the depositor's check, cannot be made by delivery of the depositor's bank book merely.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 136.]

7. GIFTS ¶62(5, 6) — CAUSA MORTIS—STOCK OF GOODS—DELIVERY.

A valid gift causa mortis of a stock of goods contained in a storeroom may be made by delivery of the key to such storeroom to the donee or his agent.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 129, 130.]

8. EQUITY ¶252—ANSWER—EXCEPTIONS.

It is error to sustain exceptions to an entire paragraph in an answer, where the paragraph contains averments which are responsive to the bill, or which set up a valid defense thereto.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 523, 524.]

Appeal from Circuit Court, Hillsborough County; F. M. Robles, Judge.

Bill by Harry Speckman and others against Alexander Szabo and others for partition and on accounting between the heirs of Fred William Meyer and Alexander Szabo, as administrator of Meyer's estate, and for an injunction against defendant Szabo. Demurrer to bill overruled, and defendants appeal. Order reversed.

H. S. Hampton and F. J. Hampton, both of Tampa, for appellants. Dickenson & Dickenson, of Tampa, for appellees.

ELLIS, J. The appellees, about 27 in number, who were the uncles, aunts, and cousins of Fred William Meyer on his mother's side, exhibited their bill of complaint in the circuit court for Hillsborough county against Alexander Szabo and Nellie Meyer and Lizzie Meyer, two aunts of Fred William Meyer on his father's side, for partition of certain real estate and an accounting between the heirs of Fred William Meyer, who it is alleged died in Tampa, Fla., seised and possessed of certain real and personal property, and Alexander Szabo, as administrator of Meyer's estate, and an injunction to restrain Alexander Szabo from paying over or delivering to the defendant Nellie Meyer the proceeds, personal property, money, etc., coming into his hands as administrator of the said estate of Fred William Meyer, deceased.

The bill alleged in substance that Meyer died intestate, in Hillsborough county, in 1915, seised and possessed of certain described real estate; that he had an equity in certain of the real estate, and owned certain personal property, consisting of cash on deposit in the Citizens' Bank & Trust Company of Tampa, and a stock of merchandise; that Alexander Szabo was appointed administrator of the estate, and duly qualified as such, and has assumed full control and management of the estate; that the defendant Nel-

He Meyer claims the entire interest, both real and personal, of the estate, and that Alexander Szabo as administrator is threatening and preparing to pay over to her all of the personal property of the estate; that the two defendants Nellie and Lizzie Meyer are sisters, and the sole heirs at law of the father of the deceased, Fred William Meyer, and that the complainants, sisters and brothers, and children and grandchildren of deceased sisters and brothers, of the deceased mother of the said Fred William Meyer, who it is alleged died without wife, children, brother, sister, mother, or father, grandmother, or grandfather surviving him. A demurrer to the bill for want of equity, because of multifariousness and vagueness of the allegations as to complainants' interests, improper joinder of parties, and because complainants show no right to the personal property of the estate, was overruled. Whereupon the defendants answered, admitting the allegations as to the death of Fred William Meyer, demanding proof of the possession by Meyer at his death of the real and personal property described in the bill, proof as to the allegations of the relationship of complainants to the deceased, Fred William Meyer, denying their right to the relief prayed for, and admitting that Nellie Meyer is claiming the entire interest in the property of the estate, denying that Alexander Szabo, as administrator of the estate, has any right, title, or possession of the personal property described in the bill, which it is averred is being administered by the probate court of Hillsborough county, and denying that, as administrator, he is preparing or threatening to pay it over to the defendant Nellie Meyer. The answer contains certain averments of fact upon which the defendant Nellie Meyer avers her sole ownership and title to the personal property of the estate, which averments are as follows:

"And these defendants, further answering said bill, and each and every allegation thereof, beg leave to set forth, jointly and severally, as follows: That in the month of March, 1915, one Frederick William Meyer, who is a nephew of the defendant Nellie Meyer herein, and who all during his lifetime regarded said defendant with love and affection, and had been advised and assisted for many years by the said defendant Nellie Meyer, became afflicted with a fatal disease and was advised by his physician that he would be compelled to undergo a serious operation; thereupon, after receiving such advice, the said Frederick William Meyer, on the eve of said operation, and at a time when by reason of the existing disease and said impending operation his death was quite probable, sent for the defendant Alexander Szabo, who at said time and at the present time had and has no individual interest in the property involved in this litigation, but at said time was a close friend and business associate of the said decedent; that the said Frederick William Meyer then and there explained to the said defendant Szabo that he anticipated his death would result from said operation he was about to undergo, from the sickness with which he was then suffering; that the only relative in the world who had any claim upon him, by reason of his affection or otherwise, was the defendant Nellie Meyer; that as

he believed he was about to die, and had no opportunity to arrange his affairs; that he then and there delivered to the defendant Alexander Szabo the keys to his building, his store, and bank book, and then and there stated to the said Szabo that he then delivered to him, as agent for his said aunt, the said Nellie Meyer, all his estate, including money in bank, and begged said Szabo to close his affairs, and to see that said property was safely delivered to the said defendant Nellie Meyer.

"These defendants, further answering, say that thereupon the said Alexander Szabo, at the request of the said Frederick William Meyer, then and there took possession of the keys, stock of merchandise, and all the estate of the said Frederick William Meyer, for and on behalf of the defendant Nellie Meyer, and upon the death of the said Frederick William Meyer, immediately following said surgical operation, as the result of said then existing disease, said defendant Alexander Szabo qualified as administrator, and at the time of the filing of this bill of complaint was endeavoring in good faith to carry out instructions and requests of the said Frederick William Meyer; that said estate was indebted in various sums, and said administrator was only endeavoring to pay off said indebtedness and to make delivery of said property to the defendant Nellie Meyer; that the real estate left by said decedent is sufficient to pay the indebtedness of said estate, without resort to the personal property. Wherefore these defendants say that by reason of the foregoing the complainants have no interest, right, or title in and to the personal property of said estate, and these defendants pray."

The complainants filed exceptions to the above quoted portions of the answer for scandal and impertinence, which exceptions were sustained in the following order:

"Exceptions sustained, because the court feels that delivery of a bank book is not a proper delivery, and further that a proper delivery must be made to the donee, and not to any one as an agent for donee, as it leaves too much room for fraud with relation to the estates of deceased persons.

"Done and ordered this the 25th day of June, 1916."

[1] The demurrer to the bill was properly overruled. The complainants primarily sought partition of the real estate, which according to the allegations of the bill was owned by the complainants and the two defendants Nellie and Lizzie Meyer as coparceners, and partition of the personal property in the possession of the defendant Alexander Szabo, alleged to be owned by them upon a final settlement of the estate. Sections 1939-1947, General Statutes of Florida of 1906, Florida Compiled Laws of 1914. The allegations of the bill, which are admitted by the demurrer, assert the ownership in common of the real property, which is described, between the parties to the suit, and although the bill does not set out the quantity and proportionate share held by each with that particularity which it should have done, the allegations are sufficiently clear, however, as to the relationship of the complainants and defendants Nellie and Lizzie Meyer to the deceased as to enable the court to adjudicate fully upon the rights and interests of the parties and the quantity and proportionate share held by each.

[2, 3] A bill is not necessarily multifarious



because there may be united in it several causes of action, and many complainants whose interests are different in quantity. If the causes of action grew out of the same transaction and all defendants interested in the same rights, the objection on the ground of multifariousness will not be sustained. And even if the subject-matter of the controversy is incumbered with many conflicting claims, equity will entertain a suit to determine and adjust all the interests at once. See *Farrell v. Forest Investment Co.*, 74 South. 216, decided at the present term. The objection to the bill on this ground does not appear to be so grave as to interpose an obstacle to the proper administration of justice, and, as we said in the above case, the matter particularly to be considered is convenience in the administration of justice. The court having taken jurisdiction of the cause for one purpose, it will proceed with the determination of all the matters presented. See the authorities cited in *Farrell v. Forest Investment Co.*, supra. It is true that the bill did not allege that the debts of the estate had been paid, nor that there were no debts to be paid by the administrator; but it did allege that the defendant Szabo was in possession of the personal property and was about to pay it over and deliver it to the defendant Nellie Meyer, which under the allegations of the bill the complainants had the right to invoke the power of the court to prevent, and to require the administrator to come to an accounting of the personal property in his hands belonging to the estate, and to pay the same over to them accordingly as their interests were established upon a final settlement of the estate. There is no conflict of jurisdiction between the circuit and probate courts for Hillsborough county presented by the bill.

[4, 5] The affirmative matter set up in the answer, which is made the basis for the relief prayed, should have been met by motion to strike the same, if complainants thought it to be insufficient. See chapter 6907, Laws of Florida of 1915. Treating the exceptions, however, as objections to the insufficiency of that portion of the answer hereinbefore quoted, we will consider the question of the validity of the averred "donatio causa mortis." A gift of this character must be made in contemplation of the near approach of death from danger then impending, to take effect absolutely only upon the death of the donor. There must be delivery to the donee, actual or constructive, of the thing given, or the means of getting possession and enjoyment of it. "It is the fact of delivery that converts the unexecuted purpose into an executed and complete gift." See 12 R. C. L. pp. 955-967; 20 Cyc. 1231; *Newton v. Snyder*, 44 Ark. 42, 51 Am. Rep. 587; *Daniel v. Smith*, 75 Cal. 548, 17 Pac. 683; *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500; *Williams v. Chamberlain*, 165 Ill.

210, 46 N. E. 250; *McMahon v. Newtown Sav. Bank*, 67 Conn. 78, 34 Atl. 700; *Deneff v. Helms*, 42 Or. 161, 70 Pac. 390; *Newman v. Bost*, 122 N. C. 524, 29 S. E. 848; *Robson v. Robson*, Adm'r, 8 Del. Ch. 51; *Dickeschied v. Exchange Bank*, 28 W. Va. 340; *Hawn v. Stoler*, 208 Pa. 610, 57 Atl. 1115, 65 L. R. A. 813; *Stokes v. Sprague*, 110 Iowa, 89, 81 N. W. 195; *Smith, Adm'r, v. Ferguson*, 90 Ind. 229, 46 Am. Rep. 216. The case of *Powell v. Leonard*, 9 Fla. 359, holds that in order to constitute a valid gift the transaction must be consummated by delivery of the thing given. See, also, *Ross & Co. v. Walker*, 44 Fla. 704, 32 South. 934; *Fritz v. Fernandez*, 45 Fla. 818, 34 South. 315.

[6, 7] The subject of gifts causa mortis and inter vivos have received much consideration by text-writers and the courts both in this country and England. It is generally conceded that the leading English case on the subject is *Ward v. Turner*, 2 Ves. Sr. 430, in which it was held that an actual delivery was indispensable to vest the property if the subject-matter is capable of delivery. The first headnote states that, if the subject-matter be not capable of delivery, there must be delivery of what is equivalent to it at law. In that case the delivery of receipts for the consideration money paid for the purchase of certain annuities was held by the Lord Chancellor Hardwicke as not being a sufficient delivery to validate the act. It is unnecessary to review the many cases cited in the briefs upon the subject. It would lead to a discussion of little profit. The conclusion of the chancellor who heard this case, that the delivery of the bank book was not a sufficient delivery to validate the gift of the money in bank, we think, was correct; but we do not agree with him that a valid delivery may not be made to an agent of the donee. In the *Ward-Turner Case* the chancellor said that the delivery of a key to a storeroom containing bulky goods had been held to be a sufficient delivery of the possession, because it is the way of coming at the possession or to make use of the thing, and therefore the key is not a symbol which would not do so. And in the case of *Powell v. Leonard*, supra, Mr. Chief Justice Dupont said that what constitutes a good delivery is a question of great difficulty. Its proper solution can only be arrived at by considering, not only the locality of the thing donated, but also its nature and kind, and that the delivery of keys, as in the case of goods in a warehouse or trunk, has even been held to be a sufficient delivery; he also thought that a delivery of a conveyance as in the case of vessels at sea was sufficient. Gifts causa mortis, as the chancellor said in this case, "leaves too much room for fraud with relation to the estates of deceased persons." For that reason, and the numerous attempts to sustain such gifts by fraud and perjury led to the enactment of the statute for the pre-

vention of frauds and perjury. See *Drew v. Hagerty*, 81 Me. 231, 17 Atl. 63, 8 L. R. A. 230, 10 Am. St. Rep. 255.

In the case of a deposit in bank, the bank book is merely evidence of the amounts which have from time to time been placed in the bank by the depositor. The possession of the book in the hands of the bank is not evidence that the amounts appearing on the bank book as debits against the bank have been paid, nor does it authorize the person to whom the book has been given to withdraw it. When the deposit is withdrawn, it is usually by check, if it is not a savings bank deposit, and neither the bill nor the answer show that the deposit was of that character. In *Walah's Appeal*, 122 Pa. 177, 15 Atl. 470, 9 Am. St. Rep. 83, 1 L. R. A. 535, the court said an assignment of such a book, like an assignment of a book of original entry, will operate to transfer the entire balance remaining due upon the account; but a delivery of it will no more transfer the funds than will a delivery of a book of original entries transfer the balances due upon the several accounts contained therein. To the same effect is *Hawn v. Stoler*, 208 Pa. 610, 57 Atl. 1115, 65 L. R. A. 813. See, also, 12 R. C. L. p. 965. Any relaxation of the law in aid of gifts *causa mortis* is fraught with danger; such donations amount to a revocation *pro tanto* of written wills, and, not being subject to the forms prescribed for nuncupative wills, are clearly of a dangerous nature, as *Tilghman, C. J.*, said in *Wells v. Tucker*, 3 Bin. (Pa.) 366, referred to in *Hawn v. Stoler*, *supra*.

[8] The chancellor sustained the exceptions to the entire paragraphs quoted from the answer. As we think the answer sets up a valid gift *causa mortis* as to the stock of goods, the order was erroneous. The order should therefore be reversed; and it is so ordered.

**BROWNE, C. J., and TAYLOR, SHACKLEFORD, and WHITFIELD, JJ., concur.**

(73 Fla. 363)

**CHARLES et al. v. APPLETON et al.**

(Supreme Court of Florida. Feb. 15, 1917.)

(*Syllabus by the Court.*)

**APPEAL AND ERROR** ¶1009(2)—**DECREE—AFFIRMANCE.**

Where there is ample evidence to sustain a decree, and no rule of law is violated, the decree will be affirmed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3971.]

**Appeal from Circuit Court, Pinellas County; F. M. Robles, Judge.**

Bill in equity by J. W. Charles and another against W. W. Appleton and wife and Lizzie M. Slack and others. Bill dismissed as to Lizzie M. Slack and husband,

and as to the other defendants without prejudice, and complainants appeal. Affirmed.

H. P. Bailey, of Tampa, for appellants. A. K. Cook and Wm. G. King, both of St. Petersburg, for appellees.

**PER CURIAM.** J. W. Charles and A. C. Kline brought a bill in equity against W. W. Appleton and wife and Lizzie M. Slack and others. The purpose of the suit is to have the record of a deed of conveyance canceled as being a fraud upon an escrow agreement. On the pleadings and evidence the court dismissed the bill as to Lizzie M. Slack and her husband. The decree contains the following:

"There may or may not be equities between the complainants and defendant Appleton if differently presented, but upon the pleadings and evidence in this case no equity on behalf of complainants has been made to appear. It is therefore ordered that the bill of complaint be, and the same is hereby dismissed without prejudice."

The complainants appealed and contend that on the evidence the decree should have been for the complainants. A discussion of the testimony would serve no useful purpose. There is ample evidence to sustain the decree made, and, as the dismissal of the bill as to the defendant Appleton is without prejudice, the complainant is at liberty to pursue any appropriate remedy to which he may be entitled in the premises under the law.

Affirmed.

**BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.**

(73 Fla. 350)

**HUDDLESTON v. GRAHAM.**

(Supreme Court of Florida. Feb. 12, 1917.  
Rehearing Denied March 24, 1917.)

(*Syllabus by the Court.*)

**1. EVIDENCE** ¶332(1) — **ADMISSIBILITY — JUDGMENT AND DECREES—STATUTE.**

Section 1522 of the General Statutes of Florida 1906, providing for the admission in evidence of judgments and decrees, and certified copies thereof, does not render the original record in a cause inadmissible to prove its contents.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1237, 1240.]

**2. EQUITY** ¶431—**DECREE—CONSTRUCTION—REFERENCE TO PLEADING.**

Where a decree in an equity cause is doubtful in meaning because of certain language used, and such decree is offered in evidence to establish the point that the matter in controversy has been adjudicated, the court will be aided in its interpretation of the meaning of the decree by reference to the pleadings in the cause.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 1048-1051.]

### 3. ESTOPPEL § 98(1)—OPERATION.

An estoppel operates against the principals and their privies.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 290.]

### 4. JUDGMENT § 748(2) — RES ADJUDICATA — DECREE IN EQUIT.

Where, in an equity cause, the legal and equitable title to land is adjudicated as between the parties, the decree in said cause will constitute res adjudicata as between the same parties or their privies in a subsequent action at law involving the title to said land.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1253, 1276, 1284.]

Error to Circuit Court, Palm Beach County; H. Pierre Branning, Judge.

Action of ejectment by Elvira S. Huddleston against D. S. Graham. Judgment on directed verdict for defendant, and plaintiff brings error. Affirmed.

Rand & Kurtz and Price & Eyles, all of Miami, for plaintiff in error. G. A. Worley & Son, of Miami, for defendant in error.

ELLIS, J. This is an action of ejectment brought by the plaintiff in error, as plaintiff below, against the defendant in error, as defendant below. The court instructed a verdict for the defendant, and to the judgment based upon the verdict the plaintiff took a writ of error.

According to the view we have of the case it is only necessary to discuss one question, namely: Whether the record of the case of R. H. Huddleston v. Nora S. Rollins et al., was admissible, and, if so, whether the decree therein was res adjudicata as to the plaintiff in this case.

The facts as shown by the record were as follows: H. H. Huddleston entered under the homestead law the land in dispute. In November, 1883, he obtained his final receipt. In July 1888, by a deed of conveyance in which his wife by a separate instrument joined, the land was conveyed to Mary M. Graham. In October, 1888, R. H. Huddleston obtained a United States patent to the land. During that year Mary M. Graham and her husband, John M. Graham, died, leaving surviving them Nora S. Rollins, who became administratrix of the estates of Mary M. and John M. Graham, also Mabel H. Graham, William M. Graham, and Douglas S. Graham.

In 1902 R. H. Huddleston exhibited his bill in chancery in the circuit court for Dade county against Nora S. Rollins as administratrix of the estate of Mary M. Graham and in her own right as one of the heirs of Mary M. and John M. Graham, and Mabel H. Graham, William M. Graham and Douglas S. Graham, to declare a trust in the lands in dispute for R. H. Huddleston to the extent of one-half interest, and the defendants as the heirs of Mary M. Graham for a one-half interest. The bill recited the circumstances

under which the complainant acquired the property, the conveyance by him and his wife to Mary M. Graham, the circumstances under which he claimed the trust estate was created, the death in 1888 of Mary M. and John M. Graham, and the relation of the defendants as the only heirs at law of Mary M. and John M. Graham. The bill concluded with a prayer that the deed of conveyance from R. H. Huddleston and wife to Mary M. Graham "be declared a trust"; that a master be appointed to sell the land, and after paying the expenses to divide the proceeds of sale equally between the plaintiff and the defendants, according to the terms of the agreement, as it was alleged was made between R. H. Huddleston and John M. Graham when the land was conveyed by the former to the wife of the latter, or that a partition of the lands be made as provided for under the statute. The defendants answered, denying the material allegations of the bill, to which the complainant filed a replication. A master was appointed to take testimony, and the case came on to be heard upon the merits in November, 1905.

The chancellor by his decree adjudged that the complainant had not maintained the bill of complaint, ordered it dismissed, and concluded the decree as follows: "Final decree is hereby entered in favor of the defendants to this bill." A petition for rehearing was granted, which resulted in an order reaffirming the decree as rendered.

In April, 1909, R. H. Huddleston and wife executed a deed to their son, C. L. Huddleston, attempting to convey the lands in dispute, and in June of the same year C. L. Huddleston and wife by deed attempted to reconvey the same lands to R. H. Huddleston.

There is evidence that in 1909 C. L. Huddleston went to Palm Beach, employed attorneys to assist him in clearing the title; that he took possession of the land, ran a two or three strand wire fence along the northern and southern boundary lines, the land lying between the Atlantic Ocean on the east and Lake Worth on the west, obtained leases from some fishermen whom they found on the place, and paid taxes for the years 1905 to 1913, inclusive.

The action of ejectment was begun in April, 1915; the case was tried in November, 1915, at which time the defendant had been living on the place about 18 months. The plaintiff in the action is the widow of R. H. Huddleston, and claims under a will of her deceased husband, who died in May, 1913. The defendant in the action is a son of Mary M. Graham. It was also admitted that Nora S. Rollins, as administratrix of the estate of Mary M. Graham, paid the taxes on the lands for the years 1888 to 1897, inclusive, holds a redemption certificate dated in 1904 redeeming the property from a sale made to

R. H. Huddleston in 1902, also certificates redeeming the property from tax sales made in 1903 and 1904.

[1] The plaintiff objected to the introduction of the record in the chancery suit upon several grounds, one of which was that the papers offered in evidence were the original court files of a cause formerly pending in the circuit court for Dade county. Palm Beach county before its creation in 1909 was a part of Dade county, and was made a part of the Seventh judicial circuit, which included Dade county, and at the time of the trial of this cause formed a part of the Eleventh circuit, which included Dade.

Statutes which provide for the admission in evidence of certified copies of judicial records, judgments, and decrees are generally held to be cumulative and not restrictive; these statutes do not render the records themselves inadmissible to prove their contents. See 10 R. C. L. p. 1104.

Section 1522 of the General Statutes of Florida 1906 provides that the judgments and decrees entered in the circuit courts of the state, and certified copies thereof shall be admissible as prima facie evidence in the several courts of the state, of the entry and validity of such judgments and decrees.

[2] It was next objected in behalf of the plaintiff that the record, consisting of the pleadings and final decree in the equity cause, were irrelevant and immaterial, and set up no defense or partial defense to the plaintiff's action. It is argued that the record of the judgment and decree did not constitute "res adjudicata" as against the plaintiff. Counsel for plaintiff in error contends that because in the final decree the court adjudged the bill of complaint to be insufficient to state a cause of action, the record does not operate as an estoppel. The decree was not altogether what the above language might imply. The language of the decree in this regard was as follows:

"The court does hereby order, adjudge and decree that the complainant has not stated in his bill of complaint sufficient cause of action to entitle him to the relief sought in his bill, and that the pleadings and the testimony in the case does not sustain the allegations in the bill, and that the complainant has not sustained or maintained by the testimony his said bill of complaint, and that the said bill of complaint be and the same is hereby dismissed with cost to the defendant to be taxed against complainant, and that final decree is hereby entered in favor of the defendants to this bill."

While there appears to be some contradiction in the language as to the court's view on

the question of whether the bill was without equity, we think, in view of the decree that should have been entered if the court thought the bill was without equity, and our reading of the bill as the same appears in the transcript that the bill was not dismissed as being without any matter of equity upon which to base the relief prayed for therein, but that it was dismissed as the decree recites, because the "pleadings and the testimony in the case does not sustain the allegations in the bill, and that the complainant has not sustained or maintained by the testimony his said bill of complaint."

[3] If the decree operates as an estoppel at all it is effective against Mrs. Elvira S. Huddleston, the plaintiff in error, because she claims under the will of her deceased husband who was the complainant in the equity cause. See *State ex rel. National Subway Co. v. City of St. Louis*, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113; 1 *Greenleaf on Evidence*, § 189; 32 *Cyc.* 388; 10 R. C. L. p. 1116; *Prall v. Prall*, 58 Fla. 496, 50 South. 867, 26 L. R. A. (N. S.) 577.

[4] In this case the plaintiff claims as devisee of her husband, the defendant as heir of his mother, Mary M. Graham. In the equity cause the complainant admitted making and executing the deed of conveyance to Mary M. Graham, thereby vesting the title in her. This bill was filed four years after he obtained the patent from the United States government. He only claimed by the bill an equitable half interest in the property, and set up facts which, if he could have established, would have entitled him to the relief sought. The legal and equitable title to this property was adjudicated in that suit, and in our opinion the decree is *res adjudicata* as to the plaintiff in this one.

The court had before it the same parties; that is to say, the predecessor in title of the plaintiff in error was before the court, and so was the defendant in error, the same subject-matter was involved, and the title under which each claims was the subject of investigation and adjudication. The court had jurisdiction of the subject-matter, and the bill was dismissed on the merits.

The other assignments of error are unnecessary to be considered.

The judgment is affirmed.

BROWNE, O. J., and TAYLOR, SHACKLEFORD, and WHITFIELD, JJ., concur.

(113 Miss. 537)

**BURCHAM v. ROBINSON.** (No. 18820.)(Supreme Court of Mississippi, Division B.  
Feb. 19, 1917.)**1. HIGHWAYS**  $\Leftrightarrow$  184(3)—**AUTOMOBILE ACCIDENT—JURY CASE.**

In an action for injuries by a passenger in a mule drawn buggy against an automobile driver, case held for the jury under the evidence as to defendant's negligence in driving by the buggy at such a rate of speed as to frighten the mules.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 473, 473½.]

**2. HIGHWAYS**  $\Leftrightarrow$  181(3)—**DUTY OF AUTOMOBILE DRIVER.**

Without any statute on the subject, it is the duty of the driver of an automobile, which, by its speed and noise, is likely to frighten the ordinary country horse or mule, to observe the frightened attitude of an approaching team, and, if necessary, to check or slacken his speed, and otherwise to take reasonable precautions to prevent the team from getting beyond the control of its driver.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 469.]

Appeal from Circuit Court, Tishomingo County; Claude Clayton, Judge.

Suit by Mamie Burcham, by next friend, against James R. Robinson. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The suit is for injuries sustained by plaintiff because of the alleged negligence of the driver of defendant's automobile in frightening the team hitched to the buggy in which plaintiff was riding on the highway so that the buggy was overturned and plaintiff thrown therefrom and injured. There was a peremptory instruction for the defendant.

J. A. Cunningham, of Booneville, for appellant. W. L. Elledge, of Iuka, for appellee.

**STEVENS, J.** Counsel for appellant challenges the correctness of the court's ruling in granting the peremptory instruction in favor of the defendant, appellee here, after the testimony for both parties had been introduced and the cause was ready to submit to the jury. Counsel in oral argument earnestly contend that appellee's driver approached and passed the team and buggy in which appellant was sitting at a reckless and high rate of speed; that he kept in the middle of the road, and that the automobile, in whizzing by, frightened the mules of appellant's father, caused the buggy to be overturned, and the inmates of the vehicle to be dumped into a gutter by the roadside. Counsel contend further that the plaintiff's proof showed that the driver of the car "violated all the law of the highway or the byway"; that the car was running so fast that even after the brakes had been put on the car "skidded up hill."

[1] Without intimating any opinion as to the weight of the testimony, it is sufficient to say that the testimony was very conflict-

ing, and the cause, in our judgment, should have been submitted to the jury. The testimony on behalf of the plaintiff tended to prove that the driver, in approaching, saw, or at least had ample opportunity to discover, that the mules were frightened and that he did nothing to slacken his speed, to turn to the right, or to prevent the injury complained of. Without expressly holding that under the facts the driver in this case should have turned further to the right, we think the testimony was sufficient to warrant a finding by the jury that the driver by his speed and manner of passing appellant's team frightened the mules and took no precautions to relieve appellant and the other inmates of the buggy from their peril, but, on the contrary, negligently and wrongfully continued his speed and course and caused the mules to dash out of the road into a tiltch. It is true that this injury occurred before the enactment of the state traffic law of 1916 (chapter 116) regulating the speed of motor vehicles and declaring the law of the road in reference thereto.

[2] But, without any statute on the subject, we conceive it the duty of the driver of an automobile, which, by its speed and noise, is likely to frighten the ordinary country horse or mule, to observe the frightened attitude of an approaching team, and, if necessary, to check or slacken his speed, and otherwise to take reasonable precautions to prevent the team from getting beyond the control of its driver. According to the testimony of the plaintiff, no precautions whatever were taken in this case to prevent or stop this pair of unruly country mules from becoming further frightened and causing the unfortunate wreck in question. It is not unreasonable, we think, to hold the owners of motor vehicles to a strict account in cases of this kind. Certain it is that under the conflicting testimony the question of whether appellee's car was being driven at a reckless rate of speed or whether the driver could have, by stopping or turning to the right, avoided the injury, should have been left to the determination of the jury under proper instructions from the court.

Reversed and remanded.

(113 Miss. 510)

**MISSISSIPPI STATE BOARD OF HEALTH v. MATTHEWS.** (No. 19346.)(Supreme Court of Mississippi, Division A.  
March 12, 1917.)**HEALTH**  $\Leftrightarrow$  7(1)—**COUNTY HEALTH OFFICER—REMOVAL—STATUTE—CONSTITUTIONALITY.**

Code 1906, § 2490, providing that the State Board of Health may at any meeting remove any county health officer, etc., in so far as it authorizes the State Board of Health to remove a county health officer is violative of Const. 1890, § 175, providing that all public officers for willful neglect of duty or misdemeanor in office shall be liable to presentment or indictment by a grand jury, and, upon conviction

shall be removed from office, or otherwise punished; the Constitution providing the exclusive method by which a public officer may be removed from office.

[Ed. Note.—For other cases, see Health, Cent. Dig. § 6.]

Appeal from Chancery Court, Hinds County; O. B. Taylor, Chancellor.

Bill by W. T. Matthews against the Mississippi State Board of Health. From a decree for complainant, defendant appeals. Affirmed.

The appellee, who was complainant in the court below, filed a bill in chancery seeking to enjoin the Mississippi State Board of Health from putting into effect an order passed by said board removing him from the office of county health officer of Leflore county. Appellee had been chosen as county health officer for a term of two years beginning July 1, 1915, under the provisions of section 2491 of the Mississippi Code of 1906, which provides as follows:

"A competent physician shall be appointed county health officer for and from each county by the State Board of Health, whose term of office shall be for two years, and said board shall cause the appointment to be certified by its secretary to the board of supervisors of the county for which the appointment was made."

At the June meeting, 1916, the board of health preferred charges against appellee alleging that he had been "negligent and careless and unmindful of the best interests of the people of the county." The particular negligence referred to was based upon his failure to report a suspicious case of smallpox. The appellee was summoned to appear before the State Board of Health and answer said charges, and after a hearing the board removed him from office and appointed another physician as his successor. The board claims authority for this action by virtue of the provisions of section 2490 of the Code of 1906, which is as follows:

"The State Board of Health may at any meeting remove any county health officer, or its president or secretary from office, and fill the vacancy thereby occasioned, or may fill a vacancy in either of said offices whenever and however it occurs; and when a county health officer shall be removed, or his successor appointed, notice thereof shall be sent and certified to the board of supervisors of the county."

Appellee contends that the provisions of section 2490 under which he was removed are in contravention of section 175 of the state Constitution, which provides as follows:

"All public officers, for willful neglect of duty or misdemeanor in office, shall be liable to presentment or indictment by a grand jury; and, upon conviction, shall be removed from office, or otherwise punished as may be prescribed by law."

Appellee contends that the board is without authority to remove him except upon conviction as provided by the Constitution, and that the provisions of section 2498 of the Code of 1906 provide a method of prosecuting

him for the offense charged. Said section provides as follows:

"Every practicing or licensed physician shall report immediately to the secretary of the State Board of Health every case of yellow fever, cholera, dengue, smallpox or other virulent epidemic contagious disease that occurs within his practice, unless the State Board of Health shall otherwise direct. Any practicing or licensed physician, willfully failing to so report shall be guilty of a misdemeanor, and upon conviction shall be punished as provided by law for misdemeanors."

The chancellor entered a decree granting the relief prayed, and the board of health appealed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. Watkins & Watkins and G. G. Lyell, all of Jackson, for appellee.

SMITH, O. J. Section 175 of our state Constitution provides the exclusive method by which a public officer may be removed from office. *Runnels v. State*, Walk, 146; *Hyde v. State*, 52 Miss. 685; *Ex parte Lehman*, 60 Miss. 967; *Lizano v. City of Pass Christian*, 96 Miss. 640, 50 South. 981; *Mayor, etc., Jackson v. State*, 102 Miss. 663, 59 South. 873, Ann. Cas. 1915A, 1213. Consequently, section 2490, Mississippi Code of 1906, in so far as it authorizes the State Board of Health to remove a county health officer, is void.

The cases of *State v. McDowell*, 111 Miss. 596, 71 South. 867, and *Ware v. State*, 111 Miss. 599, 71 South. 868, are not in conflict herewith; for the reason that in those cases the statute here, which was also there, under consideration, was not complied with in the attempted removal of McDowell and Poole from office, so that the question of the Legislature's power to enact it did not arise.

Affirmed.

(113 Miss. 531)

VICKSBURG, S. & P. R. CO. v. FORCHEIMER. (No. 18829.)

(Supreme Court of Mississippi, Division B. Feb. 19, 1917.)

CONSTITUTIONAL LAW § 309(3)—DUE PROCESS—SERVING AGENT OF INTERSTATE CARRIER.

Under Laws 1908, c. 123, making foreign corporations, doing business in the state, subject to suit irrespective of where the cause of action accrued, a railroad doing only an interstate business within the state is not unconstitutionally denied due process of the laws by serving one of its bona fide agents within the state upon a cause of action accruing elsewhere.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930.]

Appeal from Circuit Court, Warren County; E. L. Brien, Judge.

Action by Mrs. Fannie Forcheimer against the Vicksburg, Shreveport & Pacific Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This suit was begun by declaration in the circuit court of Warren county, Miss., against the defendant, a Louisiana corporation, with an office and agent at Vicksburg, Warren county, Miss., and doing an interstate business only between Vicksburg, Miss., and points in the state of Louisiana.

R. H. & J. H. Thompson and Fulton Thompson, all of Jackson, for appellant. Brunini, Hirsch & Griffith, of Vicksburg, for appellee.

STEVENS, J. The only point relied upon by appellant is the contention that the circuit court of Warren county had no jurisdiction of this suit, and that the assumption of jurisdiction by the trial court was a denial to appellant of due process of law, contrary to the Fourteenth Amendment to the federal Constitution. The question was raised by special pleas, charging that the plaintiff in the declaration was a resident citizen of the state of Illinois; that the defendant, appellant here, was a corporation created by the laws of Louisiana; and that the defendant had not entered the state of Mississippi for the purpose of doing an intrastate business, but, on the contrary, was a non-resident corporation. A demurrer was interposed to these special pleas, and by the court sustained. In addition to the averments of the pleas, there is for the purposes of this appeal a written stipulation in the record as follows:

"It is agreed that the defendant is a corporation, chartered, organized and existing under the laws of the state of Louisiana and domiciled in the state of Louisiana. It is also agreed that the defendant has an agent here and transacts business in the city of Vicksburg, state of Mississippi, as set out in their plea. It is further agreed that the defendant is not engaged in intrastate business in the limits of the state of Mississippi."

Chapter 123, Laws 1908, is as follows:

"Section 1. Be it enacted by the Legislature of the state of Mississippi, that section 919, Mississippi Code of 1906, be and the same is so amended as to read as follows:

"Any corporation claiming existence under the laws of any other state or of any other country foreign to the United States, found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are, whether the cause of action accrued in this state or not," etc.

If we should look alone to our statute and the decisions of this court, this case would be affirmed without a written opinion. See *New Orleans, etc., R. Co. v. Wallace*, 50 Miss. 244; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 South. 53. It is contended on behalf of appellant that these decisions were rendered years ago, and are contrary to the later development of the law as declared by the federal Supreme Court. It is in response to this argument that we state briefly the views which induce us to affirm the judgment of the court below.

The policy of our state is to open the door of our courts to all foreign corporations de-

siring to sue on any proper cause of action, and to subject foreign corporations to suit here the same as individuals. This is the express declaration of our statute, and this has been the holding of our court since the rendition of the decision in *Railroad Co. v. Wallace*, supra. This decision was rendered in 1874, and the court, by Peyton, C. J., made the following very positive declaration:

"Corporations are artificial persons, existing only in contemplation of law. They must dwell in the place of their creation and cannot migrate to another state. But they are liable to be sued like natural persons in transitory actions arising ex contractu or ex delicto, in any state, where legal service of process can be had. And upon a thorough examination of the law upon this subject, we have not been able to find much ground to doubt whether a private corporation of another state could be held to answer to an action in our courts. We can see no very good reason why artificial persons should not be liable to suit in the courts of another state, as well as natural persons. *Day v. Essex Co. Bank*, 13 Vt. 101; *Angel and Ames on Corporations*, 428, and 14 La. 415. In transitory actions, foreign private corporations, like natural persons, may be sued anywhere where the court can obtain jurisdiction of the corporation either by legal service of process or its appearance by attorney."

And again in *Pullman Co. v. Lawrence*, supra, our court, through Woods, C. J., reviewed not only the authorities of our state court, but the leading authorities elsewhere, and, in an elaborate opinion, reaffirmed the holding. In construing our statute, the court in this case says:

"By this statute our courts are thrown wide open to foreign corporations, and they are made liable to suit just as individual nonresidents are. They may be proceeded against by attachment, in proper cases, just as individual nonresidents are liable to be proceeded against, or, if legal process can be served on them in this state, they may be sued in any other appropriate form of action, just as individual nonresidents who may come into this state and be legally served with process may be sued in any appropriate action."

We are unable to appreciate the argument that the prosecution of this suit in the Mississippi court denies to appellant due process of law. It must be admitted that the circuit court of Warren county is an impartial tribunal, competent under our laws to pass judgment upon the subject-matter of this suit; and the only possible jurisdictional question is whether appellant was lawfully summonsed or brought within the jurisdiction of the court and given an opportunity to be heard in defense of plaintiff's case. The learned circuit court unquestionably had jurisdiction of the subject-matter. Did it then have jurisdiction of the person? It appears that a summons was issued and served in due form upon appellant's regular agent at Vicksburg, Miss.; and in response to this summons appellant appeared by attorney and pleaded to the jurisdiction. It is agreed that, while appellant was a corporation, chartered and existing under the laws of the state of Louisiana, it "has an agent here and transacts business in the city

of Vicksburg, state of Mississippi." The agent upon whom the process was served was one of the regular agents of the corporation, and not some official designated by statute to accept process for a corporation of this kind. The corporation cannot do business except through its officers and agents; so, likewise, it cannot be served with process except upon its officers and agents. The fact that appellant is found in Warren county doing merely an interstate business is immaterial. When a corporation enters Mississippi for the purpose of doing an interstate business, the corporation itself is here found doing business, and process can here lawfully be served upon the regular agents of the corporation. There can be no question that the corporation was duly served with process. More than this, the corporation appeared and by its appearance was in court for all lawful purposes. It attempted to defend by interposing a plea to the jurisdiction. If the court had jurisdiction of the subject-matter, the appearance of defendant removed all doubt as to jurisdiction of the person.

Counsel for appellant rely upon *Old Wayne Mutual Life Association v. McDonough*, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345, and *Simon v. Southern Railway Co.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492. These cases are easily differentiated from the case at bar. The jurisdiction in each of these two cases was obtained by service of process upon an agent designated by state statute, and not upon an officer or bona fide agent of the defendant company. It does not appear that either the Pennsylvania or the Louisiana statute involved in these two cases, respectively, expressly authorized a suit against a foreign corporation on a cause of action which did not accrue within the state enacting the statute in question. Our statute in this regard is much more comprehensive, and expressly authorizes suit here, "whether the cause of action accrued in this state or not." But aside from this difference in the state statutes involved, there was no personal service of process in either of the two cases relied upon. The syllabus to the *Old Wayne Case* recites expressly that the nonresident "was not personally served with process within the state, and who made no appearance in the action." The court, in its opinion, called attention to the fact that the Pennsylvania statute "is only directed against insurance companies who do business in that commonwealth—'in this state'"; and that the insurance corporation in that case should not be held to have impliedly assented to service of process upon the insurance commissioner where the cause of action did not accrue in Pennsylvania. But there was total absence of personal service of process in that case, and the corporation did not appear by agent or attorney. So, likewise, in the *Simon Case*, supra, there was no person-

al service of process upon the corporation, but a substituted service upon a state official designated by statute. The gist of the opinion is found in the following language employed by the court:

"We therefore purposely refrain from passing upon either of the propositions decided in the courts below, and without discussing the right to sue on a transitory cause of action and serve the same on an agent voluntarily appointed by the foreign corporation, we put the decision here on the special fact, relied on in the court below, that in this case the cause of action arose within the state of Alabama, and the suit therefor, in the Louisiana court, was served on an agent designated by a Louisiana statute."

Then again:

"But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law."

The company in this last-named case made no appearance, and the default judgment, in the opinion of the federal Supreme Court, was absolutely void. No such case is here presented. The great weight of modern authority is to the effect that a foreign corporation may be sued where it is found just the same as an individual, and this we understand to be the holding of the federal courts themselves. *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; *Denver & R. G. R. R. v. Roller*, 100 Fed. 738, 41 O. C. A. 22, 49 L. R. A. 77; *Nickerson v. Boller Co. (D. C.)* 223 Fed. 843; 12 R. C. L. 104. In *Barrow S. S. Co. v. Kane*, supra, the court says:

"The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them."

Decisions of state courts could be multiplied. Many of them are cited in the briefs. Affirmed.

(118 Miss. 542)

DELTA INSURANCE & REALTY CO. v. INTERSTATE FIRE INS. CO. (No. 18489.)

(Supreme Court of Mississippi, Division A. Jan. 29, 1917. Suggestion of Error Overruled Feb. 26, 1917.)

1. JUDGMENT  $\Leftrightarrow$  807—JUDGMENT IN REM—JURISDICTION.

If defendant is a nonresident and the res is within the territorial jurisdiction of the court and is brought into court by attachment or garnishment, the court may render a judgment in rem in view of Code 1906, § 536.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1431, 1432.]

2. JUDGMENT  $\Leftrightarrow$  807—JUDGMENTS IN REM—JURISDICTION.

Where plaintiff was the agent of defendant and held large sums of money belonging to defendant which was a foreign corporation, the plaintiff could not in a suit against such corporation upon publication of notice subject the



funds in its own hands to payment of debts of the corporation to it without garnishment or attachment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1431, 1432.]

Appeal from Chancery Court, Leflore County; Joe May, Chancellor.

Action by the Delta Insurance & Realty Company against the Interstate Fire Insurance Company. From a decree for the defendant, complainant appeals. Affirmed.

Appellant, a domestic corporation with domicile at Greenwood, Miss., began this suit in the chancery court, in which it seeks to hold certain funds which came properly into its hands and which belonged to the defendant, an Alabama corporation, for the payment of damages alleged to be due to defendant by the plaintiff for breach of a contract. The appellant represented appellee generally in the states of Mississippi and Tennessee, its duties being to supervise and check up the agents of the appellee and remit the funds collected to appellee at stated periods. Appellant charges that appellee without cause canceled its agency contract, which had not expired, and damaged him in the sum approximating \$28,000. At the time this suit was filed, appellant had in its hands nearly \$10,000 of funds of the appellee which it declined to remit to the appellee, claiming damages for the breach of the contract as aforesaid. The proceeding is in rem against the fund alone, and there was formal constructive service by publication and the mailing of summons to the nonresident defendant, who had no other assets in Mississippi. No personal service was obtained on the appellee, nor was an attachment run against the funds. The prayer of the bill was that the funds in the hands of the complainant (appellant) belonging to the defendant company be condemned and applied to the payment pro tanto of the liability for damages of the defendant to the complainant, and that a personal decree be rendered in favor of the complainant against the defendant for the balance. The chancellor upon the hearing dismissed the bill of complaint, and from this decree complainant appeals.

Gwin & Mounger, of Greenwood, for appellant. Percy & Percy, of Greenville, amicus curiae.

HOLDEN, J. [1] The settled law in Mississippi is that, if the defendant is a nonresident, and the thing involved, the res, is within the territorial jurisdiction of the court and is brought under the control of the court by legal process, viz., attachment against the lands, or attachment and garnishment against any such debtor and resident persons (defendants) who have in their hands effects of, or are indebted to, such nonresident debtor, then the state court has jurisdiction to render judgment, not against the nonresident in personam, but against the thing, the res,

when it is brought under the control of the court by its process, and not otherwise.

The basis of the jurisdiction of the chancery court in this case is statutory; and the court has no jurisdiction under the statute unless the following facts exist, viz., the absence of the debtor, the presence here of effects in the hands of resident persons belonging to him, or debts due to him by resident persons, or his having lands or tenements in this state. Section 536, Code of 1906; *Advance Lumber Co. v. Laurel National Bank*, 86 Miss. 419, 38 South. 313. The above facts, or any one of them, might exist, and still the court would be without jurisdiction to proceed to judgment against the thing unless it be first brought under the control of the court by proper process, against the land, or against the person having the effects belonging to, or owing the debt to, the nonresident defendant.

[2] When the law is applied, as stated above, in the case before us, we find no difficulty in deciding that the decree of the chancellor in dismissing complainant's bill was eminently correct. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931.

The suit of complainant (appellant) amounts to an effort to sue itself. It finally abandoned its attachment proceedings, as prescribed by the statute, and now relies upon the doctrine of equitable offset, and seeks to have the court allow it to complain against the absent debtor, and, at the same time, bring itself into court as the resident defendant "owing the debt" to the absent debtor. No writ of garnishment is here involved, and the money was not paid into court; but, in effect, complainant attempts to take the part of the garnishee and answer an indebtedness due under its own writ; and in the same bill which seeks, in effect, to obtain a personal decree in damages for breach of contract, it prays that the indebtedness due by it be offset by the personal decree for damages, when obtained.

The contention of appellant that, because the debt of \$9,973 due by it to the nonresident defendant is within the territorial jurisdiction of the court, the court was authorized to proceed in rem, is not sustained by the best authority, and we think is unsound.

The thing, the res, must first be brought under the control of the court by proper process; then the judgment can only go against the thing under the control of the court. In the case here no process is shown to have been issued and executed, and could not have been, to bring "the res" under control of the court, and the thing, the res, is not under the control of the court, and therefore the court has no jurisdiction. If the rule were otherwise, fraud against absent debtors could be easier consummated in cases like the one here.

The decree of the lower court is affirmed. Affirmed.

(113 Miss. 720)

**WOODS v. CLEMENTS. (No. 18817.)**(Supreme Court of Mississippi, Division B.  
March 19, 1917.)**1. MASTER AND SERVANT §300—LIABILITY OF MASTER FOR ACT OF SERVANT.**

Where the relation of master and servant is established, a master is liable under the doctrine of respondeat superior for the negligence of his servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1209.]

**2. MASTER AND SERVANT §301(1) — SERVANTS—WHO ARE.**

Defendant, a member of a real estate firm which owned a motorcar, allowed his family to use the car when it was not necessary for his business, and his adult daughter, without his express consent, took the car on Sunday for a pleasure trip, on which journey she collided with the machine of plaintiff. *Held*, that defendant's daughter was not his servant in the operation of the car, and he was not liable for her negligence under the doctrine of respondeat superior.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1210, 1216.]

Appeal from Circuit Court, Lauderdale County; W. W. Venable, Judge.

Action by George B. Clements against C. F. Woods. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Appellee, Dr. Clements, as plaintiff in the court below, brought this action to recover damages to his automobile as a result of the alleged negligence of the driver of appellant's Ford car. Appellant and his partner, one Pottivent, owned jointly a Ford car which was used by them in their real estate business. Mr. Woods made use of the Ford car while transacting the firm's business; while his partner, Mr. Pottivent, used a horse and buggy owned by the firm and used in furtherance of the firm's business. Mr. Woods kept the Ford car at his home, and when he was not using the car himself he permitted the members of his family to use it for pleasure. Miss Majorie Woods is a daughter of appellant, a member of his family, and at the time of the collision complained of was 22 years old. Mr. Woods gave to this adult daughter permission at times to use the Ford car, and states that he did not object to her using it at any time the car was not being used for business purposes. On the afternoon of Sunday, August 16, 1914, Miss Majorie, without the express permission of her father, but with his implied consent, took a pleasure trip with the Ford car and had with her her mother and two friends. There is nothing in the record to indicate that the daughter was not an experienced or good driver of a Ford car. While going along one of the main highways in the city of Meridian, she attempted to pass by and to the left of Dr. Clements, who was driving his car in the same direction along the same road, and, in attempting to pass, Miss Woods,

according to the evidence of plaintiff, negligently struck Dr. Clements' automobile, causing it to defect to the right and down the right-hand side of an embankment and against a telephone pole, as a result of which plaintiff's car was injured. Upon the question of negligence, the evidence was in sharp conflict. The record shows that Mr. Woods was an experienced driver of a Ford car, and that he drove his own car whenever he used it, either for business or pleasure. There is some evidence tending to show that Mr. Woods, some months previous to the accident, taught his daughter how to drive a Ford car, and that Mr. Woods considered his daughter a good driver. There is no evidence tending to show that Mr. Woods ever made use of his daughter as a driver for himself, or that he ever requested her to run the machine for the benefit of his wife or other members of his family.

Appellant requested, and the court refused to grant, the following instructions:

"The court instructs the jury to find for the defendant.

"The court further charges the jury that, before the plaintiff is entitled to recover in this case, the jury must believe from a preponderance of all the testimony in the case that defendant's daughter was an incompetent or reckless driver of a Ford car, and that the defendant knew or had good reason to believe that she was incompetent or reckless in driving such car.

"The court further charges the jury that if, from all the testimony in the case, they believe that the defendant had good reason to believe, and did believe, that his daughter was a competent and careful driver of a Ford car, and that so believing he permitted his said daughter to use said car for her own pleasure in driving, and that at the time of the injury complained of his said daughter was driving the car for her own pleasure, then the jury will find for the defendant, even though they may believe that the injury was caused by the negligence of the defendant's daughter in driving said car."

There was verdict and judgment for the plaintiff, from which this appeal is prosecuted.

Amis & Dunn, of Meridian, for appellant. Neville, Stone & Currie, of Meridian, for appellee.

STEVENS, J. [1,2] Before the plaintiff can recover in this suit, the proof must sufficiently show the relationship of master and servant between the defendant, Mr. Woods, and his unmarried adult daughter. It must appear that Miss Majorie Woods, the driver, was the defendant's chauffeur. If the relation of master and servant is sufficiently established, then the doctrine of respondeat superior applies, and the negligence of Miss Majorie at the time of the collision in question would be the negligence of the master. To constitute this relation there need not be either an express contract or compensation. The relationship may arise from an implied agreement. Most of the adjudicated cases brought to our attention grew out of the al-

leged negligence of minor children. It is elementary that the father has a right to the services of his minor son; a right, to a large extent, to control his actions or movements. It may be conceded that, if the father supplies his family with an automobile to be used for the pleasure and entertainment of the entire family, he may be held liable for the negligent operation of the car by one of the minor children selected to run or operate the machine. If the father should turn the car over to a child inexperienced in driving or incompetent to handle so powerful a machine, he might be liable upon another theory. Each case must turn upon its own peculiar facts. The authorities are in accord that an automobile is not per se a dangerous agency. *McNeal v. McKain*, 33 Okl. 449, 126 Pac. 742, 41 L. R. A. (N. S.) 775, and authorities cited.

Responsibility in this case, then, turns upon the negligence of the driver and the further and important inquiry whether the driver could be regarded as a family chauffeur or servant at the particular time of the accident. It appears that she was on no mission for her father, and the proof fails to show that the father even knew his daughter intended to use the car on the pleasure trip, here marred by an unfortunate accident. The proof, in our judgment, fails to establish the relationship of master and servant. This is not a case where the father is presumed to have use of his child's services, and it would be going far to say that the unmarried adult daughter of the family could on the occasion in question be classed as a servant. The car was not purchased or maintained primarily for the pleasure of the family. The father was not even the sole owner of the car. Under the facts, we think appellant was entitled to a peremptory instruction. The only previous announcement of our court anywise in point is to be found in *Winn v. Haliday*, 109 Miss. 601, 60 South. 685, the holding in which fully accords with the views now expressed.

Reversed and remanded.

(113 Miss. 545)

ILLINOIS CENT. R. CO. v. REED.  
(No. 18890.)

(Supreme Court of Mississippi, Division B.  
March 19, 1917.)

1. RAILROADS ⚡229—OPERATION — EQUIPMENT—HEADLIGHTS.

Laws 1912, c. 153, § 1, requiring electric headlights on main line roads, is mandatory.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743.]

2. RAILROADS ⚡229—REASONABLENESS OF REGULATION—POLICE POWER.

Such statute is a reasonable police regulation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743.]

3. RAILROADS ⚡443(7) — OPERATION — NEGLIGENCE—EVIDENCE.

Where the railroad failed to comply with Laws 1912, c. 153, § 1, requiring electric headlights on main line roads, and on a misty night struck a horse and killed it, there was a prima facie case of negligence under Code 1906, § 1985, making proof of injury by locomotives prima facie evidence of want of reasonable skill and care.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1618.]

4. RAILROADS ⚡443(7)—OPERATION—NEGLECT—EVIDENCE.

In such case, where the railroad did not dispute violation of the headlight statute, and did not attempt to show that the animal would have been killed if the locomotive had been equipped with an electric headlight, it did not meet the prima facie case.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1618.]

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Action by Charles Reed against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. W. P. Harris, of Jackson, for appellee.

ETHRIDGE, J. Charles Reed filed suit against the Illinois Central Railroad Company in a justice of the peace court in the city of Jackson for the killing of one horse, and recovered judgment against the company. An appeal was taken to the circuit court, where the case was tried de novo, and resulted in a judgment against the railroad company for the sum of \$100, from which judgment the company appeals here. It appears that the horse was killed near the station of Tougaloo, in Hinds county, Miss., on the night of January 1, 1915. The plaintiff produced proof sufficient to show that the horse was killed by the train of the appellant and made out a case under the prima facie negligence statute. The defendant introduced its engineer, who testified that on the night of the injury he was in charge of the passenger train of the company and struck a horse about a mile this side of Tougaloo station; that the injury occurred just north of the station board, and that he was running about 35 miles an hour, and that Tougaloo was a flag stop, and that it was misting rain that night; that he had an acetylene headlight, which is next to an electric headlight in power; that this light does not throw light as far as the electric headlight, but is next to it in capacity, and that the light in use by the train did not throw a light under then conditions over about 60 to 55 feet so that he could see an object distinctly; that when it was not raining it would throw a light about 250 feet, and that under conditions existing that night it would take between 250 and 300 feet to bring the train to

a stop; that his train was properly equipped with other appliances and was in perfect condition; that when he first saw the horse it was standing in the middle of the track between the rails, and when first seen was about 50 feet in front of the locomotive; that he was looking ahead; that it was a very good roadbed and straight track, slightly up-grade, but after seeing the horse he tried to prevent striking it, but the brake took hold, but not in sufficient time to stop the train. There was conflicting evidence as to the value of the horse, the value ranging from \$75 to \$150. The trial judge gave a peremptory instruction as to the liability in favor of the plaintiff and submitted the question of value to the jury; and this peremptory instruction of liability is complained of as error. The court also refused instructions for the defendant on the questions as to its liability.

Section 1, c. 153, Laws of 1912, reads as follows:

"Be it enacted by the Legislature of the state of Mississippi, that all railroad companies, operating or doing business in this state, are hereby required to equip and maintain each and every locomotive used by such companies to run on its main line, between sunset and sunrise, with a good and sufficient headlight, which shall consume not less than three hundred watts at the arc, and with a reflector not less than eighteen inches in diameter, and to keep the same in good condition. The word 'main line,' as used herein, means all portions of the railway line not used as yards, spurs and side tracks."

And a violation of the act is made a misdemeanor. A similar statute to this in Georgia was upheld by the United States Supreme Court in the case of Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 34 Sup. Ct. 829, 58 L. Ed. 1312. And the proof shows that an electric headlight was a more efficient headlight than the one used in the operation of the train at the time in question. The proof on the part of plaintiff also shows that the train stopped that night at Tougaloo, and this is not disputed by the defendant.

[1, 2] Taking all the facts in the record, we think it is manifest that the railroad company was liable for the value of the animal in question. The statute is mandatory, and, we think, is a reasonable police regulation, and that it was the duty of the railroad company to have its road equipped with this light as required by law.

[3] Under our statute (section 1985 of the Code), commonly called the prima facie statute, there was a prima facie case of negligence.

[4] The defendant undertook to overcome the prima facie case, and in this attempt it was undisputed that the company was violating the headlight statute, and there was no attempt to prove that the animal would have been killed if the locomotive had been equipped with an electric headlight. This being the case, the defendant did not meet the prima facie case. It further appears

from the evidence in the case that the train was being operated at too great a rate of speed for the character of headlight used.

Taking the record as a whole, there was no error, and the judgment is affirmed.

(113 Miss. 632)

BANKS & CO. v. PULLEN et ux.

(Supreme Court of Mississippi, Division B.

March 19, 1917.)

MECHANICS' LIENS § 71—SEPARATE PROPERTY OF WIFE—CONTRACTS—CONSTRUCTION.

Under Code 1906, § 2521, declaring that a husband and wife shall not contract with each other so as to entitle the one to claim or receive any compensation from the other for work and labor, and that it shall not be lawful for the husband to rent the wife's plantation, etc., or with any of her property to operate or carry on business in his own name, but all business done with the means of the wife by the husband shall be deemed and held to be on her account and for her use, and by the husband as her agent and manager as to all persons dealing with him without notice, a wife who entered into a contract with her husband for the erection of a building on her separate property, paying him as contractor, is liable to a materialman for materials furnished, the husband carrying on the business with the means of his wife, and a lien for such materials may be established against the wife's property.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 85.]

Appeal from Circuit Court, De Soto County; El D. Dinkins, Judge.

Action by Banks & Co. against G. H. Pullen and wife, Mrs. F. M. Pullen. From a judgment for the last-named defendant, plaintiff appeals. Reversed and remanded.

Mayes, Wells, May & Sanders, of Jackson, for appellant. Mayes & Mayes, of Jackson, for appellee.

COOK, P. J. Upon motion of appellee, the stenographer's notes of the evidence taken at the trial of this suit were, by order of this court, stricken from the record. Afterwards, appellee filed a motion asking an affirmance of the judgment of the trial court, which motion was overruled. The case is therefore presented to this court upon the pleadings alone.

The appellant furnished G. H. Pullen, the husband of Mrs. F. M. Pullen, certain building material for the purpose of building a dwelling house upon land belonging to Mrs. Pullen; the house was built by Mr. Pullen, and the material furnished by appellant was used in the construction of the house. The house was the dwelling house of Mrs. Pullen and her husband, and was used as such. Mrs. Pullen, the owner of the land, together with her husband, was made a party to this suit, and the petition asked that a judgment be rendered against G. H. Pullen for material furnished and used in said building, and that said judgment be declared a lien on the house, and that the house be sold to satisfy the judgment.

Mrs. Pullen, the owner of the premises, defended upon the theory that she did not make the contract for the material; that she made a contract with her husband to furnish the material and build the house at a stipulated price, which was paid in advance. In other words, Mrs. Pullen, by her answer to the petition, denied liability, because she did not have any contract with appellants; knew nothing about the dealings between her husband and appellants; that she made a contract with her husband that he furnish the material and build her a house; and that she had paid her husband for the work and material.

We think a correct solution of this problem presented by this record may be reached by the application of our statutes relating to the business relation of the husband to the wife, to the facts of the case.

In the first place, section 2521, Code 1906, makes the contract between Mrs. Pullen and her husband for compensation for work and labor a nullity. It seems that Mr. Pullen is a mechanic and the contract contemplated that he would perform the labor necessary to the construction of the building, and according to the pleadings, he did do the work.

Going a step further, it appears that Mr. Pullen was carrying on the business of a contractor, and as such made a contract with his wife to do the work and to furnish the material necessary to the completion of the job. Was he using the "means" of his wife "to operate and carry on business in his own name"? The wife furnished the money to enable him to perform the contract, so she avers. It was her money, and may we not say with equal certainty that money and means are one and the same thing in the statutory sense? Besides, he had charge of her land and erected the house thereon, ostensibly acting for her in the transaction of her business. The statute was designed to protect the public. Secret contracts between husband and wife are condemned for obvious reasons. We see in this case a husband building a house on the land of his wife and entering into a contract whereby he was to receive the means of the wife for the purpose of securing the material with which to erect the house. The husband did not use the means to buy the material; he bought it from appellant on credit. Who must suffer? The husband is made the statutory agent of his wife whenever he uses any of her means to carry on a business in his own name—"as to all persons dealing with him without notice, unless the contract between husband and wife, which changes this relation, be evidenced by writing, subscribed by them, duly acknowledged," etc.

So we think, when Mr. Pullen went into the business of contracting, financed by his wife, he was her agent, there being no pretense that the contract between him and his wife, changing this relation, was ever made

in accordance with the statute, or that appellant had any notice of the contract. He was not only her agent, but his contracts made in furtherance of his contract were, in law, the contracts of his wife, and the payment of the contract price to him does not, in any way, extinguish the obligations of his wife to pay the account made by him for materials.

This being our view of the law of this case, we will not discuss the very interesting brief of counsel for appellee referring to the lien of the materialman. Mr. Pullen was the agent of the owner authorized to buy the material and Mrs. Pullen is bound to pay the bill and her property may be sold to satisfy the claim.

Reversed and remanded.

(114 Miss. 75)

YARBRO v. PURSER. (No. 18893.)

(Supreme Court of Mississippi, Division B.  
March 19, 1917.)

1. ARBITRATION AND AWARD ~~§ 86~~—EFFECT—ADMISSIBILITY IN EVIDENCE.

An arbitration has the effect of a compromise settlement, so that in an action on the contract involved, it was error to exclude the arbitration agreement and the finding of the arbitrator.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 504-513.]

2. PLEADING ~~§ 362(1)~~—MOTION TO STRIKE.

If a compromise and settlement alleged by way of answer was untrue or void for any reason, plaintiff should deny the plea or plead in confession and avoidance, and his remedy is not by motion to strike the allegations.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1147, 1154, 1155.]

Appeal from Circuit Court, Hinds County;  
W. H. Potter, Judge.

Action by G. D. Purser against E. B. Yarbrow. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Howie & Howie, of Jackson, for appellant.  
P. L. Clifton, L. C. Hallam, C. D. Potter, and Phil Christman, all of Jackson, for appellee.

ETHRIDGE, J. G. D. Purser, the appellee, sued the appellant in the circuit court of Hinds county, first district, for the sum of \$416.40, alleged to be due on a contract between Yarbrow and Purser by which Yarbrow undertook to pay Purser \$1 per thousand for timber averaging 20 inches in diameter, and for which Purser was to procure some person to purchase from Yarbrow. This agreement is evidenced by the following instrument:

"Know all men by these presents that E. B. Yarbrow is due G. D. Purser \$1.00 per M. on all pine 20" in diameter and up, clear, that Yarbrow has sold to Union Timber & Supply Company on Elton plantation. As said Union Timber & Supply Company cuts and pays Yarbrow the stumpage, then Yarbrow is to pay G. D. Purser the \$1.00 per M. due him.

"E. B. Yarbrow."

Purser alleges that he procured a purchaser, and that the contract was made by D. H. Smith, doing business under the firm name of Union Timber & Supply Company, and Yarbro; and the contract was duly entered into; and that Smith put up a forfeiture of \$500 to carry out his contract, and began the cutting of the timber in question. He had until January 1, 1916, in which to cut the timber, but, becoming embarrassed, financially he entered into an agreement with Yarbro by which he relinquished his right under the contract, and Yarbro returned the \$500 paid as a guaranty of carrying out the contract, and in addition to that paid him \$200 in money. This contract releasing Smith in which the timber was surrendered to Yarbro is dated May 14, 1914, more than a year and a half before the expiration of the time in which to carry out the contract. The exhibits embracing the contracts were made exhibits to the declaration. Yarbro demurred to this declaration, and the demurrer was overruled. Thereupon Yarbro filed a plea of general issue and also a special plea, averring in the special plea that there has been a settlement of the matters involved between the parties in the suit and the payment of balance due under said agreement. This plea avers that the plaintiff and defendant entered into an agreement to submit the matters in dispute between them for arbitration by three parties, one of which was to be selected by Purser, and one by Yarbro, and a third by the master of the Masonic lodge at Jackson, all of said arbitrators to be members of the Masonic fraternity; that the arbitrators were selected in accordance therewith and a written agreement entered into to abide by the result of such arbitration, each agreeing that they would take no legal proceedings with reference thereto, but would accept the finding made in writing by the parties so selected as arbitrators. This agreement is made an exhibit to the special plea, and recites that there was a suit then pending by Purser against Yarbro for the sum of \$80.34, which was to be dismissed and the costs to be paid by the party who failed to sustain his contention before the arbitrators. It was to include also all timber cut by J. W. Evans up to the 4th day of February, 1914, 20 inches in diameter up, on the Elton plantation. It was further agreed that the witness should be examined in the presence of all of the arbitrators and legal formalities and rules of evidence and procedure were waived. It was then the agreement that the arbitrators should pass upon five propositions as follows:

"It is agreed that the arbitrators shall pass on the following questions:

"(1) Whether E. B. Yarbro should pay G. D. Purser for the timber cut by J. W. Evans, herein referred to, which amounts to 80,340 feet at \$1 per thousand.

"(2) Whether E. B. Yarbro or G. D. Purser should pay for the expense of collecting the \$4.50 per thousand from D. H. Smith under

contract of sale to him both attorney's fees and other expenses.

"(3) Whether E. B. Yarbro or G. D. Purser should bear the expense and trouble of looking after the logs and scaling of the same cut by D. H. Smith under his contract and seeing to it that Smith paid for all of the timber cut, and did not slip out any without accounting for it and paying for it.

"(4) As to which should stand any loss on account of D. H. Smith not living up to his agreement in the cutting of the timber and paying for it.

"(5) Whether said Yarbro should pay said Purser anything for timber that Smith failed to cut; and would not cut, and could not be prevailed upon to cut.

"It is further agreed that all these matters shall be decided upon by arbitrators on all the facts in connection therewith and without regard to any and all attempted interpretations of the understanding between the parties themselves; and that they shall especially go into the facts in connection with the first negotiations before at and just after the contract with Smith was signed.

"It is further agreed that each party hereto will forever abide by the decision of the arbitrators rendered herein, and will never take any steps at law or otherwise to try to avoid performing and complying with the decision so rendered."

The arbitrators made a written finding on these matters, which appears in the record, the concluding clause of which reads as follows:

"But if Smith fails to carry out his contract and does not cut any of the timber, or relinquishes his contract to Yarbro, or cancels the same, or it is canceled by process of law, or any other manner, Purser shall not be entitled to anything whatever on such timber as is not cut at the time of such relinquishment, cancellation, or failure of performance on the part of D. H. Smith."

He also filed notice under the general issue of the same matters. Plaintiff made a motion to require him to strike from the files either the affirmative matter in the notice or his special plea. The defendant declining to do so, the court ordered the notice under the general issue bearing on this question stricken from the files. Thereupon the plaintiff moved the court to strike from the defendant's plea above mentioned all matter therein contained with reference to an accord and satisfaction therein set forth, which motion was sustained by the court, to which the defendant excepted.

After the surrender of the contract by Smith to Yarbro, Yarbro sold the timber in question to Evans, and this suit is brought for timber not cut at the time of the surrender of the contract by Smith to Yarbro. Yarbro afterwards sold the timber to Evans, and but for the submission to the arbitrators and the finding thereon by the arbitrators (many of which matters in the arbitration were found in favor of Purser, but as to this matter in suit the finding was against Purser), the judgment rendered would have been right and proper.

[1] It was error, however, for the court to refuse to let this submission and finding of the arbitrators be put in issue and submitted

along with the other features of the case. The legal effect of this agreement alleged in this plea was to make a compromise settlement of the matters in dispute, including the matters in this suit; and the effect of this agreement was to merge the original causes of action and defenses into the written award and make that the exclusive source of rights and liabilities of the parties.

In 8 Cyc. p. 516, this rule is stated as follows:

"A compromise settlement when full and complete and fairly made operates as a merger of, and bars all right to, recovery on all claims and causes of action included therein."

At page 518 of the same work, under the heading "Conclusiveness of Agreement," the rule is stated as follows:

"Numerous authorities support the doctrine that a compromise and settlement of a controversy based on a sufficient consideration is, as between the parties thereto and as to the matters embraced therein, binding and conclusive where fairly made. Such agreements can be impeached and set aside only on grounds hereinafter indicated. They will not be opened merely to inquire into all the equities between the parties."

At page 523 of the same work, under the head of "Impeachment—Opening and Correcting," the rule is stated:

"Equity has jurisdiction to open, reform, and correct a compromise and settlement upon the showing of proper grounds for such relief."

Then under subheads different grounds are taken up for which such contracts can be impeached.

[2] If the facts stated in the plea and exhibits were untrue or avoided for any reason, the plaintiff should have either denied the plea, or pleaded matter in confession and avoidance, and the matter brought to final issue and submitted to the jury on proper instructions. For the reasons above indicated, the judgment of the court will be reversed and remanded.

Reversed and remanded.

(113 Miss. 555)

STATE ex rel. FORMAN, Dist. Atty., v.  
WHEATLEY et al., Board of Sup'rs.

(No. 19502.)

(Supreme Court of Mississippi, In Banc.  
March 19, 1917.)

# 1. CONSTITUTIONAL LAW §42—PERSONS ENTITLED TO RAISE CONSTITUTIONAL QUESTIONS.

As prior to the enactment of Laws 1916, c. 98, the orders of the county boards of supervisors who hold their office by virtue of the Constitution itself, approving assessment rolls, were final, the board, when required by the state board of equalization under act of 1916 to make far-reaching corrections in a roll already approved, may raise the question of the act's constitutionality.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40.]

## 2. CONSTITUTIONAL LAW §48—STATUTES—CONSTRUCTION IN FAVOR OF VALIDITY.

In considering a statute it is the duty of the court, if possible, to uphold and not destroy it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Statutes, Cent. Dig. § 56.]

## 3. TAXATION §448—EQUALIZATION OF ASSESSMENTS—STATUTES.

As the general constitutional scheme of uniformity of taxation is binding on assessors, boards of supervisors, and courts, it will, in the absence of a proceeding for their equalization, be presumed that the assessments on the lands of a county were correct, and Laws 1916, c. 98, providing for equalization of assessments by the state board of tax commissioners, is not invalid because in the year 1916 there could be no equalization of the land rolls, although the commissioners were allowed to equalize the assessments of personal property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 787, 788.]

## 4. CONSTITUTIONAL LAW §284(2)—TAXATION §448—DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS—WHAT CONSTITUTES.

Laws 1916, c. 98, creating the state board of tax commissioners and authorizing such board to equalize assessments made by the boards of supervisors of the several counties, provides in section 5 that the state board may add a fixed per cent. to the assessed valuation of any class of property in any county if the valuation was too low, provided such rate shall not exceed the actual valuation of the property. Section 6 declares that upon giving notice by the chairman of the board of state tax commissioners of changes or corrections to be made in the county tax rolls, it shall be the duty of the county board of supervisors to call a meeting after giving five days' notice by posting at the courthouse or publishing in a newspaper of the county, and at such meeting the board shall correct the county valuation upon the class or classes of property specified by the board of state tax commissioners so as to make the same conform to the findings of the board of state tax commissioners by applying uniformly to the specified class or classes of property the fixed increase or decrease specified. *Held*, that in view of Code 1906, § 81, authorizing an objecting taxpayer to appeal from the order of the board of supervisors to the circuit court of his county, the act cannot be deemed to work a deprivation of property without due process of law on the theory that assessments upon the order of the state board of tax commissioners are to be raised without notice to the taxpayers and without an opportunity for a taxpayer whose property was assessed at its true valuation to object to an increase; but it must be assumed, in accordance with the construction by the state board of tax commissioners, that the provisions for notice by publication were intended to give taxpayers an opportunity to be present at the hearing, and that the board of county commissioners should not, in increasing the assessments, increase assessments upon property already listed at its true value.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 896, 894; Taxation, Cent. Dig. §§ 787, 788.]

## 5. CONSTITUTIONAL LAW §48—STATUTES—CONSTRUCTION IN FAVOR OF VALIDITY.

Where two different interpretations of a statute are possible, that which will uphold its validity should be adopted.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Statutes, Cent. Dig. § 56.]

**6. STATUTES  $\Leftrightarrow$ 219—CONSTRUCTION—ADMINISTRATIVE CONSTRUCTION.**

While not binding on the courts, that construction adopted by the administrative departments is entitled to weight.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297.]

**7. CONSTITUTIONAL LAW  $\Leftrightarrow$ 284(2) — DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY.**

Notice of a meeting to increase tax assessments given by publication only is sufficient due process.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 896, 894.]

**8. TAXATION  $\Leftrightarrow$ 448—ASSESSMENTS—EQUALIZATION OF TAXES.**

In view of Const. 1890, § 112, declaring that taxation shall be uniform and equal throughout the state, and that property shall be taxed in proportion to its value, Laws 1916, c. 98, providing for equalization of assessments by the state board of tax commissioners, is not invalid as superseding the constitutional scheme of listing and valuing property by an assessor in each county and having the assessments equalized by the county board of supervisors; the authority of the county board being purely statutory, and the provisions for equalization merely following out those provisions for uniformity of taxation in proportion to value.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 787, 788.]

**9. TAXATION  $\Leftrightarrow$ 450(1) — ASSESSMENTS — INCREASE.**

Under Laws 1916, c. 98, authorizing the state board of tax commissioners to equalize assessments, the board cannot arbitrarily increase the assessment of any property beyond the highest valuation thereon in any of the several counties.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 800.]

Smith, J., dissenting in part.

Appeal from Circuit Court, Washington County; F. E. Everett, Judge.

Proceeding by the State, on the relation of J. M. Forman, District Attorney, for writ of mandamus against George Wheatley and others, constituting the Board of Supervisors of Washington County. From a judgment dismissing the petition, the State appeals. Reversed and remanded.

Appellees constitute the board of supervisors of Washington county. At their August, 1916, meeting they approved the personal assessment roll for said county; the roll was forwarded to the auditor, and by the auditor turned over to the board of state tax commissioners. The board of state tax commissioners, which will hereafter be referred to as the "state board," upon consideration and comparison of the valuations with valuations in other counties and in pursuance of authority given by chapter 98, Laws 1916, creating the state tax commission, defining its powers, and prescribing its duties, ordered certain corrections to be made in the personal assessment roll of Washington county, the effect of which would be to increase the valuations of certain classes of property about \$900,000. In transmitting the order to correct, the state

board also directed that notice be given by the president of the board of supervisors of a special or call meeting of the local board for the consideration of and making the changes for the year 1916 in accordance with the order of the state board, the notice to be given in accordance with the provision of said chapter 98. The board of supervisors gave notice of this special meeting and, upon consideration, they elected to enter a protest against the order of the state board, and to present their protest, and to prosecute their objections in accordance with the statute. The state board overruled their objections and entered a final order directing the increase of assessments specified in the order. The board of supervisors thereupon declined to correct the assessments, and upon their refusal to comply with the order of the state board, the state, on the relation of J. M. Forman, district attorney, filed this mandamus proceeding to compel compliance with the order of the state tax commission. The petition filed by the district attorney was met by general demurrer, the several grounds of which challenge the constitutionality of the statute creating the state tax commission and their authority and power to compel the board of supervisors to make any changes whatever in the assessment roll. The demurrer was by the circuit court of Washington county sustained, and from the judgment dismissing the petition, the state prosecutes this appeal.

The various grounds of demurrer, 12 in all, state and restate in varying form the following points: First, the act of the Legislature in question is invalid because it permits the state board to equalize and raise the assessment of personal property without regard to the valuation and assessment of real property. Second, the act is repugnant to the provisions of both the Constitution of our state and the Constitution of the United States, and deprives the taxpayer of his property without due process of law in that (a) it does not afford the owner of property an opportunity to be heard; (b) it does not provide notice to the owner of any hearing as to the amount his property is to be increased in assessment or as to the propriety of such increase; (c) the owner of property is not afforded a reasonable notice of hearing on the amount at which his property is to be assessed and valued; (d) the owner is not afforded an opportunity for a hearing before the state tax commission. Third, the act contravenes our state Constitution in that it takes the assessment of property out of the hands of assessors and boards of supervisors. Fourth, the act attempts to vest the state board with judicial powers in violation of the state Constitution. Fifth, that even if the act is constitutional the state board in this instance did not act as a board of equalization in accordance with the act itself, and



did not equalize the various classes of personal property or the total personal property appearing on all the rolls of the state, but acted as a board of assessors, and raised or increased the total assessment of personal property in the state in the sum of \$8,943,319.

In the presentation of this case counsel for the state contend that the members of the board of supervisors in complying with the order of the state board acted as ministerial officers, and therefore have no right to question the constitutionality of the law here under attack.

George Butler and Clayton D. Potter, both of Jackson, and Ross A. Collins, Atty. Gen., for appellant. Percy & Percy, of Greenville, for appellees.

STEVENS, J. (after stating the facts as above). It is agreed that section 112 of our Constitution provides the general standard for the assessment of property for taxation, and for the collection of ad valorem taxes. It furnishes the ideal rule by which the rights of taxpayers are to be measured—the guiding star for the lawmaker and every officer charged with the duty of assessing and valuing property for taxation. But the goal towards which our state has been striving has never yet been fully attained. The key words of our Constitution are “uniform,” “equal,” “true value,” and, to accomplish results, “general laws.” While property in every county is to be assessed at true value, it is a matter of common knowledge and comment that in practice this has been accomplished in name, and not in fact. The Constitution provides for a county assessor, fixes his term of office, and contemplates that this officer shall list and value all taxable property in his county. Experience for a long time indicates that the assessor generally places upon his roll unchanged the various valuations fixed by the property owner himself. The power to equalize assessments has heretofore been conferred upon the boards of supervisors, but experience further demonstrates that there are as many different standards of values in the state as there are separate boards of supervisors. The uniform rate of state tax must be applied to the unequal and varying valuations over the many counties of our commonwealth. Valuations of the same class of property has varied in adjoining counties without any real or substantial reason for the difference. It follows that heretofore one county has been contributing to the state more revenue than many other counties with the same amount of taxable property. The burden has been unequally distributed. This is the known mischief which chapter 98, Laws 1916, has undertaken to remedy. This law was intended to be a step forward toward the ideal system contemplated by our organic law. Its purpose is to accomplish the very uniformity and equality demanded by the Constitution. The question whether it is a practical scheme

or embodies the best wisdom on this subject is of little concern to the court. All we are called upon to determine is whether the act is obnoxious to any of the provisions either of our state or federal Constitution.

[1] But first, can the constitutional questions be raised by appellees as they undertook to do and successfully so in the lower court? Without entering into a prolonged discussion of this subject, about which the authorities are not fully in accord, we prefer to hold in the present case that the questions were properly raised by appellees, and that the court should take cognizance of their complaints. The members of the boards of supervisors hold their office by virtue of the Constitution itself. They have imposed upon them large and important duties and responsibilities; in meeting assembled they constitute an inferior tribunal. It is their duty to approve in the first instance the assessment rolls. If there is no objection, their approval is final. Before the enactment of chapter 98, Laws 1916, their final authority to approve the assessment rolls was unchallenged. While any individual taxpayer had the right of appeal, the order of the board of supervisors approving the roll was not subject to review. In approving the roll they have heretofore acted as officials, and not as subordinates. When, therefore, the order of the state board directed them to make far-reaching corrections in a roll which they had already approved and submitted to the auditor and the approval of which would be final but for the new statute here under review, the members of the board would naturally be confronted with the question of the validity or invalidity of the order they are directed to obey. If the new law is unconstitutional their corrections would be a nullity, and if a nullity the corrections, if made, would plunge into chaos the revenue system of Washington county. It is a question in which the public has a direct interest. If the statute of 1916 is unconstitutional, any compliance with the order of the state board would be an unconstitutional act, and appellees would in that instance disobey the very Constitution which they have sworn to uphold and obey. We hold, therefore, that the constitutional questions are properly before us.

[2] In the consideration of the merits of this case, it is of course the duty of the court, if possible, to uphold and not destroy the statute. In approaching then the legal questions argued, we do so with sympathetic regard for the work of the lawmaking department of our government.

[3] There is no merit in the contention that the statute is invalid because it permits the state tax commission to equalize and raise the assessment of personal property without regard to the valuation and assessment of real property. The act itself provides no new standard of assessments. The object of the new law is to assess all property at its true

value to the end that all taxable property shall bear its just proportion of the burdens. The general constitutional scheme is binding on assessors, boards of supervisors, and the courts. It is equally binding upon the state tax commission. The fact that in the year 1916 the state board was confronted with the work of equalizing assessments of personalty and not realty affords no ground for complaint. The land assessment rolls were not and could not then be presented for consideration. The land rolls of Washington county effective for the year 1916 are conclusively presumed to be correct. The time for the approval of a new assessment of lands has not arrived, and there is here presented no contention that the state board of tax commissioners has ordered an unlawful increase in the assessment of realty, or has taken any action affecting the rights of land-owners.

[4] The second, third, fourth, fifth, and sixth grounds of the demurrer challenge the constitutionality of the statute upon the ground that a compliance by the board of supervisors with the order of the state tax commissioners would deprive the individual taxpayer affected by the order of his property without due process of law in this, that the act under review does not provide for notice to be given the taxpayer of the proposed increase, does not afford an opportunity to be heard, and that it does not afford redress against an excessive or unconstitutional valuation. Counsel for the state meet this criticism of the statute by the assertion and argument that, so far as any correction ordered by the board of state tax commissioners is concerned, no notice is required.

Counsel do argue that the aggrieved taxpayer in any particular case has his remedy either under section 91 of the Code relating to certiorari, or by an injunction to restrain the tax collector from collecting taxes upon an excessive or unlawful valuation. They argue further that the individual taxpayers are represented before the state tax commissioners by their representatives, to wit, the members of the board of supervisors. In contending that no notice whatever is required counsel for the state rely upon the case of *Bi-Metallic Co. v. State Board of Equalization et al.*, 239 U. S. 441, 36 Sup. Ct. 141, 60 L. Ed. 372. But in our judgment the express terms of the statute itself dispose of this criticism and the attack based upon the due process clause of our state and federal Constitution. In the first place section 5 of the act, in conferring authority to adjust and equalize as between counties, expressly says:

"And to that end may add a fixed per centum to the assessed valuation of any class of property in any county, if they find that the valuation was too low: Provided, such raise shall not exceed the actual valuation of the property in any case," etc.

Section 6 of the act then provides as follows:

"Upon the giving of such notice by the chairman of the board of state tax commissioners of changes or corrections to be made in the county tax rolls, it shall be the duty of the president of the board of supervisors of the county affected to call a meeting immediately of said board of supervisors, after giving five days' notice by posting at the courthouse or publishing in a newspaper of the county, and at the said meeting the said board shall correct the county valuation upon the class or classes of property specified by the board of state tax commissioners, so as to make the same conform to the findings of the said board of state tax commissioners by applying uniformly to the specified class or classes of property the fixed increase or of decrease specified by the said board of state tax commissioners, and by raising or lowering all the individuals' returns of all the taxpayers of the county upon the specified class or classes of property accordingly."

This section is subject to two interpretations so far as the rights of the individual taxpayer are concerned. By one construction it would become the duty of the board of supervisors to increase the assessment of every taxpayer in the class of property ordered to be increased and to place the same percentage of increase upon every taxpayer affected. If this is the imperative duty of the board, then the honest taxpayer whose property has been assessed at true value would be called upon to pay taxes upon an excessive and unlawful increase. If his property has been given in at market price or true value, a price at which perhaps he would be willing to sell, then any additional burden of increase in assessment upon such an individual would be in the face of the Constitution and would violate the very uniformity and equality contemplated both by the Constitution and the very statute here under attack. Such an individual should have a right to protest and a remedy provided for by the law. The statute could be construed as requiring the board of supervisors to raise every individual a like amount without giving them either the right to be heard or any remedy. There is another construction, however, to be placed upon the language of the act, and according to this construction the rights of the individual taxpayer would be noticed and safeguarded. Section 6 does provide that the meeting of the board of supervisors is to be held upon notice; this notice is a general notice by publication and for the benefit of the public generally. By this notice every taxpayer is advised of the meeting and has a right to attend; by the terms of this section the board of supervisors are not directed to increase every individual taxpayer and fix an arbitrary percentage, but distributes the burden of increase amongst the individual taxpayers within the class of property affected by the order. In raising this class of property they are directed by the state board to increase not the assessment of any particular individual, but the total assessed valuation of that class of property. In accomplishing this increase of total valuation, the board of supervisors are accorded the ab-

solute right to distribute the burden of increase uniformly amongst the taxpayers of that class. The section of the act makes use of the word "uniformly"; we regard the use of this term here in the sense in which the Constitution itself used the word "uniform." To illustrate, then: If honest Richard Roe originally gave in his assessment at the top market price—at constitutional true value—and the state board has ordered an increase by which he is to be affected, honest Richard has a right to appear at this meeting of the board and object to the increase so far as he is concerned. In objecting, he has the right to tender evidence, if necessary, to establish his contentions. If the board should overrule his objections he then has the right, under section 81 of the Code, to appeal from the order of the board to the circuit court of his county. In the circuit court his appeal could be tried anew and a judgment according to right and justice entered. By this construction the interests of any and every individual taxpayer would be protected and an adequate remedy afforded. Section 81 of the Code is a general provision authorizing any person aggrieved by a decision of the board of supervisors "as to the assessment of taxes" to appeal. While the statute here, under review is an innovation, it was certainly not the purpose of the Legislature to ignore or override the individual. As to the class of property upon which the increase is ordered there is no final adjudication until the local board has complied with the order of the state board. In complying with this order the local board is not denied the right to hear the complaints of individuals, and to refuse to increase the assessment of any particular individual whose property is already assessed at actual value. This does not necessarily mean that the local board should not increase the grand total of the class. It is their duty to increase the grand total of the class in accordance with the instructions of the state board, but in making the increase to distribute the burden equitably amongst the members of that class. This construction of the statute frees it from the charge that it violates the due process clause of both the state and federal Constitutions, and renders the act in this regard constitutional.

[5] If there are two different interpretations of a statute, one of which would render the act constitutional, and the other unconstitutional, it is elementary that we should adopt that view and construction which would harmonize the act with the Constitution, and which would therefore uphold and not strike down the work of our lawmakers. It is our understanding that the interpretation which we here place upon the statute is the interpretation which the board of state tax commissioners themselves placed upon these provisions of the statute.

[6] While the construction of the state

board would not be binding upon this court, it yet remains that the construction which a department of government has placed upon the very law under which it was created and which it is sworn to enforce should be both suggestive and persuasive with the courts. By circular letter under date of October 23, 1916, the state tax commission by their general instructions says:

"It is not contemplated that any property will be assessed for more than its actual value; and, if any individual assessment would be increased beyond the actual value of the property, the increase should not be made as to it, but the grand total of the class must be increased in accordance with our instructions."

This remits the individual taxpayer to his rights and affords him his remedy. It gives him his day in court. It has often been asserted and well said that the individual was not made for the government, but the government for the individual. We shrink from any interpretation that would ignore the rights of the individual taxpayer. We cannot believe the Legislature intended either to ignore or to oppress the individual. The Legislature in providing that the state board shall return the assessment roll to the local board for correction indicated a purpose to leave full jurisdiction with the board of supervisors to make the increase in a way not to injure any one. If this was not the purpose, then why provide for a general notice to the public for the call meeting of the local board? This notice is given for the benefit of the public generally. The sufficiency or reasonableness of time or notice in pursuance of which the call meeting of the local board is held is not here brought in question.

[7] It has uniformly been held in reference to the assessment of property for taxation that a notice by publication is a sufficient compliance with the due process clause of the Constitution. A notice by publication is the only practical or effectual notice possible. This notice the statute expressly provides. It is our judgment, therefore, that any aggrieved taxpayer would be given the right of appeal by complying with section 81 of the Code; and, this being so, it is unnecessary for us either to criticize or to adopt the views expressed by the federal Supreme Court in the *Bi-Metallic Case*, *supra*. It is also unnecessary to indicate whether the taxpayer would have any other or additional remedy either by certiorari or by injunction.

The provisions of the latter half of section 6 of the act in no wise conflicts with what we have said above. This part of the section provides a method by which the board of supervisors may object to the general order of the state board and a way in which they may appear in Jackson with witnesses and present their views. If, upon hearing the objections, the protest of the board of supervisors is overruled, it then becomes the duty of the latter "to immediately revise and correct the

county valuation, in the manner hereinbefore in this section contemplated and provided." It may be that some provisions of this act are drawn rather left-handedly, and may not be altogether clear. We take it, however, that if the board of supervisors instead of complying with any general order of the state board elect to protest within the 15 days allowed by statute, they are at liberty to adjourn the call meeting and present their contentions before the state board in an effort to secure a rescission of the order or at least a modification thereof. Certain it is that if the state board refuses to rescind the order, the local board must return to their county and make the corrections; and in doing so, it is their duty to equalize the additional increase of burden amongst the taxpayers affected by the order. This view is in absolute harmony with the general scope and purpose of the statute. The statute under review in no wise undertakes to equalize as between individuals, but exclusively between counties. At the same time it does not either expressly or by implication supersede the jurisdiction of the local board to equalize as between individuals, and nowhere does it take away the right of the individual to an appeal. The courts are open to the individual and his appeal to the court even if successful does not and will not disturb the final approval of the roll as to any and all persons who do not appeal.

[8] Counsel for appellees have contended with learning and ability that the entire scheme here proposed undermines and supersedes our constitutional scheme of listing and valuing property by an assessor in each county, and of having the assessments equalized by the board of supervisors. Reliance is especially had upon the decision of this court in *State v. Tonella*, 70 Miss. 701, 14 South. 17, 22 L. R. A. 346. The issue raised by the *Tonella* Case was entirely different from that now presented. The statutes condemned by the *Tonella* Case attempted to authorize the revenue agent to sue any individual taxpayer of the state for back taxes on property which had been assessed, but in the judgment of the revenue agent had been undervalued, and on property assessed whether lawfully assessed or not. It undertook to authorize a state officer to go behind assessment rolls which had been finally approved by boards of supervisors and which by their approval had become fixed judgments as between the state and the taxpayer. The statutes there condemned substituted the one state officer for the constitutional local assessor in the original work of listing and valuing property for assessment and taxation. Any attempt to authorize the revenue agent to ignore the previous judgments of the board of supervisors evidenced by the approved rolls, to that extent, tended to disturb vested rights, and, that too, by legislation which in effect

was retroactive. Judge Cooper in his learned opinion called attention to the fact that the scheme there provided for in effect upset all the general revenue laws and the constitutional scheme, and substituted the individual discretion or judgment of one official, even to the extent of authorizing him effectually to increase one man's assessment without at the same time increasing all others whose property was undervalued. The opinion in the *Tonella* Case, taken as a whole and viewed in the light of the issues there presented, does not condemn the statute which we are now called upon to construe. The very object of the present law is to accomplish a correct assessment which the *Tonella* Case holds to be necessary. It accomplishes this purpose before, and not after, the assessment roll has been finally adopted. By the present statute the state board is constituted a higher tribunal with authority to speak before the several rolls are approved. As already indicated, the Legislature must have thought that many counties were systematically undervaluing certain classes of property. The Constitution does of course provide for an assessor, fixes his term of office, and contemplates that he shall discharge the duty of listing and valuing the taxable property in his county. When he has done so, the board of supervisors have heretofore discharged the duty of equalizing as between all taxpayers of the county. While the members of the board of supervisors are provided for by the Constitution, the Constitution itself nowhere expressly provides that the board shall equalize assessments. The power to equalize is statutory. Before the act of 1916 can be struck down as unconstitutional, we must be able to point to that provision of the Constitution which expressly or by necessary implication prohibits the legislation. No particular section of the Constitution has been called to our attention which, in our judgment, denies to the Legislature the power here asserted. The power of the Legislature as the immediate representatives of the people is supreme when not in conflict with the organic law. In their wisdom the Legislature has provided the law in a commendable desire more nearly to accomplish uniformity and equality. It does not interfere with the work of the assessor, but leaves this official free and untrammelled in the discharge of his duties so far as his judgment goes. The Constitution nowhere makes the judgment of the assessor a finality. To do so would render the revenue laws impotent. It is conceded that the valuations placed by the assessor have heretofore been either increased or decreased by the board of supervisors, and that under a statutory power. The present law simply goes a step further and constitutes a still higher tribunal with statutory power to review, alter, and change the valuations of boards of super-

visors whenever necessary to accomplish equality and uniformity as between counties. There are expressions in the opinion rendered by this court in the Tonella Case which are significant and in entire accord with the views here expressed. At one place in the opinion Judge Cooper says:

"If one rule of valuation should be adopted in one county and another in another, there would not be equality of taxation."

And again:

"It is to be remembered that in all the assessments which are reopened by the law under consideration, the boards of supervisors had been charged with the duty of examining and equalizing the rolls; and, if this was done, as must be presumed, any action by the revenue agent in changing one assessment would disturb the uniformity and equality of the burden, unless his jurisdiction may be considered as a revisory one, and his finding of the fact of undervaluation of particular property be considered as a judicial determination that all other property appearing thereon had been assessed at its true value."

The expression "unless his jurisdiction may be considered as a revisory one" unmistakably points to the situation here presented. The state tax commission is created as a department of government with revisory power over boards of supervisors in the work of equalizing assessments between counties. In applying the leveling process as between counties it does not disturb the jurisdiction of the county boards to level or equalize between individuals. Each board has its own peculiar functions to perform. The object of each is to accomplish uniformity and equality, and to see that all property is assessed as nearly as possible at true value.

Our attention has been called to the fact that 40 states of the Union have a state board of equalization similar to the one here provided. Our attention is also directed to many adjudicated cases upholding the constitutionality of these boards and to a few cases condemning such statutes as unconstitutional. It would unnecessarily prolong this opinion to refer to various adjudicated cases on this subject or to criticize or approve the reasoning by the various state courts. In some of the states the Constitution expressly provides for a state board of equalization; in others the board is created by statute. There are so many differences between the Constitutions of the various states, their schemes of taxation, and the public policy as expressed both by statute and adjudicated cases, that we refrain from commenting on the various cases cited by counsel from other states. We must leave so arduous a task to the digester or writer of footnotes and confine ourselves to our own Constitution and the pronouncements of our own court. They are fully cited in the briefs, and many of them support our views.

We deem it unnecessary to discuss at length *Hawkins v. Mangum*, 78 Miss. 97, 28 South. 872. The court there condemned the

arbitrary classification of property without regard to true value. We direct attention to this specific language of the court:

"This act does not admit of taxation of 'all property in proportion to its value,' as the Constitution requires, but adjusts it according to the opinion of the assessor, not of its real value, but as to what general class it ought to be put in."

And on the suggestion of error:

"In the act under consideration there appears no legislative purpose to have an assessment for taxation according to value. On the contrary, the confessed purpose is not to do so. \* \* \* Where a thing is undertaken to be taxed, it can be taxed in no other way than according to value. The Constitution requires it, and every citizen is interested in it, so that the burden shall be equal and uniform."

The right of the boards of supervisors to increase assessments to cover improvements placed on land and the right of the tax collector to make additional assessments was expressly upheld in *Tunica County v. Tate*, 78 Miss. 294, 29 South. 74, and *Powell v. McKee*, 81 Miss. 229, 32 South. 919. It is conceded that there must be an assessment. The discharge of this duty in the first instance is the constitutional function of the assessor. Under the present scheme the assessor proceeds with his work now as heretofore. The power to tax is a necessary governmental function. The Legislature has the undoubted right to fix a rate of taxation sufficiently high to cover the expenses and meet the demands of government. Instead of being forced to raise the rate, it ought to have the right to require all property to be assessed at true value—to demand of every owner of taxable property a fair and honest assessment. So long as this is done no one should have a right to complain.

[9] On the point that the act itself was not complied with, because in the year 1916 the state board increased the total valuations of personal property in the state approximately \$8,000,000, we hold as follows: The statute, in our judgment, authorizes the state board to increase or decrease the total valuation of any class of property in any county to the end that there may be an equalization as between counties. In doing this, the board has no authority to increase the assessment of any property above that placed by one or more of the highest assessed counties of the state. It could not arbitrarily exceed the highest valuation placed by any board upon the class of property dealt with. In all cases the act itself expressly limits the state board to true value. If they exceed true value, the individual has a right to protect himself. We cannot assume that the state board will exercise arbitrary power or undertake to confiscate property. If in equalizing as between counties it results that the total valuation of any class of property is thereby increased, a legitimate result is accomplished. The board has the same power to decrease as it has to increase, and the necessary result of the exercise of this power is not unlawful, but le-

gitimate. Whether the board will rightfully exercise this power is a question that cannot now concern us.

The judgment of the learned circuit court will be reversed, the demurrer overruled, and the cause remanded.

Reversed and remanded.

SMITH, J. (dissenting). I am unable to agree with my Associates that section 6 of the statute here under consideration is susceptible of two interpretations, but, on the contrary, it seems to me to be plain, unambiguous, and susceptible of only one interpretation. By it, together with section 5, boards of supervisors are directed to raise or lower, horizontally, and by a fixed per centum, the assessments of the class or classes affected by the order of the state tax commissioners, and are given no power to apportion the gross amount by which the assessment of a class is ordered to be increased or decreased among the individual members thereof as in the judgment of the members of the boards may be equitable and just. All that such boards are authorized to do on the complaint of a taxpayer is to take the matter up with the state tax commissioners and obtain, if possible, a revision of the order to raise or lower the assessments of the entire class or classes affected. The equalization scheme of the statute relates wholly to counties, and has no relation to the equalization of individual assessments, which are presumed to have been equalized before the assessment rolls are first approved by the boards of supervisors, so that the raising or lowering ordered by the state tax commissioners will affect all of a class alike. The revised and corrected property valuations to be made by boards of supervisors under the order of the state tax commissioners is intended to be final, and there is nothing in the statute to warrant the view that these valuations may be corrected by an appeal to the circuit court, or otherwise.

The construction given the statute by my Associates is not contended for by counsel for appellant; their only contention in this connection being that the statute does not violate the due process of law clause of the Constitution, for the reason that the order of the state tax commissioners to a board of supervisors to raise or lower the assessed valuation of any class of property affects all of a class alike, and, therefore, under the rule announced in *Bi-Metallic Investment Company v. State Board of Equalization*, 239 U. S. 441, 36 Sup. Ct. 141, 60 L. Ed. 372, notice to and an opportunity to be heard by the individual taxpayers is not necessary. Under the construction given the statute by my Associates this question does not arise.

I express no opinion upon any other question in the case.

(113 Miss. 603)

**McGHEE v. LAUREL LIGHT & RY. CO.**  
(No. 18758.)

(Supreme Court of Mississippi, Division A.  
Jan. 29, 1917. Suggestion of Error  
Overruled Feb. 26, 1917.)

**DAMAGES \$12 — CUTTING SHADE TREES —  
NOMINAL DAMAGES.**

Where a light and railway company, through its agents, trespassed on plaintiff's property without her consent, and cut the limbs of her ornamental shade trees standing thereon, the company was liable for nominal damages for invading plaintiff's rights, though plaintiff showed no actual damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 81.]

Appeal from Circuit Court, Jones County; Goode Montgomery, Special Judge.

Suit by Mrs. B. B. McGhee against the Laurel Light & Railway Company. From a judgment for defendant, plaintiff appeals. Reversed, and case remanded.

Appellant brought suit against appellee for entering upon her premises and cutting the limbs from certain shade trees in her yard. Appellee claims that this was done in order to repair its wires which were strung on poles along the street in front of appellant's premises and could not be repaired without cutting certain limbs from appellant's trees. The only value the trees have is ornamental, and appellant sued both for actual and punitive damages. The case was submitted to a jury, who returned a verdict for the defendant, from which comes this appeal.

Shannon & Schaubert, of Laurel, for appellant. Deavours & Hilbun, of Laurel, for appellee.

HOLDEN, J. From the undisputed proof in the record it appears that the appellee, Laurel Light & Railway Company, through its agents and servants, trespassed upon the property of appellant by going upon her premises, without her consent, and cutting the limbs of her ornamental shade trees standing thereon. This act constituted an invasion of the rights of appellant, and renders appellee liable for nominal damages, even though no actual damages be shown. It is the invasion of the right which gives the cause of action. Therefore the lower court erred in granting to the appellee instruction No. 3, which reads as follows:

"The court instructs the jury for the defendant that, before the plaintiff can recover any damages in this case, the plaintiff must show by a preponderance of all the evidence in the case that the defendant, or its servants and agents, cut and destroyed the limbs of the trees on plaintiff's property, and further the plaintiff must show that the cutting of the limbs of the said trees on plaintiff's property actually damaged and injured said property, and, if the jury do not so believe, then it is the sworn duty of the jury to return a verdict for the defendant."

The judgment of the lower court is reversed, and the case remanded.

**FORD v. POWELL.** (No. 18548.)(Supreme Court of Mississippi, Division B.  
March 19, 1917.)Appeal from Circuit Court, Calhoun County;  
J. L. Bates, Judge.Suit by E. S. Ford against Z. W. Powell.  
From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Joe H. Ford, of Houston, for appellant.

**ETHRIDGE, J.** The appellant sued the appellee in the circuit court of Calhoun county on three promissory notes payable to E. T. Miller & Co. or bearer and assigned to E. S. Ford by Miller & Co. The notes were given to Miller & Co. by Powell and D. R. Collins for an agency for the novelty ironing board, and under the contract Powell and Collins were made managers of E. T. Miller & Co. and given exclusive privilege of selling the novelty ironing board in Oktibbeha county, Miss., and the privilege of selling concurrently with other agents in Chickasaw, Clay, Webster, and Calhoun counties. It was further provided that for every 20 dozen boards sold they should have the exclusive agency in any unoccupied county in the United States. The ironing boards were to be sold at \$3.75 each, and were to be bought and paid for at the rate of \$15 per dozen. Powell defended the suit on the ground of failure of consideration, and claimed that Ford had notice of his defense before buying. The proof on the part of the appellee, defendant below, is insufficient to support a verdict in his favor, and a peremptory instruction should have been given for the appellant.

On the issue of whether he was the buyer with or without notice, the evidence is barely sufficient to go to a jury, but, treating that issue as being sufficiently settled on the evidence, the proof of failure of consideration is insufficient, and the judgment is reversed and the cause remanded.

Reversed and remanded.

(113 Miss. 608)

**ADAMS, State Revenue Agent, v. LUCEDALE COMMERCIAL CO.** et al.

(No. 18622.)

(Supreme Court of Mississippi, Division B.  
March 19, 1917.)**EQUITY §—359—VOLUNTARY DISMISSAL—CONSTITUTIONAL AND STATUTORY PROVISIONS.**

The Constitution empowers the chancery court to entertain and give relief in lawsuits wherein no equitable principles are involved, Code 1906, § 802, gives to every plaintiff the absolute right "to suffer a nonsuit" if he elects to do so "before the jury retire to consider of its verdict," and section 687 declares that all things contained in the chapter not restricted by their nature or by express provision to particular courts shall be the rules of decision and proceeding in all courts. *Held*, that the chancellor had no discretionary power in considering an application of complainant to discontinue his action, though it might have a discretion when the time had passed for the complainant to dismiss as a matter of right, and that the chancery court erred in denying complainant's right to dismiss his bill "without prejudice"; the only limitation of the rule being in cases wherein the defendant has secured some right by the filing of the bill which would be destroyed by its dismissal.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 749-755.]

Appeal from Chancery Court, George County;  
J. M. Stevens, Chancellor.

Bill by Wirt Adams, State Revenue Agent, against the Lucedale Commercial Company and others. From the denial of his motion for leave to dismiss his bill "without prejudice," and from an order dismissing the cause and denying complainant any relief, he appeals. Reversed, and decree entered dismissing the bill without prejudice.

F. C. Hathorn, of Hattiesburg, for appellant. White &amp; Ford, of Gulfport, for appellees.

**COOK, P. J.** We will treat the record in this case according to the theory of appellee as to what it contains, and what it should contain. The appellant, on July 28, 1913, a day of the regular term of the chancery court, filed a motion asking the leave of the court to dismiss his bill of complaint "without prejudice." On July 27th the court overruled this motion, and on the same date, on the motion of appellee, the court entered an order dismissing the cause and denying complainant any relief.

At the preceding term of the court an order was entered for a hearing in vacation, the parties of each side of the controversy were given leave to take testimony within a fixed date, and the cause was to be heard on its merits, on a day fixed in the order. Nothing was done by either side; no testimony was taken, and the case was not heard by the chancellor in vacation. It will be seen that both the complainant and the defendant elected to do nothing towards a hearing in vacation. So the precise question presented to us is, Did the chancery court err when complainant was denied the right to dismiss his bill "without prejudice"? We do not believe that the order for a hearing in vacation affects the point which must control in this case.

It may be conceded, for argument's sake that defendant could have appeared before the chancellor in vacation and asked that the cause be dismissed for want of prosecution, and if he had done so, and had the chancellor seen fit to so decree, the decree would be res adjudicata. The answer, however, to this supposititious right of defendant is that he failed to avail himself of it, and the order for a vacation decree then became functus officio.

It seems to be argued that the chancellor is vested with discretionary powers when he is called upon to consider an application of complainant to discontinue his action. We are unable to indorse this view of the law. Section 802, Code 1906, gives to every plaintiff the absolute right "to suffer a nonsuit" if he elects to do so "before the jury retire to consider of its verdict." This section of the Code is found in chapter 20, Circuit Courts. Section 687 of the same chapter reads thus:

"All things contained in this chapter, not restricted by their nature or by express provision to particular courts, shall be the rules of decision and proceeding in all courts whatsoever."

The right of a complainant to dismiss his bill without prejudice, to discontinue his suit or to suffer a nonsuit, are "not restricted by their nature or by express provision to particular courts."

Under our Constitution the chancery court may entertain and give relief in lawsuits wherein no equitable principles are involved. It would not be contended that a plaintiff in a lawsuit may not suffer a nonsuit, and we are unable to see why this statutory right could be denied by a chancellor, a judge of a chancery court, when a judge of a circuit court could not do the same thing. In a chancery court juries are dispensed with, except in exceptional cases, but the chancellor has no more power or discretion for this reason than a circuit judge. In fact, the word "discretion" is a much-abused word.

After a thorough examination of the authorities we are convinced that the rule supported by all of the authorities, or at least by the great weight of authority, is to the effect that chancery or equity courts are controlled by a rule similar to our statutory rule. The only limitation of the rule is applied to cases wherein the defendant has secured some right by the filing of the bill which would be destroyed by the dismissal of the bill. Even then it is not a matter of discretion with the chancellor, it is a right of the defendant which controls. The discretion of the court may be exercised when the time has passed for the plaintiff or complainant to dismiss as a matter of right; before that time there is no discretion. It seems that the right to dismiss without prejudice did not exist in common-law courts; it originated in the courts of equity, and from our investigations it was a right to be denied only when the other party would be prejudiced.

In this state the right to suffer a nonsuit is fixed by the statute quoted above, and, in terms we think this statute is applicable to equity courts. In equity courts the right ceases after the cause has been submitted to the chancellor; in law courts, after the case has been submitted to the jury. Probably the statute was not needed in equity practice; the right to dismiss already existed, but to make sure, the Legislature made it apply to all courts wherein it was already applicable, or in the language of section 687 the rule prescribed by section 802 "shall be the rules of decision and proceeding in all courts whatsoever."

This being our view of the law, the decree of the chancery court must be reversed, and a decree will be entered here dismissing the bill without prejudice.

Reversed, and decree here.

STEVENS, J., took no part in this decision.

ADAMS, State Revenue Agent, v. DEAN.  
(No. 18623.)

(Supreme Court of Mississippi. March 19, 1917.)

Appeal from Chancery Court, George County; J. M. Stevens, Chancellor.

Suit between Wirt Adams, State Revenue Agent, and F. P. Dean. Decree for the latter, and the former appeals. Reversed, and decree here.

F. C. Hathorn, of Hattiesburg, for appellant. White & Ford, of Gulfport, for appellee.

PER CURIAM. The decision of this case is controlled by the case of Adams v. Lucedale Commercial Co., No. 18622, this day decided, 74 South. 435.

Reversed, and decree here.

ADAMS, State Revenue Agent, v. LUCE.  
(No. 18666.)

(Supreme Court of Mississippi. March 19, 1917.)

Appeal from Chancery Court, George County; J. M. Stevens, Chancellor.

Suit between Wirt Adams, State Revenue Agent, and G. M. Luce. Decree for the latter, and former appeals. Reversed, and decree here.

F. C. Hathorn, of Hattiesburg, for appellant. White & Ford, of Gulfport, for appellee.

PER CURIAM. The decision of this case is controlled by the case of Adams v. Lucedale Commercial Co., No. 18622, this day decided, 74 South. 435.

Reversed, and decree here.

ADAMS, State Revenue Agent, v. McINNIS.  
(No. 18667.)

(Supreme Court of Mississippi. March 19, 1917.)

Appeal from Chancery Court, George County; J. M. Stevens, Chancellor.

Suit between Wirt Adams, State Revenue Agent, and Murdock McInnis. Decree for the latter, and the former appeals. Reversed, and decree here.

F. C. Hathorn, of Hattiesburg, for appellant. White & Ford, of Gulfport, for appellee.

PER CURIAM. The decision of this case is controlled by the case of Adams v. Lucedale Commercial Co., No. 18622, this day decided, 74 South. 435.

Reversed, and decree here.

ADAMS, State Revenue Agent, v. LEATHERBURY.  
(No. 18668.)

(Supreme Court of Mississippi. March 19, 1917.)

Appeal from Chancery Court, George County; J. M. Stevens, Chancellor.

Suit between Wirt Adams, State Revenue Agent, and George S. Leatherbury, Jr. Decree for the latter, and the former appeals. Reversed, and decree here.

F. C. Hathorn, of Hattiesburg, for appellant. White & Ford, of Gulfport, for appellee.

PER CURIAM. The decision of this case is controlled by the case of Adams v. Lucedale Commercial Co., No. 18622, this day decided, 74 South. 435.

Reversed, and decree here.



**THORSEN v. ILLINOIS CENT. R. CO.**  
(No. 17469.)

(Supreme Court of Mississippi. March 19, 1917.)

Appeal from Circuit Court, Montgomery County; J. A. Teat, Judge.

Action between W. A. Thorsen and the Illinois Central Railroad Company. Judgment for the latter, and the former appeals. Affirmed. See, also, 72 South. 879.

J. H. Price, of Indianola, for appellant. Mayes, Wells, May &amp; Sanders, of Jackson, for appellee.

**PER CURIAM.** Affirmed.**HALSEY v. EVERETT et al.** (No. 18592.)  
(Supreme Court of Mississippi. March 19, 1917.)

Appeal from Chancery Court, Newton County; G. C. Tann, Chancellor.

Suit between Roy Halsey and Joe Everett and others. Decree for the latter, and the former appeals. Affirmed.

W. I. Munn, of Newton, for appellant.

**PER CURIAM.** Affirmed.**McINNIS v. ROPER.** (No. 18551.)  
(Supreme Court of Mississippi. March 19, 1917.)

Appeal from Circuit Court, Forrest County; Paul B. Johnson, Judge.

Action between Addie B. McInnis and W. A. Roper. Judgment for the latter, and the former appeals. Affirmed.

Currie &amp; Currie, of Hattiesburg, for appellant. D. M. Watkins and R. S. Hall, both of Hattiesburg, for appellee.

**PER CURIAM.** Affirmed.**MEAD v. LUCAS et al.** (No. 18681.)  
(Supreme Court of Mississippi. March 19, 1917.)

Appeal from Chancery Court, Lauderdale County; G. C. Tann, Chancellor.

Suit between Mrs. Emma A. Mead and W. W. Lucas and another. Decree for the latter, and the former appeals. Affirmed.

Amis &amp; Dunn, of Meridian, for appellant. E. B. Williams, of Poplarville, and A. S. Bozeman, of Meridian, for appellees.

**PER CURIAM.** Affirmed.**FIELD v. YAZOO & M. V. R. CO.** (No. 18897.)  
(Supreme Court of Mississippi. March 19, 1917.)

Appeal from Circuit Court, Claiborne County; T. G. Birchett, Judge.

Action between Medora C. Field and the Yazoo &amp; Mississippi Valley Railroad Company. Judgment for the latter, and the former appeals. Affirmed.

J. McC. Martin and R. B. Anderson, both of Port Gibson, for appellant. Mayes, Wells, May &amp; Sanders, of Jackson, for appellee.

**PER CURIAM.** Affirmed.**LAFAYETTE COUNTY v. PARHAM.**  
(No. 18837.)

(Supreme Court of Mississippi. March 19, 1917.)

Appeal from Circuit Court, Lafayette County; J. L. Bates, Judge.

Action by Lafayette County against S. M. Parham. Judgment for the latter, and the former appeals. Affirmed by court in banc and by court equally divided.

Edgar Webster, of Oxford, for appellant. O. E. Slough, of Marks, for appellee.

**PER CURIAM.** Affirmed by court in banc and by court equally divided.**STANLEY v. COOKE.** (No. 18895.)  
(Supreme Court of Mississippi. March 19, 1917.)

Appeal from Circuit Court, Lowndes County; T. B. Carroll, Judge.

Action by Herbert Stanley against Mrs. Rowena L. Cocke. Judgment for the latter, and the former appeals. Affirmed.

Ethridge &amp; Ethridge, of Meridian, for appellant. Frierson &amp; Hale, of Columbus, for appellee.

**PER CURIAM.** Affirmed.**YAZOO & M. V. R. CO. v. PARKER.**  
(No. 18509.)

(Supreme Court of Mississippi. March 19, 1917.)

Appeal from Circuit Court, Quitman County; W. A. Alcorn, Jr., Judge.

Action between the Yazoo &amp; Mississippi Valley Railroad Company and Cleveland Parker. Judgment for the latter, and the former appeals. Affirmed.

Mayes, Wells, May &amp; Sanders, of Jackson, for appellant. M. E. Denton, of Marks, for appellee.

**PER CURIAM.** Affirmed.**PARNELL v. SOUTHERN RY. CO.**  
(1 Div. 962.)

(Supreme Court of Alabama. Feb. 15, 1917.)

**1. ASSIGNMENTS** §24(1) — **CLAIMS ASSIGNABLE—CAUSE OF ACTION—TORT.**

Claims against railroads for setting fire to property near their rights of way, though tort actions for damages to or destruction of property, are assignable.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 42, 44, 45.]

**2. ASSIGNMENTS** §3—**ASSIGNMENT OF CAUSE OF ACTION—LOSS FROM FIRE—CONSTITUTIONALITY OF STATUTE.**

Code 1907, § 5159, providing that claims against railroad companies for injuries to property may be assigned in writing, and each successive assignee thereof may sue thereon in his

own name, is not arbitrary, capricious, or without semblance of reason, and violative of Const. 1901, § 240, providing that all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 5.]

### 3. CONSTITUTIONAL LAW § 249 — EQUAL PROTECTION OF LAWS—STATUTE—"RAILROAD COMPANIES."

Such statute is not violative of Const. U. S. art. 14, § 1, providing that no state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws, though using the language "railroad companies," only including corporations and associations of persons, but not including individuals, since the words "railroad companies" were intended to embrace all legal persons engaged in the transportation of persons or freight over railroads for hire.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 710.]

For other definitions, see Words and Phrases, First and Second Series, Railroads.]

McClellan, Mayfield, and Sayre, JJ., dissenting.

Appeal from Circuit Court, Washington County; Ben D. Turner, Judge.

Suit by Thomas Parnell against the Southern Railway Company. From a judgment of nonsuit on demurrer to the complaint, plaintiff appeals. Judgment reversed, and judgment rendered overruling the demurrer, and cause remanded.

John E. Mitchell, of Mobile, for appellant. Bestor & Young, of Mobile, and Granade & Granade, of Chatom, for appellee.

GARDNER, J. Appellant brought suit against the appellee for recovery of damages for the destruction by fire of a sawmill, machinery, and equipment, located near the right of way of appellee's railroad. It was charged in the complaint that the property was destroyed through the negligence of agents or employees of the defendant railroad company while acting in the scope of their employment, in the negligent operation or negligent construction or equipment of the defendant's engine, whereby sparks emitted therefrom set fire to and destroyed the said property. The property belonged at the time of the fire to J. B. Slade and C. E. Harrell, who, after its destruction, assigned in writing to the plaintiff, Parnell, their claim against the defendant for said loss. Demurrers were interposed, taking the point that there is no warrant in law for plaintiff to bring suit in his own name for damages to property of others, and that such a claim cannot be legally assigned so as to authorize the assignee to bring suit in his own name. The demurrer was sustained, and from this adverse ruling on the pleading the plaintiff took a nonsuit and prosecutes this appeal to review the ruling of the lower court.

Section 5159 of the Code reads as follows:

"Claims against railroad companies, for injuries to property, may be assigned in writing, and each successive assignee thereof may sue thereon in his own name."

It is, of course, conceded that if this is a valid statute the demurrer should be overruled. The appeal therefore presents for review the one question as to the constitutionality of this statutory provision.

[1] We think it clear that claims of this character, although tort actions for damage to or destruction of property, are assignable. *McNutt v. King*, 59 Ala. 597; *Camack v. Blaquay*, 18 Ala. 286; *Southern Ry. Co. v. Stonewall Ins. Co.*, 177 Ala. 333, 58 South. 313, Ann. Cas. 1915A, 987; *Holt v. Stollenwerck*, 174 Ala. 213, 58 South. 912; *Leach v. Greene*, 116 Mass. 534; *L. N. A., etc., Ry. v. Goodbar*, 88 Ind. 213; *Snyder v. Wabash, etc., R. R. Co.*, 86 Mo. 613, 29 Am. & Eng. R. R. Cas. 237.

[2, 3] It was indicated in the *Stonewall Ins. Case*, *supra*, that as a general rule a right of action for torts for injury to property is not assignable in this state so as to pass the legal title and enable the assignee to sue in his own name. This may, for the purposes of this case, be conceded as the general rule here recognized. So conceding, however, it is insisted that the above-quoted section is void as in violation of section 240 of the Alabama Constitution of 1901, which reads as follows:

"All corporations shall have the right to sue, and shall be subject to be sued, in all courts in like cases as natural persons."

And it is further insisted that it is violative of section 1, art. 14, of the federal Constitution, reading as follows:

"No state shall make or enforce any law which shall \* \* \* deny to any person within its jurisdiction the equal protection of the laws."

In support of the former insistence, much reliance is placed upon the cases of *S. & N. A. R. R. v. Morris*, 65 Ala. 193, and *Smith v. L. & N. R. R. Co.*, 75 Ala. 449. The *Morris Case* dealt with an act which fixed a liability upon railroads for attorney's fees not to exceed a certain amount, when appeal is taken and unsustained from a judgment against them rendered by a justice of the peace, in suits for damages of a certain character. The act there under consideration was of about the same character as that of the state of Texas, reviewed and declared invalid by the United States Supreme Court in *Gulf, etc., Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 668. The other case relied upon (*Smith v. L. & N. R. R. Co.*) dealt with a statute which created an entirely new cause of action—one theretofore unknown, and on account of its discrimination against corporations or private associations of persons, in favor of the individual, was declared invalid. It is to be noted that in each of these cases the nature and measure of liability was affected by the act imposing

new liabilities. Such cannot be said, however, of the statute here under review.

We have held that this claim is assignable. The only question of moment is as to whether the assignee is permitted to sue in his own name, or whether he must maintain the suit in the name of his assignor. The statute under consideration says that he may maintain the suit in his own name. No liability or undue burden is imposed upon the railroad company, nor does the statute affect any of the substantial rights of the parties. It applies, not to the right, but to the remedy. In the suit upon its merits the same defenses are allowed the defendant, and the same limitations exist as to the rights of the plaintiff, whether the suit is instituted by the original owners, Slade and Harrell, or by the plaintiff, Thomas Parnell.

This provision of our law seems to have been first enacted on March 1, 1870 (Acts 1869-70, p. 235), and the constitutional provision here under consideration has remained without material change so far as the question here involved is concerned. The constitutionality of the act appears to have been first raised in the case of *L. & N. R. Co. v. Landers*, 135 Ala. 504, 33 South. 482, though not there passed upon. It was next presented in *Southern Ry. Co. v. Stonewall Ins. Co.*, 163 Ala. 167, 50 South. 940, and on second appeal of the same case (177 Ala. 327, 58 South. 313, Ann. Cas. 1915A, 987). That case, like the present one, involved the destruction of property belonging to several persons, by fire alleged to have been caused by the emission of sparks from the railway engine. The constitutionality of the statutory provision was there considered by the court not necessary to be determined; but the opinion discloses the conclusion that the statute did not affect any substantial right but only a question of form, as is indicated by the following quotation from that opinion:

"We are not required by this appeal to pass upon the constitutionality of that statute; and, as held on the former appeal in this case, the defect, if any, was technical only, and could have been corrected by amendment in response to objection seasonably and properly interposed."

In the case of *Home Protection Ins. Co. v. Richards*, 74 Ala. 466, this provision of our Constitution was invoked upon an attack on the act providing that suits may be brought against corporations in any county in which they do business by agents. It was there said:

"It is a general rule that no one have any vested right to any particular remedy or form of procedure, and that the matter of venue belongs to the procedure or remedy, and is no part of the right itself. The act of February 13, 1879, the constitutionality of which is assailed by the appellant, is intended only to regulate civil procedure, and does not, in our judgment, appear to be such an unreasonable discrimination as that we can pronounce it to be arbitrary, capricious, or without the semblance of reason. Unless this be true, there is usually no other limitation upon the authority of the lawmaking power, in the exercise of its discretion as to

classification of persons, and the shaping of remedies so as to adapt them to the inherent nature of the subject-matter of legislation, in the infinitude of their changing variety."

The act was declared valid.

In *Smith v. L. & N. R. Co.*, supra, the *Richards Case*, supra, is commented upon and differentiated; it being pointed out that the latter case involved the question of mere form of proceeding, the court saying:

"The difference commented on in that case did not affect the nature or measure of liability; but only the forum, or form of its enforcement. If the effect of the statute, therein construed and held constitutional, had been to fasten a liability on one class, from which the other class was exempt, the case would have been considered as falling properly within the influence of *Mayor v. Stonewall Ins. Co.*, 53 Ala. 570, and *S. & N. A. R. v. Morris*, 65 Ala. 198."

There can be no insistence in this case, therefore, that this legislation, by operating upon the remedy, has seriously impaired any legal rights of the defendant railroad. It relates to a question of form, a mere matter of procedure, referred to in *So. Ry. Co. v. Stonewall Ins. Co.*, supra, as purely a technical question.

In the *Richards Case*, supra, the language of the opinion indicates the view of the court that the constitutional provision of our state here under consideration would not embrace questions of civil procedure which could not be said to seriously impair any legal right; but that, in any event, for such legislation to be held objectionable there must be such an unreasonable discrimination as to be pronounced "arbitrary, capricious, or without the semblance of reason." Clearly, such could not be said of the statutory provision here under review.

In a dissenting opinion by Judge Gray in the case of *Gulf, etc., Ry. Co. v. Ellis*, supra, it was pointed out that the Legislature must be presumed to have acted upon lawful motives and to have been satisfied from observation that frequently the patience as well as the means of those holding petty claims against a railroad for damages to stock become exhausted through protracted and expensive litigation. So with reference to the statute here under review. The Legislature must be presumed to have acted with lawful motives and to have made observations similar to those just referred to. It is not infrequent, as courts must judicially know, that cotton stored in a warehouse, destroyed by fire alleged or claimed to have been caused by sparks from a passing train, is owned, by numerous people, as was the situation in the case of *So. Ry. Co. v. Stonewall Ins. Co.*, supra. Likewise, it sometimes happens that stock or cattle belonging to several different persons may be killed by a passing train. The amount involved as to each may be small, and the expense of litigation may fall heavily upon one who has neither the time nor the means to spare for the enforcement of such claim. In each illustration given,

the same facts which would support or defeat a recovery as to one claimant would support or defeat a recovery as to all. It may also happen that some of the claimants would have to travel a considerable distance for the purpose of prosecuting their petty claims. Doubtless, considerations of this character moved the Legislature to enact what is now section 5159 of our Code. It clearly cannot be insisted that such a law is arbitrary, capricious, or without reason. We are fully persuaded that this section does not offend the above-quoted provision of our Constitution. We are also of the opinion that it clearly is not in violation of that portion of section 1 of article 14 of the federal Constitution previously quoted.

It has long been recognized by the United States Supreme Court that classification of corporations with reference to their relation to the public is reasonable, and that the business of railroads is of such a nature and so affected with the public interest, that many laws relating to this class of business have been held free from constitutional objection that they were discriminatory. In *Smith v. Woolf*, 160 Ala. 644, 49 South. 395, is found the following extract from *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552:

"The state may distinguish, select, and qualify objects of legislation, and necessarily the power must have a wide range of discretion. \* \* \* Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary."

And in the case of *Atchison, etc., Co. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909, the court said:

"It is the essence of a classification that upon the class are cast duties or burdens different from those resting upon the general public. \* \* \* Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

The following cases are also of interest in this connection: *Mo. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Gano v. Minneapolis, etc., Ry. Co.*, 114 Iowa, 713, 87 N. W. 714, 55 L. R. A. 263, 89 Am. St. Rep. 393, affirmed in *Minneapolis, etc., Co. v. Gano*, 190 U. S. 557, 23 Sup. Ct. 854, 47 L. Ed. 1183; *Noble St. Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487; *Int. Harv. Co. v. State of Mo.*, 234 U. S. 199, 34 Sup. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525; *McDavid v. Bank of Bay Minette*, 193 Ala. 341, 69 South. 452; *Hawkins v. Smith*, 242 Mo. 688, 147 S. W. 1042.

Our conclusion that the statute infringes upon no provision of the Fourteenth Amendment to the federal Constitution we consider is clearly supported by the above-cited authorities.

It is urged, lastly, that the statute is dis-

criminatory in that the language used embraces "railroad companies" only, which would include corporations and associations of persons in partnership but would not include individuals. A similar argument was answered by the Supreme Court of Texas in *State v. T. & P. Co.*, 106 Tex. 18, 154 S. W. 1159, in the following language:

"It is common knowledge that in this state railroads of the kind affected by the act are owned by corporations, and, in general, are conducted only by such agencies. In the enactment of the law, the Legislature was dealing with practical conditions; and as the act, if held applicable merely to railway corporations, embraces all who, in general, own and conduct such railroads in the state, we do not think it should be condemned as based upon an arbitrary or unreasonable classification, because there are excluded from its operation individuals, partnerships, associations, etc., who may, in a private capacity, engage in such business; but, as a matter of fact, do not pursue it, and to whom therefore a statute in relation to such business would have no practical application."

See, also, *State of Texas v. T. & P. Co.* (Tex. Civ. App.) 143 S. W. 223.

Should this question be considered material, however, there could be little difficulty in reaching the conclusion, considering the language of the statute and the purposes for which it was enacted and the object the Legislature had in view, that the words, "railroad companies" were intended to embrace corporations, firms, or individuals engaged in the transportation of persons or freight over railroads for hire; and it was clearly the intention to have the act apply to all such common carriers. Such is the definition found in section 5520, Code 1907. See, also, section 5507.

The Supreme Court of Illinois, in the case of *Chicago Dock Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448, reached a like conclusion in construing a statute using the phrase, "the railroad company," saying:

"It is very clear that 'natural persons' are here within the intention, although not within the letter, of the act, for the entry against which protection is intended to be afforded is the laying of railway tracks in the streets."

A like conclusion was reached by the Supreme Court of Georgia in the construction of a tax statute using the phrase, "every sewing machine company." *Singer Mfg. Co. v. Wright*, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497. The case of *State v. Stone*, 118 Mo. 388, 24 S. W. 164, 25 L. R. A. 243, 40 Am. St. Rep. 388, is also directly in point.

We therefore conclude that section 5159 of our Code is not obnoxious to the provisions of our own nor of the federal Constitution, and that the court below committed error in sustaining the demurrer to the complaint.

The judgment will be reversed, and one here rendered overruling the demurrer, and the cause will be remanded.

Reversed, rendered, and remanded.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur. McCLELLAN, MAYFIELD, and SAYRE, JJ., dissent.

(199 Ala. 391)

**ALABAMA, T. & N. RY. CO. v. ALICEVILLE LUMBER CO. et al. (6 Div. 177.)****Supreme Court of Alabama. Dec. 21, 1918.  
Rehearing Denied Feb. 1, 1917.)****2. EQUITY  $\Leftrightarrow$  42(1)—JURISDICTION—EFFECT OF CROSS-BILL.**

Defendants who by filing cross-bills become plaintiffs submit themselves to the jurisdiction of the chancery court.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 119.]

**2. EQUITY  $\Leftrightarrow$  39(1)—JURISDICTION—ESTOPPEL TO QUESTION.**

Since, once having assumed jurisdiction, a court of equity will proceed to full adjudication of all issues presented by pleading and evidence, where complainant filed its bill to restrain prosecution of two actions against it, it could not question jurisdiction of the court to render decree determining complainant's rights in the other actions.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-109, 111, 114.]

**3. EQUITY  $\Leftrightarrow$  377—JURY TRIALS—RIGHT.**

Code 1876, § 3890, as to jury trials in equity cases, has been essentially changed by Code 1907, § 3201, and decisions under the former statute have no application, but under sections 3201, 3202, the court may submit an issue to a special jury in chancery, or certify an issue to the district court for trial.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 783-793.]

**4. EQUITY  $\Leftrightarrow$  377—JURY TRIALS—RIGHT.**

Where jury trial in equity is not a matter of right, but only to aid the chancellor, he has the utmost discretion to determine whether an issue shall be submitted to a jury.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 783-793.]

**5. EQUITY  $\Leftrightarrow$  381—JURY TRIALS—EFFECT OF VERDICT.**

The chancellor or court of equity, which submits an issue to a jury, has revisory power over the jury's verdict.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 813-817.]

**6. APPEAL AND ERROR  $\Leftrightarrow$  671(3)—SCOPE OF REVIEW—EQUITY CASES—JURY TRIALS—RECORD.**

In an equity case, where the chancellor submits an issue of fact to the jury as a matter of right, whose finding he incorporates in his decree, the court on appeal may consider exceptions, when certified, to procedure at the jury trial or before the chancellor, although Code 1907, § 5955, requires a trial de novo on appeal, since it could not otherwise say whether the verdict was proper, and to deny such right would be a denial of right of appeal given by section 5955.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2369.]

**7. APPEAL AND ERROR  $\Leftrightarrow$  837(4)—SCOPE OF REVIEW—RESORT TO RECORD.**

If, on appeal, there is uncertainty as to what was decided, resort may be had to the pleadings and the opinion of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3274.]

Appeal from Chancery Court, Pickens County; Thomas H. Smith, Chancellor.

Bill by the Alabama, Tennessee & Northern Railway Company against the Aliceville Lumber Company and others, to enjoin ac-

tions at law, with cross-bill by respondent. From a final decree for respondents complainant appeals. Affirmed.

The final decree directed to be set out is as follows:

There are two systems under which an issue is had out of chancery. One given by statute, as in cases of contested wills, which is a matter of right to have such an issue (section 6207, Code 1907); the other where the court refers a disputed question of fact after having read the evidence and wishing the aid of the verdict of the jury to satisfy the mind and conscience of the chancellor (section 3201, Code 1907; *Ex parte Colvert*, 188 Ala. 650, 65 South 964). The two seem to be distinguishable in several particulars. In the first, it is a matter of right, and is ordered before evidence has been taken in the chancery cause, and the finding is binding, but may be set aside for error in the trial. *Adams v. Munter Bros.*, 74 Ala. 342; *Ex parte Colvert*, supra. In the second, where the reference is made by the chancellor after having read the evidence already taken, to aid and assist him in arriving at a conclusion on a doubtful question of fact. In this class of cases the verdict is merely advisory. Section 3201, Code 1907, and citations; *Marshall v. Croom*, 60 Ala. 121; *Adams v. Munter Bros.*, supra; *Mathews v. Forniss*, 91 Ala. 157, 8 South. 661. The question referred to the jury in this case was whether or not a fire which destroyed a certain mill was caused by the locomotive of complainant, through the negligence of complainant, etc., and the value of the property which was destroyed, all of which was more particularly shown by the decree ordering the issue to be tried by a jury. This court does not set as a court of review, as I understand the authorities, charged with the duty to refer the case back to the jury should a single erroneous question and answer have been allowed on the trial, but the question presented is whether such an unfair trial was had that the court should disregard the finding entirely. For the court to do this the entire evidence should have been certified to it with such objections pointed out as show that the finding of the jury was so opposed to the evidence as to be worthless as a guide to the chancellor. Authorities supra. This has not been done. They seem to rely on supporting their motion on objections to evidence without showing what was the ruling of the lower court. This court must presume in favor of the lower court and not against it. It must be shown, not that certain irrelevant and immaterial or illegal evidence is offered or even admitted, but that the finding of the jury from the legal evidence before it was erroneous, unfair, and not such as could be arrived at by a fair-minded jurymen. There is nothing in this record to show this, or to show that the jury was influenced by the admission of illegal or irrelevant evidence. An examination of the testimony taken by depositions in this cause before the issue was referred to the jury leads the chancellor to the same conclusion as that arrived at by the jury from the evidence before it. The chancellor is then justified in arriving at the conclusion that the finding of the jury was fairly obtained, and should not disregard it. This, I take it, is what is intended by the authorities when they use the expression, "instructs the conscience of the chancellor and enables him to arrive at a more satisfactory conclusion." Upon consideration of the motion and evidence to set aside the finding of the jury, and on the pleadings and proof as noted, I am satisfied that the finding of the jury should be accepted by the chancellor, and a motion for a re-reference to the jury should be denied. I am also of opinion, upon considera-

tion of this finding of the jury, and of all the evidence submitted on the hearing that cross-complainants are entitled to relief. It is therefore ordered, adjudged, and decreed by the court that the motion of complainant to set aside the verdict of the jury be and is hereby denied; that the property at the time of its destruction belonged to A. S. Murphy and Jos. B. Cunningham; that the fire destroying the lumber mill, machinery, products, etc., was caused by the negligence of defendant, complainant in this case, the Alabama, Tennessee & Northern Railway Company, a corporation.

Then follows the valuation as set out in the opinion, and an order forever enjoining defendants, the Aliceville Lumber & Construction Company, a corporation, and the Aliceville Lumber Company, a partnership, from instituting or carrying on any suit against complainant for the recovery of any damages by reason of the destruction or damage of the property described in the pleadings in this case, which was caused by a fire which occurred on October 10, 1909.

Oliver, Verner & Rice and Harwood, McKinley, McQueen & Aldridge, all of Tuscaloosa, and William H. Armbrrecht and Gregory L. Smith & Son, all of Mobile, for appellant. Patton & Patton, of Livingston, and H. A. & D. K. Jones, of Tuscaloosa, for appellees.

THOMAS, J. In the latter part of the night of October 9, or early in the morning of October 10, 1909, the property involved in this suit was destroyed by fire. It consisted of a sawmill, plant, machinery, lumber, etc., situated near the railroad and depot of the Alabama, Tennessee & Northern Railway Company, in the town of Aliceville, Pickens county, Ala. At this time this property was in the possession of Joseph B. Cunningham and Andrew S. Murphy, partners doing business under the name of Aliceville Lumber Company, who claimed the same, and claimed to have been operating the plant on their partnership account. This milling business was originally established by the Aliceville Lumber & Construction Company, a corporation, about the 1st day of January, 1906. Soon after its incorporation said Cunningham and Murphy purchased the interests of most of the other persons interested in said corporation, and from that time invested additional amounts in said business, operating it to the time of its destruction under the name of Aliceville Lumber Company, without the participation of other stockholders. Though there had been no meeting of the directors nor of the stockholders since the corporation was organized, it had never been dissolved as provided by law. The individuals, said Cunningham and Murphy, owned the land on which the mill was situated. The contract under which the corporation originally entered thereon provided that the lumber company should have the use of said land as long as it desired to use the same as a mill site, without the payment of rents, and without other consideration than, that upon its ceasing to use the land the improvements

thereon should remain as the property of said individual owners.

On the 13th day of April, 1910, there were instituted in the circuit court of said county two suits against the Alabama, Tennessee & Northern Railway Company, for the recovery of damages for the destruction of said property by fire. Both suits were in all respects alike, except that in the one the parties plaintiff were Joseph B. Cunningham and Andrew S. Murphy, partners, and in the other the sole party plaintiff was Aliceville Lumber & Construction Company, a corporation. In each case the defendant propounded to the adverse party interrogatories under the statute; and answers to said interrogatories, on behalf of the plaintiffs, were made by Joseph B. Cunningham, and were to the effect that the property destroyed by fire was claimed in one suit as that of Cunningham and Murphy as individuals, and in the other suit, as that of Aliceville Lumber Company, a corporation.

On the 5th day of May, 1911, the defendant, Alabama, Tennessee & Northern Railway Company, filed its original bill in the chancery court of said county, invoking the jurisdiction of that court to prevent a multiplicity of suits and to protect complainant against vexatious and oppressive litigation at the hands of the respective plaintiffs in said suits. At the time of the filing of this bill the complainant company obtained writs of temporary injunction, restraining the respective respondents, Cunningham and Murphy, doing business under the firm name of Aliceville Lumber Company, and the Aliceville Lumber & Construction Company, a corporation, from prosecuting said suits at law, pending the determination of the causes in chancery.

On the 3d day of June respondents demurred to this original bill, and on the 14th day of July, 1911, moved a dissolution of the injunction on the ground that there was no equity in the bill. After the demurrers were overruled and the motion to dissolve was denied, the said respondents, on the 27th day of December, 1911, filed in said cases separate answers, and demanded a trial by jury of the issues of fact: (1) Whether the fire which consumed the properties in question was caused by, or originated through, the negligence of the complainant, its servants or agents; and (2) whether the complainant is liable for the destruction of said property by fire. Thereafter complainant and respondents took testimony by depositions. This testimony is now set out, occupying about 200 pages of the record. At the Spring term of the chancery court (March 27, 1913) said testimony was duly published by order of the court. The case was submitted on pleadings and proof and on respondents' motion and demand that the questions or issues above indicated be tried by jury, in either the chancery court or the circuit court of said county, as set out in respondents' respective an-

swers. Upon the submission on the pleadings and the proof and on said motion, the court, on the 27th day of June, 1913, rendered a decree wherein it was adjudged that the chancery court, having assumed jurisdiction of the subject-matter on the grounds set out in the original bill, would proceed to the full and final adjudication of the entire case; that on the evidence but one recovery could be had; that the question of fact was one of doubt; and that the questions of fact should be decided by a jury. This decree of the chancellor holding it proper to refer said issues of fact to a jury for determination, is, in part, as follows:

"It is therefore ordered, adjudged, and decreed by the court that the following issues be and they are hereby referred and certified to the circuit court of Pickens county, Ala., to be tried by a jury, and the result of the trial to be by the clerk of said court certified to this court, that is:

"(1) Whether or not the fire which destroyed the mill, its machinery and lumber, at or near Aliceville, on the night of, to wit, the 10th day of October, 1909, which mill was at that time under the control and management of Joseph B. Cunningham and Andrew S. Murphy, either as partners doing business under the firm name of Aliceville Lumber Company, or doing business there for the Aliceville Lumber & Construction Company, was caused by the negligence of the defendant, the Alabama, Tennessee & Northern Railway Company, or its agent or agents, servant or servants, either by failing to have its locomotive or locomotives equipped with a suitable spark arrester or arresters or in the negligent operation of the locomotive or locomotives whereby, as a result whereof, a spark or sparks, or coal or coals escaped from the said railroad company's locomotive or locomotives while passing the mill above described, on, to wit, the 10th day of October, 1909, and set fire to or destroyed, or greatly injured, or damaged, the mill, its machinery, products, and lumber.

"(2) If the jury should find the above issue in favor of the respondents in this case, and that the fire was caused by the negligence of the railroad company, its agent or agents, the jury will then determine what was the damage done by said fire to the following described property [describing said property]. If the jury should find the first issue in favor of the railroad company, it will not be necessary to determine the subsequent issues. It is further ordered that Cunningham and Murphy, or Aliceville Lumber & Construction Company be treated as plaintiff, and the railroad company as defendant, upon the trial of said issues. It is further ordered that upon the trial of said issues either party in this cause may introduce any legal evidence heretofore given in this court by deposition, as well as any other legal evidence that they may desire to introduce."

All further questions were reserved "until the certificate had been returned to the determination of the issues above referred." Said issues were by the register of the chancery court certified to the circuit court of Pickens county for trial by a jury pursuant to said order of the chancellor. From the certificate of the clerk of said circuit court we are informed that said issues were duly and regularly submitted to, and tried and determined by a jury in that court, on the 12th day of January, 1914, pursuant to the decree of the chancellor of date June 7, 1913; and the result thereof was duly certified by

the clerk of said circuit court to the chancery court, and duly filed, on the 24th day of March, 1914. This certificate was, of the finding of both issues of fact, submitted to the determination of the jury, against the Alabama, Tennessee & Northern Railway Company, and of the assessment of the damages of the respective pieces of property destroyed by fire, as follows: (A) Damages to sawmill shed and to one planing mill shed, \$1,000; (B) damages done to sawmill, two planing machines, one edger machine, one cut-off saw, two steam boilers, two steam engines, one knife grinder, one lot of shafting, belting, and fixtures and attachments attached to or used in connection with the above-described machinery, \$6,324.80; (C) damages done to the lumber on the said mill-yard at the time of said fire, on, to wit, the 10th day of October, 1909, the further sum of \$6,820.

The Alabama, Tennessee & Northern Railway Company reserved no bill of exceptions, certified stenographic notes, or other record or certificate of the evidence on which the jury in the circuit court tried and determined the issues of fact so certified by the chancellor to that court for determination; nor certificate or other record of any rulings by the circuit court, on the reception or rejection of evidence, or on the trial of the said submitted issues of fact by the jury. The record of the proceeding thereafter had in the chancery court likewise failed to inform the chancellor, and now, on appeal from the decree of the chancellor, fails to inform this court, what evidence was before the jury, on which the issues were tried, and what evidence was excluded by the court from the jury's consideration, or what the instructions of the court were, to the jury, on the law as applicable to the evidence adduced. Aside from the depositions on file when the cause was first submitted on the motion, and the order of submission by the chancellor to the effect *that either party might introduce any legal evidence theretofore given in the chancery court by the depositions, as well as any other legal evidence that might be desired to be introduced on the trial of the issues in the circuit court*, and said certificate of the clerk of the circuit court, of the finding of the jury, this record is silent as to what transpired during said trial.

On March 26, 1914, complainant moved in the chancery court to vacate and set aside the said verdict of the jury, on the grounds, among others: That the finding of the jury had not been certified back to the chancery court in accordance with the decree theretofore rendered in the cause; that the verdict and finding of the jury was contrary to the evidence; that said verdict and finding of the jury was contrary to law; that the preponderance of the evidence did not show that the complainant, or its agents or servants, set fire to or destroyed by fire the property of respondents; that the evidence

introduced in the cause did not support a finding that the fire which destroyed respondents' property was proximately caused by the negligence of the complainant, its agents, servants, or employes. This motion, however, does not appear by this record to have been supported by any certificate, or stenographic report, or other showing of what evidence was adduced or excluded on the trial of the submitted issues of fact by jury in the circuit court of Pickens county.

At the spring term of the chancery court (on the 20th day of March, 1914), the respondents, Cunningham and Murphy, and Aliceville Lumber & Construction Company, amended their respective answers to the said original bill, by making them cross-bills, each respondent making the other, and the Alabama, Tennessee & Northern Railway Company, parties respondent to his cross-bill, claiming the property destroyed, and denying title in the others. Each cross-bill prayed a decree against the Alabama, Tennessee & Northern Railway Company for the value of the property destroyed, with interest, and for other, further, and general relief. On the 26th day of March, 1914, each of the respondents to the cross-bills, except the Alabama, Tennessee & Northern Railway Company, filed answer to the cross-bill of the other, and the causes were continued for the answer of the Alabama, Tennessee & Northern Railway Company.

On April 25, 1914, said Alabama, Tennessee & Northern Railway Company filed its answers to said cross-bills, in substance denying the allegations therein contained, demanding strict proof of the same, and denying that the fire which destroyed the property in question was caused by the negligence of said respondent, or of its agents or employes.

At the fall term of said court (on the 2d day of October, 1914) the respective cases were submitted for final decree, by consent of all parties in open court, and the same were held by the chancellor for decree in vacation. The minute entry of this submission for final decree was:

"This cause coming on to be heard at this term was submitted for decree on the pleadings and proof and objection and former decrees, heretofore noted in former submission, assigned on motion to set aside the verdict of the jury as all appears by note of testimony refuted to-day. And held by consent of all parties in open court for decree in vacation, complainants are to have until 12th November, 1914, within which to file briefs, defendant then to have till December 24, 1914, to file briefs, and then complainant to have till January 3, 1915, to file briefs and reply, immediately after which the register will forward the papers to the chancellor. \* \* \* It is further ordered that all causes, motions, and petitions not otherwise disposed be and hereby are continued to the next term of this court and thereupon the court adjourns sine die."

And on the minutes of said court, of date 26th day of March, 1915, it is recited that:

"This day come the parties by their solicitors, and the case is submitted on note of testimony

offered on former submission and consent for decree in vacation."

On the 1st day of June, 1915, the chancellor rendered, and (on the 5th day of June, 1915) caused to be filed and enrolled, the final decree in said causes, from which the appeal is taken.

The reporter will set out this final decree in the statement of facts.

In this decree final jurisdiction of all litigated matters in said causes is assumed and exercised, and the causes are determined; and the class of cases wherein the submission of disputed facts to a jury is a matter of right (Code, § 6207), and the class of cases where a reference of such facts is made by the court (Code, § 3201) for the purpose of satisfying the conscience of the chancellor, are distinguished. It is further specifically indicated in the decree that to enable the chancery court to review the finding of facts by the jury, the entire evidence should have been certified to it, with such objections pointed out as showed that the finding of the jury was so opposed to the evidence as to be worthless as a guide to the chancellor; that this had not been done; that respondent railway company seemed to rely, for support of its motions, on objections to the evidence, without showing what the rulings of the lower court were; that the court must presume in favor of the lower court, and not against it; that it must be shown, not that certain irrelevant and immaterial or illegal evidence was offered or even admitted, but that the finding of the jury from the legal evidence before it was erroneous and unfair, and not such as could be arrived at by fair-minded jurymen; that there was nothing in this record to show this, or that the jury were influenced by the admission of illegal or irrelevant evidence. The further recital is made in the decree that "an examination of the testimony taken by depositions in this cause before the issue was referred to the jury leads the chancellor to the same conclusion as that arrived at by the jury from the evidence before it," and that "the chancellor is then justified in arriving at the conclusion that the finding of the jury was fairly obtained," and should not disregard it. The decree, thus made and enrolled, was in effect the verdict of the jury. On July 12, 1915, appellant perfected its appeal to the Supreme Court from this decree, and now assigns the rendition of the decree as error.

[1] The jurisdiction of the chancery court was invoked by appellant railroad company, as complainant in the original bill, on the ground of a community of interest in the subject-matter in controversy, in which the various litigants are interested. As complainants in the cross-bills, on the special grounds for equitable intervention therein alleged, appellees submitted to the jurisdiction of the chancery court. *Aetna Ins. Co. v. Hann*, 72 South. 48; *Hamilton v. Alabama*



Power Co., 70 South. 737; *Cleveland v. Insurance Co. of North America*, 151 Ala. 191, 44 South. 37; *Roanoke Guano Co. v. Saunders*, 173 Ala. 358, 359, 56 South. 198, 35 L. R. A. (N. S.) 491; *Southern Steel Co. v. Hopkins*, 174 Ala. 465, 57 South. 11, 40 L. R. A. (N. S.) 464, Ann. Cas. 1914B, 692; *Turner v. City of Mobile*, 135 Ala. 73, 33 South. 132; *Tribette's Case*, 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642; *Vandalia Coal Co. v. Lawson*, 43 Ind. App. 226, 87 N. E. 47. Having assumed jurisdiction, a court of equity will proceed to a full adjudication of the issues presented in the cause by the pleading and the evidence. *Hicks v. Meadows*, 193 Ala. 246, 69 South. 432; *Hundley v. Harrison*, 123 Ala. 292, 26 South. 294; *Booth v. Foster*, 111 Ala. 312, 20 South. 356, 56 Am. St. Rep. 52; *Virginia Co. v. Hale & Co.*, 93 Ala. 542, 9 South. 256; *Marshall v. Marshall*, 86 Ala. 383, 5 South. 475; *Farris v. Dudley*, 78 Ala. 124, 56 Am. Rep. 24.

[2] Without deciding the question of jurisdiction of the chancery court, we hold that the appellant cannot now be heard to question it. In *Whaley v. Wilson*, 112 Ala. 627, 631, 20 South. 922, 923, this court said, touching the ascertainment of damages by a chancery court, that:

"Having assumed jurisdiction to grant relief in such a case, the court of equity will retain the bill and proceed to do complete justice between the parties, without remitting them to a court of law for an adjustment of damages, to which complainant may be entitled growing out of the creation and maintenance of the nuisance. This may be done on the evidence by the chancellor himself, or by reference to the register to report, or else it may be submitted to the determination of a jury."

The *Whaley Case* is rested on the authority of *Stow v. Bozeman*, 29 Ala. 397, 402, 403, where the court said: "Having obtained jurisdiction over the case on account of the misrepresentation as to the quantity of the land," the court "should have gone on and done complete justice by settling the entire litigation, without remitting the complainant to his defense at law as to the payments alleged to have been made on the notes. \* \* \* If the question of fact had been of damage, or fraud, or any other peculiarly fitted for the determination of a jury, it would have been proper to have left that question for trial at law." The *Whaley Case* has since been approved on this point by *Tedescki v. Berger*, 150 Ala. 649, 43 South. 960, 11 L. R. A. (N. S.) 1060; *Farris v. Dudley*, supra; *Barnett v. Tedescki*, 154 Ala. 474, 45 South. 904; *Terrell v. Southern Railway Co.*, 164 Ala. 423, 51 South. 254, 20 Ann. Cas. 901; *Kilgore v. Kilgore*, 103 Ala. 614, 15 South. 897.

The question of issues out of chancery was first discussed in *Kennedy v. Kennedy*, 2 Ala. 571, where the right and duty of a chancery court to determine questions of fact is asserted, and it was declared that the chancery court should not award an issue to be tried at law, unless the proof is so conflicting as

to make it difficult to attain any conclusion. There was at common law an exception to this rule, for in England an heir at law, contesting the validity of a will, had the right to try the issue of *devisavit vel non* by a jury. 2 Har. Ch. Prac. 126; 2 Black. Com. 452; 2 Story's Eq. 672. An early Alabama statute, under which this proceeding might be had, gave the chancellor the power to direct an issue of fact whenever the chancellor thought proper, in issues of *devisavit vel non*. *Kennedy v. Kennedy*, supra; *Johnston v. Hainesworth*, 6 Ala. 443. Such a reference being made, for the purpose of enlightening the conscience of the chancellor, he was allowed the utmost discretion in awarding or refusing this jury trial. In *Johnston v. Hainesworth*, supra, on this question it is said:

"Until the testimony is taken, it cannot be known whether any conflict will arise so as to make it necessary to refer the decision to a jury, and it is premature to direct one previously."

In *Rice v. Tobias*, 83 Ala. 348, 3 South. 670, is the expression:

"The statute then, as under the Code of 1876, authorized an issue of fact to be tried when 'necessary,' as under the old English rule of chancery practice. Such a reference, as said in *Adams' Equity*, p. 376, can only be made, 'where the evidence creates a doubt, and not as a substitute for omitted evidence; and, therefore, the party claiming the issue must first prove his case by regular depositions.'"

[3] It is to be observed that the decision in *Rice v. Tobias*, supra, was based on section 3890 of the Code of 1876, and that Mr. Justice Somerville pointed out that this statutory right was limited to cases whenever it was "necessary" for any fact to be tried by a jury under the statute then regulating jury trials of issues out of chancery. This was section 3890 of the Code of 1876, which was essentially different from the corresponding section (3201) of the Code of 1907. The holding in *Rice v. Tobias* has no application to the submission of issues of fact for jury trials under section 3201 of the Code of 1907. Under the present statute a chancery court may submit an issue of fact arising in a cause pending therein, to the determination of a jury "summoned to attend the court of chancery," or such issue "may be certified for trial to the circuit court of the district" (Code, § 3201); and such issue must be tried by such jury "upon the like evidence as a suit at law, together with such parts of the bill, answers, depositions, and other proceedings in the cause, as the court may order; and the court may also order the examination of the parties to the suit, allowing the other party to impeach or contradict such evidence." Code, § 3202.

Where there was a motion to vacate an order, setting aside the verdict of a jury rendered in a will contest in chancery, this court has recently discussed the right of the chancellor to submit controverted issues of fact to a jury for trial, and it was held

that the chancellor directing such trial had the power to set aside the verdict of the jury and order a new trial by jury of the issues submitted, or of other issues of fact so presented in the court. *Ex parte Colvert*, 188 Ala. 650, 65 South. 964. See, also, *Adams v. Munter*, 74 Ala. 338; *Alexander v. Alexander*, 5 Ala. 517.

[4] Where such trials by jury are not a matter of right, but are only for the purpose of "enlightening the conscience of the chancellor," he is allowed the "utmost discretion in making or refusing" the order submitting the issue of fact to a jury. *Kennedy v. Kennedy*, supra; *Alexander v. Alexander*, supra; *Johnston v. Hainesworth* supra; *Atwood v. Smith*, 11 Ala. 894; *Adams v. Munter*, supra; *Rice v. Tobias*, supra; *Mathews v. Forniss*, 91 Ala. 157, 8 South. 661; *Norwood v. L. & N. R. R. Co.*, 149 Ala. 151, 159, 42 South. 683; *Stallworth v. Brown*, 155 Ala. 217, 46 South. 467; *Ex parte Colvert*, supra; 1 Pom. Eq. Jur. § 32; *Adam's Eq.* 376; 1 Story, Eq. Jur. 72.

In *Robinson v. Inzer*, 70 South. 717 where a court of equity had submitted a disputed question of fact to a jury for trial on the law side of the court, and a verdict had been certified therefrom in favor of the respondent, and the complainant in the court of equity had thereupon moved that the verdict be set aside and a decree rendered in favor of the complainant, this court declared that the jury trial on the law side of the court "was not an independent trial, but was a part of the chancery proceeding, and the verdict was subject to the revisory power of the chancellor."

The exercise of this revisory power by the chancellor, over the issues of fact as ascertained and declared by the verdict of a jury, has been considered by our court. In *Norwood v. Louisville & Nashville Railroad Company*, supra, discussing generally the jurisdiction of the court of chancery, it is said:

"No question of law can be reserved by bill of exceptions, the action of the jury is merely for the information of the chancellor, and not conclusive on his conscience or judgment, and in many respects the trial is unlike the jury trial at law that it would seem a court of chancery should, at least, demand strict conformity to the requirements of the law before interfering with the judgment of the law court."

That the expression, "No question of law can be reserved by bill of exceptions," had reference to review by an appellate court of the finding of the jury is made plain in *Mathews v. Forniss*, supra. The Chief Justice there said of such trials:

"Issues thus ordered, and proceedings under them, are governed by principles essentially different from those which obtain in trials of common-law suits. In their trial, unlike the proceedings in common-law suits proper, no question can be reserved by bill of exceptions for revision in an appellate court. And the finding of the jury is not conclusive upon the judgment or conscience of the chancellor. He may disregard the jury's finding and render his decree in direct antagonism to it. He may also, if not satisfied with the finding, re-refer the issue

to another jury; and the finding of a second jury is not absolutely controlling with him. Such issue and the proceedings under it are not determinative in their nature. They are but aids to assist the chancellor in forming his judgment, which is, at last, the decree, or judgment in the cause. And when an appeal is taken, error is not assigned to any ruling on the trial before the jury. The revisable questions are those which arise out of the rulings of the chancellor as chancellor."

It will be noted that in the *Mathews Case*, the bill in equity was for the purpose of contesting the probate of a will, and that in such case the trial of the disputed issue of fact by a jury was a matter of right, if such had been invoked by timely demand therefor, and that the right was waived by a final submission of the cause by agreement; no demand for such trial by jury being made.

[5] It is now insisted that the *Mathews Case* was a modification of the rule of procedure indicated in *Adams v. Munter*, supra, by Chief Justice Stone, as follows:

"It is contended, in the next place, that the chancellor should have decreed for complainant, *verdictum non obstante*. This contention is based alone on the depositions found in the record. But now can we know, or presume, that the issue before the jury was tried on that evidence alone? The statute directs that 'such issue must be tried upon the like evidence as a suit at law,' together with the proof furnished by the chancery file, as the chancellor may order. How, in the state of this record, are we to know what oral evidence was or was not given before the jury? In the absence of record proof to the contrary, we must presume that all was rightfully and lawfully done in the court below. If the appellant was dissatisfied with the conduct of the trial of the issue in the circuit court, he should have had the particulars wherein he supposed himself injured by the rulings on that trial, certified by the presiding judge, and thus made that certificate, or the certified exceptions, the basis of a motion for relief before the chancellor. The chancellor had power to award a *venire de novo*, with more specific directions, if he chose to give them, or to disregard the finding of the jury, as based on illegal or insufficient testimony, or improper rulings by the presiding judge."

The two cases of *Adams v. Munter*, and *Mathews v. Forniss* were decided by Judge Stone. A careful consideration of both opinions convinces us that Judge Stone had in mind the two cases in which a chancellor may refer a question of fact to be tried by a jury; that is: (1) Where a trial by jury of the disputed question of fact in chancery was given as matter of right; and (2) where no such right existed, but the necessity therefore (under the statute then of force) was from the evidence apparent to the chancellor. The decision in *Mathews v. Forniss* cited the *Adams v. Munter Case* in support of the conclusion announced. This is persuasive that Judge Stone did not intend to overrule or modify the decision in *Adams v. Munter*, or else that the two opinions were not thought to be inconsistent. It is true that in *Mathews v. Forniss* the expression is used:

"In their trial, unlike the proceedings in common-law suits proper, no question can be reserved by bill of exceptions for revision in an appellate court. \* \* \* And when an appeal is

taken, error is not assigned to any ruling on the trial before the jury."

It is clear, however, that this language, "for an appellate court," had reference to the revision, by appeal to this court, of the verdict of a jury, or of the rulings of the court on such trial at law, without presenting the same for review by the chancellor. Such revisory power was with the chancellor or the court of equity submitting such fact for trial at law. Further considering the two cases, it is noted, that in *Adams v. Munter*, a bill was filed in the chancery court for the purpose of having set aside a fraudulent judgment, a case in which *Adams* had no right to a trial by jury under the statute of 1876, and that the chancellor had decreed in conformity with the verdict of the jury, and dismissed the complainant's bill. On appeal from this decree the complainant assigned as error the interlocutory order of the chancellor submitting the issue of fact to the jury, the incorporation of the verdict of the jury in the decree of the chancellor, and the dismissal of the bill. It was further contended that the chancellor should have decreed for appellant verdicto non obstante; that the chancellor erred in overruling complainant's motion to annul and disregard the verdict of the jury and the rendition of the final decree. In this state of the pleading was declared the rule of the *Adams v. Munter* Case. Thus was presented for decision the question that is before us.

In *Mathews v. Forniss*, involving the contest of a will, the right to a trial by jury existed as a matter of right, yet, as we have pointed out, there was no timely demand therefor, the necessity for such certification for a trial by jury being apparent to the chancellor, and he did so certify the same. The status thus presented was practically the same as where such right did not exist, but the same was certified to a jury for trial to the end of informing the conscience of the chancellor. The controlling factor in *Mathews v. Forniss* is shown by the recital (91 Ala. 161, 162, 8 South. 662):

"At the term of the court when the submission was ordered, neither party applied for a jury. When the file reached me, the complainant insisted upon an issue before a jury. I do not think, as a matter of right, the complainant can demand a jury now, after being silent as to that on the original submission. But a careful examination of the pleadings and the voluminous testimony convinces me that this is a proper case to be tried by a jury, especially when the application is made by either party before the court is called on to enter upon the investigation of the questions of fact at issue. It is therefore adjudged, ordered, and decreed that an issue be made up between the parties, setting forth clearly the true questions of fact to be tried." \* \* \* The chancellor, as we have seen, did not set aside the submission, when he made an order referring the issue to a jury; and we hold that the submission was [italics interpolated] for the aid of his own judgment or conscience under section 3585 of the Code. We consequently disallow the bill of exceptions (91 Ala. 165, 8 South. 664)."

Judge Stone treated, however, as a controlling factor the fact that the cause was submitted to the chancellor for decree on the merits, so entered of record, and that at such time neither party requested a trial by jury; and that the right to demand a jury had been waived because no such demand therefor had been made before the submission of the cause; and that such submission of the issue of fact to a jury, by the chancellor, while the cause was so pending before him on final submission by agreement of parties, was irregular. Such a submission should have been set aside before making an order submitting the issue of fact to a jury of the circuit court. The order of submission of fact to the jury, not being in accord with the procedure provided or theretofore indicated, the bill of exceptions, seeking to review the act of the chancellor in this court, was disallowed as improper to present the questions for review in the Supreme Court. Such questions so sought to be reviewed must be presented and insisted on in the lower court before the chancellor.

In *Ex parte Colvert*, supra, the procedure laid down was for the aggrieved party to have the particulars, wherein he supposes himself injured on the trial at law, certified as the proceedings thereof to the chancery court and make such certificate the basis of a motion for relief before the chancellor. This procedure declared in the *Colvert* Case was an authority of *Adams v. Munter*, supra. The *Adams* Case was on authority of *Alexander v. Alexander*, 5 Ala. 517, which case in turn rested on the decision of the Lord Chancellor in *Barker v. Ray*, English Chancery Report, 2 Russell's Rep. 75. It is true that the *Colvert* Case was the contest of a will, and the statute thus governing provides that either party, as a matter of right, may demand a trial by jury. There is therefore a difference between the *Colvert* Case and the instant case. In the former, such trial was a matter of right; in the latter, a matter of discretion. It must be admitted that the expression in *Ex parte Colvert*, "It would seem \* \* \* that the same rules or procedure must govern every case in which the trial by jury is had of doubtful or controverted issues of fact, arising in a suit in chancery regardless of the question as to whether the chancellor has a discretion as to ordering a jury trial or whether he is without discretion in so ordering it," was dictum. But it was in accord with the decisions in *Adams v. Munter*, supra, *Alexander v. Alexander*, supra, and *Barker v. Ray*, supra.

It will be well, in adverting to the *Barker* Case, to say that there an issue of fact was directed and tried, and that Lord Chancellor Eldon presupposed knowledge on the part of the chancellor of the evidence adduced at the jury trial, the Lord Chancellor saying:

"In considering whether, in such a case as this, the verdict ought to be disturbed by a new

trial, allow me to say that the court, in granting or refusing new trials, proceeds upon very different principles from those of a court of law. *Issues are directed here to satisfy the judge, which judge is supposed, after he is in possession of all that passed upon the trial, to know all that passed here;* and, looking at the depositions in the cause, *and the proceedings both here and at law*, he is to see whether on the whole they do or do not satisfy him. It has been ruled over and over again that, if on the trial of an issue a judge reject evidence which ought to have been received, or receive evidence which ought to have been refused, though in that case a court of law would grant a new trial, yet if this court is satisfied that, if the evidence improperly received had been rejected, or the evidence improperly rejected had been received, the verdict ought not to have been different, it will not grant a new trial merely upon such grounds."

[6] It is thus clear that each of these cases presupposes, or specifically declares a procedure by which the chancellor may be informed of the facts adduced on the trial at law of the submitted issues; that is to say, by a certificate or certified exceptions or certified stenographic report of the trial by the trial judge as the basis of a motion for relief before the chancellor. Failing in this, if the chancellor sees fit to embrace the finding of the jury in his decree, this court cannot be informed of the evidence on which he acted and by which the decree is supported.

How can it be said, if the complaining party may not seasonably take or make exceptions on the trial of the issue of fact before the jury, and duly present the same to the chancellor by such authenticated certificate, that the chancellor committed error in the incorporation in his decree of that finding of fact? How else could the chancellor be informed whether on such trial evidence was taken ore tenus pursuant to the statute (Code, § 3202) and pursuant to the decree in this case of submission of said issue for trial to the jury and what the evidence was? How else could this court be informed of "the facts upon which the decision of the chancellor is rested"? Woodrow v. Hawving, 105 Ala. 240, 16 South. 720; Roy v. O'Neill, 168 Ala. 354, 52 South. 946; Freeman v. Blount, 172 Ala. 655, 55 South. 293; Claflin Co. v. Muscogee Co., 127 Ala. 376, 30 South. 555; Toney v. State, 144 Ala. 87, 40 South. 388, 3 L. R. A. (N. S.) 1196, 113 Am. St. Rep. 20, 6 Ann. Cas. 865.

If we may look to other analogous rulings of our court, in Wood v. Wood, 119 Ala. 183, 24 South. 841, on appeal from a decree dismissing the bill, where the certificate recited that the record contained all of the evidence, except the testimony of one witness, which the note of testimony showed was before the chancellor and not found in the record, it was presumed that the testimony of such witness in connection with all the other evidence justified the conclusion of the chancellor. To the same effect was the ruling in Jefferson v. Sadler, 155 Ala. 537, 46 South. 969. It is noted that in Blount v. Blount, 158

Ala. 242, 250, 48 South. 581, 21 L. R. A. (N. S.) 755, 17 Ann. Cas. 392, where the decree of the chancellor affirmatively showed the exclusion of competent evidence for complainant, a reversal was had, though the recital was contained in the decree that the result would not have been different with the evidence admitted. So in Freeman v. Blount, 172 Ala. 655, 55 South. 293, discussing the effect of section 5955 of the Code, the court declared that obviously such a review in respect to the fact leading to the rendition thereon of such decree "comprehends the duty to revise the seasonably taken and appropriately made exceptions, \* \* \* to the rejection or reception of the evidence."

Further analogous cases are those holding that a register's finding on the oral examination of witnesses is presumed to be correct (Bidwell v. Johnson, 70 South. 685; Roy v. O'Neill, supra), and that the judgment of the court, where the trial was had without the intervention of a jury, will not be disturbed unless plainly contradictory to the great weight of the evidence. Hackett v. Cash, 72 South. 53; Finney v. Studebaker Co., 72 South. 55; Jackson Lumber Co. v. Trammell, 74 South. —; Woodrow v. Hawving, supra; Scruggs v. State, 165 Ala. 121, 51 South. 302.

It is insisted that no weight should be given to the decision of the chancellor upon the facts, but that the Supreme Court should weigh the evidence and award justice as to them it seems meet (Code, § 5955; Huntsville Elks Club v. Garrity-Hahn Co., 176 Ala. 128, 57 South. 750; Thornton v. Esco et al., 181 Ala. 241, 61 South. 255; Shows v. Folmar et al., 133 Ala. 599, 32 South. 495); that the statute requires this court to pass anew upon the facts, even in a case where the trial was had at law on submission of the chancellor, though the evidence adduced at such trial is not shown by the record. We believe it necessarily follows that in chancery cases, where a trial by jury was a matter of right and the issue was so submitted and tried, and the chancellor embraced in his decree the finding of the jury, not to provide for a review before the chancellor of the proceedings had on the jury trial, would, in effect, be a denial of the right of review of the facts by appeal under section 5955 of the Code. So in other cases from such court, where the chancellor, under the statute, submits a question of fact to the decision of a jury of the circuit court, and it is so tried, and on certification the verdict is made the decree in the cause, if the chancellor may not be informed by a certificate or certified stenographic report from the trial judge of the proceedings had before such judge or such trial, this, in effect, would be a denial of the right of review by appeal under section 5955 of the Code. How could this court say in either event that the proper decree was or was not entered in the cause, if the method of informing the chancellor of the evidence introduced or excluded

on the jury trial and of making such information a part of the record in the chancery court were not provided? If no presumptions are to be indulged in favor of the correctness of the decree under the statute, the same statute presupposes a procedure, that parties litigant may fully inform the reviewing tribunal, the chancery court, and lastly, the appellate court, of all proceedings had on the trial of the issue of fact before the jury, and of the introduction and exclusion of competent evidence that induced the decree appealed from. The one is necessary to the application of the other. Without such a rule of procedure the right of appeal in such cases would be vain and useless.

[7] It is elementary that, if there be uncertainty as to what was really decided, resort may be had to the pleadings and the opinion of the court, to throw light upon the subject. *National Foundry & Pipe Works v. Oconto Water Sup. Co.*, 183 U. S. 234, 22 Sup. Ct. 111, 46 L. Ed. 157; *Baker v. Cummings*, 181 U. S. 117, 21 Sup. Ct. 573, 45 L. Ed. 776; *Mining Co. v. Tyler*, 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859.

The chancellor's final decree makes plain his difficulty in passing on appellant's motions and objections to evidence, reciting that the evidence on which the trial at law was had was not certified to him, and that the respondent, appellant, had relied on supporting its motions and objections to the evidence, "without showing what was the ruling of the lower court" thereon.

It follows that the decree of the chancery court must be affirmed.

Affirmed.

MCCLELLAN, MAYFIELD, and SOMERVILLE, JJ., concur.

(199 Ala. 486)

WALKER et al. v. McPHERSON et al.  
(6 Div. 254.)

(Supreme Court of Alabama. Dec. 21, 1918.  
Rehearing Denied Feb. 15, 1917.)

1. RELIGIOUS SOCIETIES §4—INCORPORATION—REGULARITY.

The fact that a church had previously petitioned the higher authorities of the denomination for permission to consolidate with another local church, the trustees filing the certificate of incorporation being among those who signed the petition for consolidation, did not affect the regularity of the incorporation.

[Ed. Note.—For other cases, see *Religious Societies*, Cent. Dig. §§ 3, 5-14.]

2. RELIGIOUS SOCIETIES §18—PROPERTY—EFFECT OF INCORPORATION.

When a church became incorporated the corporation thereby succeeded to all the rights of the unincorporated body, including title to real estate held in the name of its trustees, and hence upon the regular election of new trustees after the incorporation, the old trustees had no further control over or title to the property or right to maintain suit concerning it.

[Ed. Note.—For other cases, see *Religious Societies*, Cent. Dig. §§ 111-129.]

Appeal from City Court of Bessemer; J. C. B. Gwin, Judge.

Action by J. F. McPherson and others against J. E. Walker and others. Judgment for plaintiffs, and defendants appeal. Reversed and rendered.

Pinkney Scott, of Bessemer, for appellants.  
C. L. Odell, of Bessemer, for appellees.

GARDNER, J. In the year 1900 the Bessemer Land & Improvement Company, for the sum of \$500, conveyed to James Eastla, W. S. McCulley, R. S. Hickman, George D. Mingea, and J. F. McPherson, "trustees of the First Cumberland Presbyterian Church, Bessemer, Ala.," certain lots situated in Bessemer. The above-named parties were duly appointed trustees of said church, an unincorporated religious body. Two of the trustees, McCulley and Mingea, are now deceased.

It is averred in the bill in this cause, and admitted in the answer, that the above-named church was a branch of the "Cumberland Presbyterian Church in the United States," and that subsequent to said conveyance the "Cumberland Presbyterian Church in the United States" united with the general religious body known as the "Presbyterian Church in the United States of America," and the Bessemer organization thereupon became "the First Presbyterian Church U. S. A., of Bessemer, Ala."

There was also located in Bessemer a church known as "the First Presbyterian Church U. S., of Bessemer," a branch of what is commonly called the Southern Presbyterian Church. In 1908 said Cumberland or First Presbyterian Church U. S. A. was without a pastor and unable to maintain regular services. The First Church U. S. (being of a distinct denomination and having the stronger of the two congregations), was at this time considering the erection of a new church building and, it being apparent that there was not in Bessemer sufficient field for the successful work of two churches of practically the same faith, a proposition was made to unite the two, under the name of the "First Presbyterian Church of Bessemer," as a branch of the Southern or Presbyterian Church U. S. It was proposed that each church sell the property then occupied by it, and that the combined proceeds be used in the erection of a modern church building to be located on a lot owned by the First Church U. S. J. F. McPherson, one of the trustees and the only ruling elder of the First Church U. S. A., called a congregational meeting, by published notice, for the consideration of this proposition; and while there is no record evidence of this meeting, it is claimed that such was duly held, and that the members present unanimously expressed their desire for the consolidation, and signed a petition (which is attached as "Exhibit B" to the bill

of complaint) addressed to the Birmingham Presbytery, which reads as follows:

"Bessemer, Ala., Dec. 15, 1908. To the Birmingham Presbytery of the Presbyterian Church U. S. A.—Greetings: We, the undersigned members of the First Presbyterian Church U. S. A., formerly the First Cumberland Presbyterian Church of Bessemer, Ala., believing that it would be to the best interest of our Church and the advancement of Christ's kingdom in our midst to join with the First Presbyterian Church U. S. (Southern), of Bessemer, respectfully request your permission to do so and to take our church property with us. \* \* \*

After the aforesaid action of the First Church U. S. A., the First Church U. S., proceeded with the erection of the proposed new church building, and contracted indebtedness on the faith and credit of obtaining the proceeds of the sale of said Cumberland Church property.

Rev. H. L. Walker, one of the respondents here, becoming a member of the Birmingham Presbytery at about this time, took an active part, in July, 1909, in resisting before the Presbytery the above-quoted petition, and finally secured unfavorable action thereon. In the meantime no disposition was made of the property in question, and while many of the members had united with the First Church U. S., and others had gone elsewhere, a few still remained with the old church.

At the time of the proposed consolidation the First Church U. S. A. had no indebtedness. After the unfavorable action of the Presbytery, Rev. H. L. Walker, under direction of the chairman of the Home Mission Committee of the Presbyterian Church U. S. A. took charge of the said Bessemer church with its then membership of 13 communicants. With these as a nucleus the respondent began work as pastor of the church, and in April, 1910, the church was incorporated as provided by sections 3613, 3614, Code 1907, under the name "Fifth Avenue Presbyterian Church U. S. A., Bessemer, Alabama," the three trustees filing the certificate of incorporation (Code, § 3614) having been among those who signed the petition above set out as "Exhibit B." Complainants in the bill, Eastis, Hickman and McPherson, were discontinued as trustees; others being elected in their stead at the time of incorporating the church.

Respondent Walker undertook much in behalf of the church, building a manse and also erecting on the property a "little store building" costing \$200 or \$300. When the necessary money could not be secured at the bank, respondent Walker obtained a loan to the church from his brother, J. E. Walker, which money was used to cover indebtedness incurred in the erection of the church and store, and also toward the pastor's salary. This borrowed money was secured for some time by note, but when the church became incorporated, respondent had it to execute to said J. E. Walker a mortgage on the church property to secure the indebtedness, which mortgage seems to have been foreclosed prior to the filing of this suit.

When respondent H. L. Walker had been in charge of this church for about two years, the Home Mission Committee withdrew its support, and soon thereafter Walker resigned and left Bessemer. The church property has since been unused, and the bill in this cause was filed by the surviving, above-named trustees and by the First Presbyterian Church U. S., seeking the direction and authority of the court for a proper disposition of said property. H. L. Walker and J. E. Walker and the Fifth Avenue Presbyterian Church are made parties respondent, and required to show their title to the property. Plaintiffs further pray that if the said Walkers hold a mortgage or a mortgage foreclosure deed against the property, as alleged, they be required to deliver such instrument into court, that the same be canceled as a cloud upon the title of plaintiff trustees.

The trial court concluded that the title was in the trustees, that the subsequent incorporation of the Fifth Avenue church was without effect so far as the title was concerned, and ordered a sale of the property and cancellation of the mortgage as prayed in the bill.

It is insisted by counsel for the complainants that the action taken at the congregational meeting referred to, resulting in the petition above set out, was sufficient to authorize, and was indeed a direction requiring, the sale of the property for the purpose of consolidating with the other church, and that the approval of the Presbytery was not necessary. There is evidence in the record tending to show that the local church had the power to sell and dispose of its property without reference to the approval of the Presbytery, and that the Presbytery was supreme only in matters ecclesiastical. The evidence does not specifically show, however, that this authority extended so far as to warrant the local church organization in using the proceeds of its property toward the erection of a church building for an entirely different denomination. There is evidence for respondents to the effect that such authority does not exist, that the approval of the Presbytery is necessary. The laws of the church are not in evidence, and none quoted in the record can be said to be decisive of this question. The proof in this respect is therefore in conflict.

But the conclusion we reach in the case does not require a determination of this question, and it is therefore left undecided. We entertain the view that, whatever may be the rule in this respect, the evidence clearly discloses that at the congregational meeting of the First Church U. S. A., the members merely expressed their desire to consolidate with the First Church U. S.; and their petition to Presbytery shows that they deemed such congregational action entirely dependent upon the approval of the Presbytery. The petition expressly requests permission for this consolidation; and not only this, but the record shows without dispute that the mem-

bers of the congregation, as well as the trustees, awaited the action of the Presbytery, in the meantime taking no steps to consummate a sale of their property. There is nothing in the record, therefore, which would warrant the assertion that the congregation have acted, or intended to act, contrary to the wishes of the Presbytery or without its approval. They merely petitioned the Presbytery for permission to consolidate, which permission was in course of time denied.

[1, 2] As the months went by, many of the members united with other churches, but a few remained steadfast. While respondent Walker was in charge of the church under the Mission Board, he succeeded in considerably increasing the membership; and after the church's incorporation as the Fifth Avenue Presbyterian Church U. S. A., new trustees were elected in place of those who are named as complainants in this cause, and who, it seems, had severed their connection with the said church. The trustees filing the certificate of incorporation were among those who signed the petition for consolidation. Under this state of facts we discern no irregularity in the incorporation of the said church; indeed, it seems to have been effected in all respects in accordance with the statute. The deed to the property was originally made to complainants and others, as trustees of the local church, which was then unincorporated; but upon its becoming incorporated it succeeded to all the rights of the unincorporated body, as held by this court in *Gewin v. Mt. Pilgrim Bap. Church*, 166 Ala. 345, 51 South. 947, 139 Am. St. Rep. 41. Such being the situation, the complainants in this suit are without control over the property in question, they having been superseded by other duly elected trustees of the incorporated church and being therefore without the right to maintain this suit. The decree of the court below is accordingly reversed, and one here rendered dismissing the bill.

Reversed and rendered. All the Justices concur.

(199 Ala. 514)

WALKER v. JOHN SMITH, T. (5 Div. 578.)

(Supreme Court of Alabama. Feb. 8, 1917.)

1. MUNICIPAL CORPORATIONS — 670 — USE OF SIDEWALKS — RIGHT OF PEDESTRIANS — USE BY ABUTTING OWNER.

A pedestrian has the right to use the entire width of the sidewalk subject to reasonable and necessary limitations, among them the right of an abutting property owner to use the sidewalk in front of his premises when reasonably necessary for loading and unloading his goods and merchandise.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1446.]

2. MUNICIPAL CORPORATIONS — 807(1) — INJURY ON SIDEWALK — CONTRIBUTORY NEGLIGENCE.

Though a pedestrian can assume that the sidewalks are in proper condition for travel and need not be on the lookout for obstructions, he

may be guilty of contributory negligence if he sees the defect and with knowledge thereof walks thereon rather than to choose a safe place which is equally open and obvious.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1679.]

3. APPEAL AND ERROR — 1040(14) — HARMLESS ERROR — SUSTAINING PLEAS — CURE BY EVIDENCE.

Error in sustaining pleas of contributory negligence to a count alleging wanton injury is harmless, where the undisputed evidence shows that there was no wanton injury.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4102, 4105.]

4. MUNICIPAL CORPORATIONS — 819(1) — INJURY ON SIDEWALK — LIABILITY OF ABUTTING OWNER — EVIDENCE — WANTON INJURY.

Where the undisputed evidence showed that defendant was using the sidewalk in front of his premises only temporarily to transport cotton seed meal from drays into his store and there was conflicting evidence as to whether all of the meal which sifted out while being transported had been swept from the walk, there was no evidence to support a recovery for wanton injury to a pedestrian who slipped and fell on the walk.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1739.]

5. TRIAL — 253(4) — INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

In an action for injuries to a pedestrian which she alleged resulted from the abutting owner's negligence in permitting cotton seed meal to remain on the sidewalk, a requested charge that if plaintiff was injured because of meal deposited on the sidewalk by defendant's employes while trucking cotton seed meal over the walk, and she was not negligent, she is entitled to recover was properly refused, as authorizing a recovery without regard to negligence of the defendant.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613, 616.]

6. APPEAL AND ERROR — 216(2) — PRESENTING QUESTIONS BELOW — MISLEADING INSTRUCTIONS — REQUEST FOR FULLER INSTRUCTION — "APPARENT."

In an action against an abutting property owner for injury caused by plaintiff falling on the sidewalk, the giving of a requested charge on contributory negligence which failed to state knowledge or notice to the plaintiff of the slippery condition of the walk, but did state that such condition must have been open and apparent to plaintiff, was not reversible error, since one definition of "apparent" is clear or manifest to the understanding; plain, evident, obvious, known, and, if the instruction was misleading, plaintiff could have asked an explanatory charge.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 627.

For other definitions, see *Words and Phrases*, First and Second Series, Apparent.]

7. APPEAL AND ERROR — 1052(6) — HARMLESS ERROR — ADMISSION OF EVIDENCE — EFFECT OF VERDICT.

Error relating to evidence as to the extent of plaintiff's injuries is harmless, where the jury found for defendant and awarded no damages whatever.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4176.]

8. EVIDENCE — 126(1) — RES GESTÆ — STATEMENT OF PERSON INJURED.

In an action against an abutting property owner for injuries caused by a fall on the sidewalk, testimony that after plaintiff had fallen and a young man from the store came out and



helped her up she stated to him, "This is so dangerous," was not part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 372.]

Appeal from Law and Equity Court, Lee County; Lum Duke, Judge.

Action by Maud Walker against John Smith, T. Judgment for the defendant, and plaintiff appeals. Affirmed.

Suit by appellant (plaintiff in court below) against the defendant for recovery of damages sustained by her in a fall on the sidewalk in front of defendant's mercantile store, or warehouse, in the city of Opelika. Jury and verdict for the defendant.

Count 1 alleged, in substance, that the plaintiff was walking along the sidewalk, and when in front of said warehouse she slipped and fell, the fall being caused by a quantity of cotton seed meal spilled there and causing the damp walk to be slippery and dangerous to pedestrians. Plaintiff alleged that on account of such dangerous condition of the sidewalk she slipped and fell with such violence as to break her elbow and permanently injure her arm, causing her to suffer much pain. It is averred that said injuries were proximately caused by the negligence of the defendant in causing or permitting the cotton seed meal to be and remain on the sidewalk, thereby rendering it unsafe for pedestrians.

Count 2, added by amendment, merely set up a negligent use of the sidewalk in a general way by the defendant, omitting the details set out in count 1. Count 3 charged that "the defendant so negligently used the said sidewalk as to cause the plaintiff to fall," etc., and concluded with the following averment:

"That her said injuries were proximately caused by the willful, wanton, or intentional negligence of the defendant, his servants, agents, or employes in so willfully, wantonly, or intentionally using said sidewalk as to cause the same to be and become dangerous."

The defendant interposed pleas of contributory negligence 2, 3 and A, each setting up, in substance, practically the same thing, to the effect that at the time plaintiff was injured she was walking along the sidewalk in front of defendant's place of business, which sidewalk was 12 feet wide and over which an awning was extended; a slight rain had fallen, causing the margin of the walk to become damp for a space of about 2 feet; that ample space, to wit, about 10 feet, was left dry and free from the wet cotton seed meal, upon which plaintiff could have walked in safety; that the condition of the walk "was open and patent to plaintiff, and she saw such condition"; and in another plea alleging in addition that she knew and appreciated the danger of walking on the wet pavement without taking due care, but she nevertheless chose to walk along the narrow margin of the sidewalk which was damp and slippery. Demurrers to these pleas were overruled.

The following charges were refused to the plaintiff:

"(3) If the jury believe from the evidence that Mrs. Walker fell and was injured because of dust or cotton seed meal deposited on the sidewalk by defendant's employes while trucking cotton seed meal over said sidewalk, and she was not negligent in traveling over said sidewalk, she is entitled to recover."

(A) "The court charges the jury that the plea of contributory negligence is not proven in this case."

The following charges were given at the request of defendant:

"(1) If the jury believe from the evidence that the defendant's storing room abutted the sidewalk, and that there was no other way of transporting goods from the drays into the warehouse, and if the jury believe from the evidence that the defendant was conducting said storage room and storing goods in it for mercantile purposes, then the jury is charged that the defendant had a right to truck the cotton seed meal from his dray over said sidewalk into his storage room, if not more than a reasonable time was consumed in trucking said meal across said sidewalk, and if the trucking was done in a reasonably prudent way."

"(4) The jury is charged that the owner of a storehouse or a storing room abutting on a sidewalk in a town or city is, under the law, entitled to the temporary use of the sidewalk in front of his store, provided he consume no more than reasonable time in the moving of such merchandise across the sidewalk into such storehouse."

"(8) The jury is charged that whilst a pedestrian has a right to the entire width of the sidewalk to walk upon, yet if the jury find from the evidence that a part of the sidewalk in this instance was wet and slippery, and this condition was open and apparent to the plaintiff, and if a greater part of it, about 10 feet in width of the sidewalk and running the full front of the building, was dry and safe for pedestrians, it was the duty of the plaintiff to select the dry and safe portion of said sidewalk to walk upon, and if she negligently selected the wet and slippery part to walk on, and such selection and walking upon said slippery part proximately contributed to the injury of the plaintiff, then the plaintiff cannot recover in this suit."

"(E) The jury is charged that no wanton, willful, or intentional misconduct has been shown on the part of the defendant in this case."

James W. Strother, of Dadeville, and Dickinson & Dickinson, of Opelika, for appellant. R. B. Barnes and N. D. Denson & Sons, all of Opelika, for appellee.

GARDNER, J. [1] It is insisted by counsel for appellant that pedestrians have the right to the use of the public streets, and that this right extends to the entire width thereof (City Council of Montgomery v. Reese, 146 Ala. 410, 40 South. 760; Am. Bolt Co. v. Fennell, 158 Ala. 484, 48 South. 97), and that they attempt to limit or restrict plaintiff to the use of only a portion of the sidewalk. The general rule is well recognized and indeed conceded by counsel for appellee. This rule is subject, however, to certain reasonable and necessary limitations, among them the right of an abutting property owner to use the sidewalk in front of his premises when reasonably necessary for the purpose of loading or unloading his goods and merchandise. Speaking to this question, the Su-



preme Court of Illinois in *Garibaldi v. O'Connor*, 210 Ill. 284, 71 N. E. 879, 66 L. R. A. 73, said:

"Abutters upon a public street may use the sidewalk in front of their premises for the purpose of loading and unloading goods, merchandise, or other like articles in which they may deal or use; but the sidewalks belong to the public, and the public primarily have the right to the free and unobstructed use thereof, subject to reasonable and necessary limitations, one of which is the right of an abutting property owner to temporarily obstruct the walk by loading or unloading goods, wares, or merchandise when such obstruction is reasonably necessary. Such obstruction must, however, be both reasonable as to the necessity therefor, and temporary in point of time. The prior and superior right of passage is possessed by the public."

See, also, *Flynn v. Taylor*, 127 N. Y. 596, 28 N. E. 418, 14 L. R. A. 556, and cases cited in note thereto; *Welsh v. Wilson*, 101 N. Y. 254, 4 N. E. 633, 54 Am. Rep. 698; *Riseman v. Hayden*, 86 Neb. 610, 126 N. W. 288, 29 L. R. A. (N. S.) 707; *Kelly v. Otterstedt*, 80 App. Div. 398, 80 N. Y. Supp. 1008; 28 Cyc. 864.

[2] The pleas in effect invoke the principle that one, although in the exercise of a right as a pedestrian upon a public street, and although such pedestrian has the right to assume that the streets are in proper condition for public travel and is not required to be on the lookout for obstructions, may nevertheless be guilty of contributory negligence if while walking on the street he sees such defect and with a knowledge of the dangerous condition walks thereon rather than to choose a safe way which is equally open and obvious. *Mayor, etc., v. Tayloe*, 105 Ala. 170, 18 South. 576; *Mayor, etc., v. Starr*, 112 Ala. 98, 20 South. 424; *Lord v. City of Mobile*, 113 Ala. 360, 21 South. 366; *City of Mobile v. Shaw*, 149 Ala. 599, 43 South. 94; *Osborne v. Ala. Steel Co.*, 135 Ala. 571, 33 South. 687; note to *Lerner v. Philadelphia*, 21 L. R. A. (N. S.) 659, 677. We are of the opinion that the pleas were not subject to the demurrers interposed.

[3] It is further urged, however, that count 8 sought recovery for wanton injury, and that as the pleas of contributory negligence were interposed to each of the said counts, they presented no answer to count 3, and the demurrer taking this point should have been sustained. The sufficiency of said count as one seeking recovery as for willful or wanton injury may be questioned. *B. R. L. & P. Co. v. Brown*, 150 Ala. 327, 43 South. 342. This, however, we need not determine, for the following reason: The undisputed evidence shows that defendant had temporarily used the sidewalk in transporting some cotton seed meal from his drays to the storeroom on the morning the plaintiff received her injuries, and that this was the only method by which the goods could be placed in the storeroom. It therefore appears without conflict that the defendant made use of the sidewalk only temporarily, and that such use was reasonably necessary. The only cause of action

upon which plaintiff could insist, therefore, was the alleged negligence of the defendant in permitting some of the escaped meal to remain on the pavement while the sidewalk was wet.

[4] The defendant insisted that in handling cotton seed meal some of it would necessarily sift through and onto the floor or walk, but that after the storage of the meal the walk had been swept and that the dampness complained of extended only about 2 feet from the edge of the walk. Plaintiff's evidence tended to show, however, that the entire walk was damp, and that there was some meal scattered on its entire width in front of the store, which caused a slippery condition resulting in her fall thereon. We are of the opinion, and the trial court so charged the jury, that there was no evidence upon which to rest a recovery as for wanton injury. Such being our conclusion, if the assignment of demurrer above referred to should be conceded for the purposes of this case only to be well taken, the error was clearly one without injury, and one on which no reversal could be rested.

[5] Charge 3, refused to plaintiff, would authorize a recovery without regard to the question of negligence on the part of the defendant, and was well refused.

Plaintiff requested the affirmative charge on the plea of contributory negligence. After a full examination of the record, we are of the opinion that the evidence was sufficient for the submission of that issue to the jury.

The charges given at the request of the defendant recognize in varying language the principle above stated in reference to the right of an abutting property owner to the temporary use of the sidewalk when reasonably necessary for the transportation of his goods. In the giving of these charges we find no reversible error.

[6] Charge 8, given at defendant's request, deals with the question of contributory negligence, and it is insisted by counsel that the charge is faulty in failing to state the knowledge or notice to plaintiff of the slippery condition of the walk. The charge uses the language: "And this condition was open and apparent to the plaintiff." Among other definitions of the word "apparent" found in *Webster's International Dictionary* is the following: "Clear or manifest to the understanding; plain, evident, obvious, known." It may be that the use of the word in the charge was misleading, but if it be conceded that the charge had misleading tendencies, it was open to the plaintiff to have asked an explanatory charge in answer thereto. There was no reversible error in giving said charge.

[7] We do not deem it necessary to separately treat other assignments of error dealing with the question of evidence. Some of them relate to the extent of the injury suffered by the plaintiff, as to whether her arm is permanently injured, and questions of like character.

The jury returned a verdict for the defendant and plaintiff was awarded no damages whatever. We are unable to see where any reversible error could be rested on these questions.

[8] Plaintiff testified that after she had fallen a young man seated inside the store came out and helped her up, brushing the meal off her dress, and that she stated to him at the time, "This is so dangerous." This testimony was excluded by the court, and we are clear to the view that the above quoted remark was not a part of the res gestæ and its exclusion did not constitute error.

The other questions presented by the assignments of error have been by us carefully considered. They present nothing calling for separate treatment, however. After full consideration of the record, we find no reversible error, and the judgment of the lower court is accordingly affirmed.

**Affirmed.**

ANDERSON, C. J., and McCLELLAN and SAYRE, JJ., concur.

(199 Ala. 411)

**MOULTON v. STATE. (3 Div. 268.)**

(Supreme Court of Alabama. Feb. 15, 1917.)

**1. CRIMINAL LAW §723(5)—ARGUMENT OF SOLICITOR—RACE PREJUDICE.**

In a prosecution for murder, statement of solicitor, "If you do not hang this negro, you will have a similar crime in this county in six months," was improper and prejudicial, being an appeal to race prejudice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1676.]

**2. CRIMINAL LAW §730(14)—IMPROPER REMARKS BY SOLICITOR—CORRECTION BY CHARGE.**

In a prosecution for murder, solicitor's remarks in his opening argument, "If you do not hang this negro, you will have a similar crime in this county in six months," held not cured by a later charge, to effect that jury were not to consider remarks for state in reference to white and black races, although it would not arouse passion of ordinary intelligent persons.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693.]

**3. CRIMINAL LAW §1166½(12)—APPEAL AND ERROR—PREJUDICIAL REMARKS IN CHARGE BY COURT.**

In a prosecution for murder, opening remarks in charge, "For the first time in the history of this court since the appointment of an official stenographer, so far as I am advised, the judge of the court has been requested to render his charge to the jury in writing," held reversible error, being a reflection on defendant, who under Code 1907, § 5363, was entitled to a written charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3125.]

McClellan, J., dissenting.

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Andrew Moulton, alias, was tried for murder, and he appeals. Reversed and remanded.

Rushton, Williams & Orenshaw and Bedwith & Davison, all of Montgomery, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

**PER CURIAM.** The brief for defendant appellant, complains of other things that occurred during the trial, but only two exceptions were reserved, and upon these the fate of the appeal must depend.

1. Defendant was tried on June 13, 1916, for the murder of a white man whom he had killed on the first day of the same month. The assistant solicitor, in the course of his opening argument for the prosecution, said to the jury:

"If you do not hang this negro, you will have a similar crime in this county in six months."

Defendant's objection was overruled, whereupon, after duly excepting, he moved the court to instruct the jury to disregard the said remark; but the court overruled the motion, whereupon the defendant again duly and legally excepted. The assistant solicitor, in his argument to the jury, made also the following statement:

"Unless you hang this negro, our white people living out in the country won't be safe; to let such crimes go unpunished will cause riots in our land."

Defendant objected to this remark, and the court sustained the objection. The bill of exceptions then makes the following recital:

"During the closing argument of special counsel representing the state, said counsel made the following statement to the jury in reply to certain remarks made by defendant's counsel in his address to the jury: 'I hope to God the day will never come in this country when the head of the Ethiopian will be on the neck of the Caucasian.' And further said that 'the defendant should not be convicted unless the jury was convinced to a moral certainty that the defendant was guilty.'"

It does not appear that defendant's counsel or the court took any notice of the remarks shown by the excerpt from the bill of exceptions stated last above. In his general oral charge to the jury the trial judge said to them:

"In the first place I charge you that the arguments of counsel are not evidence in this case, and should be considered by you merely as explaining the evidence so as to enable you to reach a fair and impartial verdict. I, therefore, exclude from your consideration the several remarks made by the solicitor for the state in reference to the white and black races, as I do not think they will help you in the consideration of the evidence, although they are not of such a character as would tend to inflame or arouse the passions of any ordinarily intelligent person."

[1, 2] Dissociated from other peculiar features of the trial which, to use the language of the decision in *Birmingham Railway v. Gonzalez*, 183 Ala. 273, 287, 61 South. 80, 84 (Ann. Cas. 1916A, 543), created "the general atmosphere of the case," the court would not be inclined to attach importance to that remark of the assistant solicitor as to which the trial court's ruling necessitated an excep-

tion by the defendant. In a different atmosphere the reference to defendant as a negro and the statement that, unless the defendant should be hanged, the county would have a similar crime in six months might be permitted to pass as belonging to that class of hasty or exaggerated statements of opinion, not facts, counsel often make in the heat of debate, which do not, and are not expected to, become factors in the formulation of the verdict, and which, while improper, are usually valued at their true worth. *Cross v. State*, 68 Ala. 484. But, looking to the whole record as it stood at the time when this exception was reserved, considering that in the evidence, even in that introduced by the prosecution, there was a strong tendency toward the establishment of a state of facts more favorable to defendant than that indicated by the jury's finding, considering the general conditions surrounding the trial, all which had before that appeared in this cause, and the menace of it all to a calm and dispassionate application of a just and humane law, the court is of opinion that the matter here brought into review involved an appeal to race prejudice, and should have been so recognized and treated at the time of the ruling upon it, and, not only so, but the innately evil capacity and tendency of the argument were in short order practically demonstrated by other breaches of the privilege of argument of an even more obviously harmful character. Authority for the holding that the judgment should be reversed on this exception may be found in *Tannehill v. State*, 159 Ala. 51, 48 South. 662, where many cases are cited; in *James v. State*, 170 Ala. 72, 54 South. 494, where the conviction was reversed because the solicitor had said to the jury that, "If the negro was taken out of court, there would not be much left"; in *Simmons v. State* (App.) 71 South. 979; where the Court of Appeals reversed the judgment because the solicitor had said, "You must deal with a negro in the light of the fact that he is a negro," etc., the court saying, "The fact that the defendant was of the negro race did not deprive him of the equal protection of the law, or necessarily discredit his testimony, and should not have been used in argument as a means of arraying the prejudices of the jury against him;" and in *Taylor v. State*, 50 Tex. Cr. R. 560, 100 S. W. 393; *State v. Jones*, 127 La. 694, 53 South. 959; *State v. Lee*, 130 La. 477, 58 South. 155; *Hampton v. State*, 88 Miss. 257, 40 South. 545, 117 Am. St. Rep. 740; *Harris v. State*, 96 Miss. 379, 50 South. 626; *Hardaway v. State*, 99 Miss. 223, 54 South. 833, Ann. Cas. 1913D, 1166; *Collins v. State*, 100 Miss. 435, 56 South. 527; *Vickers v. U. S.*, 1 Okl. Cr. R. 452, 98 Pac. 467; *State v. Cook*, 132 Mo. App. 167, 112 S. W. 710; *Battle v. U. S.*, 209 U. S. 36, 28 Sup. Ct. 422, 52 L. Ed. 670.

True it is that the court in its general oral charge to the jury seems to have recognized the capacity for harm contained in the cumu-

lative appeals to prejudice shown by the bill of exceptions, but this court has not approved as altogether effectual the method of treating definite error by subsequent mere general statements of exclusion. *Varnon v. Nabors*, 189 Ala. 464, 66 South. 598. It is to be noted also that the court's remedial remarks to the jury, while expressed in general terms, minimized rather than reproved the arguments in which counsel had indulged, whereas this court has held even in civil cases that where improper, though not incurable, suggestions may have fallen upon fruitful ground, the effort of the trial court should be by specific, clear, and emphatic instruction, to reprobate the argument and set the jury on the way to a proper verdict. *Wolfe v. Minnis*, 74 Ala. 386. This court in *Tannehill v. State*, supra, observed that courts in other jurisdictions had held, on what seemed to be good reason, that an appeal to race prejudice constitutes so serious a breach of the privilege of argument that even the specifically directed interference of the court cannot suffice to nullify its prejudicial effect. However, the court, going so far only as the exigency of that case required, held merely that error had intervened. Probably the safe middle course in all such cases—cases of appeal to race prejudice included—is indicated by the following language of the court in *Birmingham Railway v. Gonzalez*, supra:

"Each case of this character must be decided upon its own merits. There is no horizontal rule by which these qualities [the prejudicial qualities of improper remarks in argument to the jury] can be ascertained in all cases. Much will depend upon the issues, the parties, and the general atmosphere of the particular case."

True it is, also, that on the occasion of the next manifestation of the race idea the court did all that it was requested by the defendant to do, and sustained an objection, and that the last appeal to that bias (that in which counsel expressed the hope, hardly required by any duty or necessity of a situation of which there can be no reasonable fear, that the heel of the Ethiopian might never be on the neck of the Caucasian) is extenuated by the recitals of the bill of exceptions that this statement was made in reply to "certain remarks" made by defendant's counsel in his address to the jury, and by his apparently contemporary concession that defendant should not be convicted unless the jury were convinced to a moral certainty of his guilt; but, while it is not easy in the circumstances of this case to conceive what "certain remarks" responsible counsel could have made that required the set-off of an appeal to race prejudice (certainly defendant had no such appeal) and while the court in a case of this character is interested in knowing the real means by which the conviction is procured rather than in the effect of the perfunctory concession of a legal truism, it has not referred to either or both of these later statements by counsel as constituting reviewable or reversible error in the absence

of a motion for a new trial—such motions in criminal cases have been made reviewable by the statute (Code, § 2846, as amended by the act of September 22, 1915; Acts, p. 722)—but only as evidencing and illustrating the probable prejudicial effect of the court's ruling on the matter reserved for review by defendant's first exception taken in the court below. The court holds, therefore, upon due consideration of all the facts in this case, that for the ruling on the solicitor's argument the judgment of conviction must be reversed.

[3] 2. The bill of exceptions shows in the next place that defendant required that the judge should charge the jury in writing as provided by section 5363 of the Code; that the evidence and the arguments of counsel were finished about 7 p. m.; that at 10:30 p. m., the judge was ready and did at that time read his charge, the opening paragraph of which was as follows:

*"For the first time in the history of this court since the appointment of an official stenographer so far as I am advised, the judge of the court has been requested to render his charge to the jury in writing. This is a privilege which the law gives, but whether I will be able to make the law in this case more plain to you in a written charge than I could by minutely explaining it to you orally it matters not."*

Defendant duly excepted to that part of the foregoing which we have written in italics, and the subject-matter of this exception is urged for error. In the matter of exceptions to casual remarks by the court which lay down no proposition of law for the guidance of the jury nor give intimation of opinion as to any controverted question of material fact, it seems that the burden rests upon the appellant to show probable injury as a condition of reversal. *Phillips v. Beene*, 16 Ala. 720; *Melnaka v. State*, 55 Ala. 47; *Campbell v. State*, 55 Ala. 80. In *Griffin v. State*, 90 Ala. 596, 8 South. 670, the court said:

*"Any statement by the court, however unintentional, made in the presence of the jury, calculated to control the jury in its consideration of the weight to be given to testimony, will work a reversal, unless it be clearly shown that such remarks have been explained and excluded from them. It may be thought that the criticism of the court is too restricted and technical; but the principle involved is of such paramount importance it would be dangerous to permit the least infringement of the rule to pass without correction. The separate province of the court and of the jury must be jealously guarded, carefully recognized and preserved. It is an 'anchor sure and steadfast' to protect those on trial for a violation of law, and to restrain the courts from the exercise of undue influence upon the juries, to whom is committed the important and exclusive right of weighing the evidence."*

The statement made by the judge and now in question lays down no proposition of law, nor does it state or intimate any opinion as to any specific issue of controverted fact, but it was deliberately addressed to the jury, and defendant contends that its only possible purpose and tendency was to reflect upon the defense, or, more accurately speaking, upon counsel's conduct of the defense. The court here agrees that the remark should not have

been made, and, considering the case as presented upon the whole record, considering to recur to *Birmingham Railway v. Gonzalez*, supra, its "general atmosphere," that the trial court in making it to the jury, thus deliberately, committed reversible error. If a judgment of error at this point depended upon a finding that the trial court intended or supposed that this part of its charge would have any effect on the course or result of the trial, there would be no hesitation in our denial of reversible error; but it is matter of common knowledge that jurors are very susceptible to the influence of the presiding judge, watching him with a quick understanding of every indication of opinion, and while we are not to be misled into setting up a too exacting standard for trial judges, we must consider the subject of this exception with a view to its capacity of interpretation as an index of what the judge thought of the accused, his counsel, or his case. Indulgent considered, it seems to have been nothing more than an expression of irritation that the request for a written charge should have been made in the conditions then and there obtaining. But the occasion was charged with grave responsibility; the expression of the judge's opinion was given in formal charge to the jury and had every appearance of great deliberation. It cannot be assumed that the jury gave it no consideration. At best it was erroneous, and it carried a suggestion that should have been carefully avoided. It carried a necessary implication, a forcible suggestion, that the prisoner, or his counsel, was engaged in a useless performance and unnecessarily delaying the rapid progress of the case to a conclusion. It thus reflected unfavorably upon the merit of the defense, though, perhaps, not so directly as to fall within the rule of *Griffin v. State*, supra. But the defendant had only demanded a law-given right, and it should have been conceded without unfavorable comment. In some jurisdictions the appellate courts take the view that it is impossible to determine the extent to which the rights of a party may have been prejudiced by the unfavorable suggestions of the trial judge, and for that reason reversals are ordered in such cases. 21 Ency. Pl. & Pr. 994. The court here finds no need to go that far at this time; its decision is simply this: That the part of the charge to which exception was reserved was improper, and in the peculiar circumstances of this case probably prejudicial to the defendant; it may have been highly prejudicial. Therefore the court holds it for reversible error.

Reversed and remanded. All the Justices concur except McCLELLAN, J., who dissents.

McCLELLAN, J. (dissenting). I am unable to concur in the reversal of the judgment on the two grounds on which the conclusion to reverse is builded. These grounds are said to exist in the action of the trial court in over-

ruling an objection to a statement made by the solicitor in his opening argument to the jury and in a statement made by the trial judge in the first sentences of his written charge to the jury. It is best to take from the bill of exceptions itself the recital of these matters:

"During the course of his argument to the jury, the assistant solicitor made the following statement: 'If you do not hang this negro, you will have a similar crime in this county in six months.' The defendant duly and legally objected to said remark of the assistant solicitor, but the court overruled said objection, to which action of the court the defendant then and there duly and legally excepted. The defendant also moved the court to instruct the jury to disregard said remarks, but the court overruled said motion, and to the action of the court in overruling said motion the defendant then and there duly and legally excepted."

The other basis for imputation of error is this:

"Gentlemen of the jury: For the first time in the history of this court since the appointment of an official stenographer, so far as I am advised, the judge of the court has been requested to render his charge to the jury in writing."

This statement of the solicitor is the only statement made in argument to which the defendant reserved an exception at the time an adverse ruling by the court was made. The other objection interposed by the defendant to statements made by the solicitor in his opening argument to the jury evoked a ruling in favor of the defendant. There was no objection whatever to the statement attributed to special counsel when he was making the closing argument for the state "in reply," to quote the bill of exceptions, "to certain remarks made by defendant's counsel in his address to the jury." There was no motion made by the defendant at any stage of the case seeking to withdraw the case from the jury on account of statements made in argument. *Johnson's Case*, 102 Ala. 1, 17, 16 South. 99. No motion was made for a new trial, as might have been done under the new practice established by the act approved September 22, 1915 (Gen. Acts 1915, p. 722). It is therefore manifest that error to reverse can, under long and universally recognized practice in this state, be predicated *alone* of error in one of the two clearly defined particulars stated. In respect of such cases as this, this court is an appellate court only; and, within its proper function, it can only review and revise particular matters efficiently reserved for its consideration in the court below. It is, in my opinion, a complete departure from the unvarying practice in this court to introduce error into the action of the trial court by reference to matters not embraced within the exception, or subsequently, to the ruling, occurring. The court has invariably presumed the absence of error in the trial court until error was shown on the face of the record. It has invariably held that the bill of exceptions must be "construed most strongly against the party excepting, and if it will admit of two

constructions, one of which will reverse, and the other support, the judgment, the latter construction will be adopted." *McGehee's Case*, 52 Ala. 224; *Dickens' Case*, 142 Ala. 49, 39 South. 14, 110 Am. St. Rep. 17; *Dowling's Case*, 151 Ala. 131, 44 South. 403. It has likewise invariably ruled that an exception to the argument of counsel that embraces matter not erroneous cannot prevail; the reason being, obviously, that the court will not separate the bad from the good, to the end that a judgment should be avoided.

In the first place, I cannot see that the statement with reference to which the exception was reserved was error at all. The court has not so held in this case except by giving a vitalizing effect to other statements of counsel, subsequently made, to which no exception was reserved. There was not in the remark to which the exception was reserved the slightest appeal to race prejudice. To interpret it to such an effect is, it seems to me, rationally impossible. It was a general statement of prophetic opinion, and that only. It asserted no fact. The only fact it implied was that this defendant was a member of the negro race, a fact obvious to all and undisputed. Unless it can be said to be error to say that one on trial is a member of the negro race, then certainly the basis of this exception was not an improper or erroneous declaration by the solicitor. Very much stronger statements in arguments to juries touching the negro race have been held not to constitute error. In the case of *Brown v. State*, 121 Ala. 9, 25 South. 744, where the defendant was on trial on an indictment for rape, the solicitor in his closing argument to the jury several times characterized the defendant as having a foul heart, with being a fiend, a demon, "and appealed to the jury to convict the defendant in order to prevent innocent little *white* girls from such fiends and demons as the defendant [*italics supplied*]." The court, notwithstanding, affirmed the judgment of conviction. This case was approvingly cited in *Peel's Case*, 144 Ala. 134, 135, 39 South. 251. In *Dennis v. State*, 139 Ala. 109, 35 South. 651, the court affirmed a judgment, in review of exception appropriately taken, notwithstanding the solicitor had said to the jury:

"You gentlemen know the evils attendant upon these crap games; a crowd of negroes with a bottle of whisky in one pocket and a pistol in the other, get together to gamble, and you know what crimes grow out of these meetings."

In *Jackson's Case*, 136 Ala. 22, 34 South. 188, where the defendant was on trial for murder, the solicitor said to the jury in his argument:

"Mob law must be stopped. If a crowd of negroes take a negro out and hang him, and if the jury acquit the defendant, where they have evidence to convict him as you have in this case, then the first thing you know, they will be taking a white man out and hanging him."

To seasonable exception reserved to review this statement of the solicitor, this court responded as follows:

"The evidence tended to show that the deceased was hanged by a mob, and that the defendant participated in the lynching. Under this evidence, the solicitor in his remarks to the jury, and which were objected to by the defendant, did not exceed the bounds of legitimate argument."

When the only remark of the solicitor to which an exception was reserved in this case is contrasted with the remarks upon which the court rested a pronouncement of error and a reversal in *Tannehill v. State*, 159 Ala. 52, 48 South. 662, it will readily appear that the *Tannehill* Case cannot be employed as an authority to support the conclusion that the matter here excepted to was error. There the court interpreted the remarks of the solicitor as appealing to race prejudice. It takes, in my opinion, some stretch of the imagination to find in the remarks of the solicitor an *appeal* to race prejudice. But, be that as it may, *Tannehill's* Case is without bearing on the single exception in this connection to which this court can devote its powers of review. In *James v. State*, 170 Ala. 74, 54 South. 494, the solicitor said:

"If the negro was taken out of court, there would not be much left."

Following what was supposed to be an authority afforded by *Tannehill's* Case, *supra*, the judgment of conviction was reversed. If the *James* Case is to be justified at all, it must be upon the theory that the statement of the solicitor was the assertion of a fact not in evidence. Again, if it can be imagined that the mere expression of the solicitor's prophetic opinion was error, it was, in my opinion, entirely removed by this specific, emphatic, condemnatory declaration by the court to the jury in his written charge:

"In the first place, I charge you that the arguments of counsel are not evidence in this case, and should be considered by you merely as explaining the evidence so as to enable you to reach a fair and impartial verdict. I therefore exclude from your consideration the several remarks made by the solicitor for the state in reference to the white and black races, as I do not think that they will help you in the consideration of the evidence, although they are not of such a character as would tend to inflame or arouse the passions of any ordinarily intelligent person."

That the defendant was, at the time, satisfied with the court's effort to remove all possible prejudice that might have resulted from statements made by the solicitor in his argument to the jury is sufficiently shown by the fact that no request of the court to do anything more in that regard was made.

When it is considered that the bill of exceptions expressly affirms that the remarks attributed to the special counsel in his closing argument to the jury were "in reply to certain statements made by defendant's counsel in his address to the jury"; when it is considered that no objection was made to this argument of the special counsel, and no exception of course reserved to any ruling of the court thereon; when it is considered that the improper statement by the solicitor, to

which the court sustained defendant's objection, was made subsequent to the ruling made the basis of the exception under consideration; and when it is considered that the unobjected to remarks of the special counsel were made subsequent to the ruling of the court to which the defendant reserved an exception—it is impossible, it seems to me, to give to these subsequently transpiring events an effect to make that error which was before the subsequent events happened manifestly free from error. In *B. R. L. & P. Co. v. Gonzalez*, 183 Ala. 273, 284, 287, 61 South. 80, 84 (Ann. Cas. 1916A, 543), in review of a motion for new trial (no motion for new trial was made in the case at bar) it was said:

"Upon a very full consideration of the two statements heretofore pointed out as improper, we cannot say, from the dim light afforded by the record, that they were, as made, either grossly improper or highly prejudicial. Each case of this character must be decided upon its own merits. There is no horizontal rule by which these qualities can be ascertained in all cases. Much will depend upon the issues, the parties, and the general atmosphere of the particular case. The final test is: Can the prejudicial tendency or effect of the improper statement be counteracted by an appropriate instruction from the trial judge, or is it probably beyond the reach of such remedial action?"

In employing the phrase "the general atmosphere of the particular case" it is very plain that the court did not intend to upset the established practice in this state. The phrase is metaphoric only. What it manifestly meant was that the circumstances disclosed by the record of the particular case would be looked to by the court in reviewing a ruling on *motion for new trial* in order to determine whether the improper remark, to which no effectual exception had been reserved, was either so grossly improper or highly prejudicial that it could not be eradicated by remedial action on the part of the trial judge. *Atmosphere* as there employed meant circumstances only. *Atmosphere* is too intangible to be put into a record; and unless its figurative use in legal writings is so understood, it has no place in legal parlance. *Atmosphere* may be put into a receptacle; but *atmosphere* cannot be put into a record.

In my opinion, the exception taken to the passage in the written charge of the court is equally vain. In the first place, a quotation of the whole paragraph will serve to demonstrate the entire innocence of the expression of which the appellant complains:

"Gentlemen of the jury, for the first time in the history of this court since the appointment of an official stenographer, so far as I am advised, the judge of the court has been requested to render his charge to the jury in writing. This is a privilege which the law gives, but whether I will be able to make the law in this case more plain to you in a written charge than I could by minutely explaining it to you orally, it matters not."

The bill of exceptions states that the trial was concluded at 4 p. m. and that in the presence of the jury the defendant requested

the court to give its general charge to the jury in writing; and that the argument of counsel was concluded about 7 p. m. It is further recited that:

The court "thereupon took a recess until 8:30 p. m. \* \* \* The judge of the court came in a little later, but court was not reconvened on account of the reporter transcribing the written charge of the judge until 10:30 p. m., at which time the court read its general charge to the jury."

It is very natural that the judge should feel a disposition to make an explanation to the jury. He stated that this privilege which the defendant had claimed was one given the defendant by law. His expression following that was purely explanatory. The only possible implication from the whole statement made by the judge was that he thought the requirement, the claim of the privilege the law gives, was a useless requirement. He stated therein no law except the law that confers on the defendant the privilege he claimed. He did not allude in the remotest degree to the merits of the cause, nor to the guilt or innocence of the accused. He did not in any way criticize the conduct of the defense under the management of defendant's counsel. To repeat: He simply expressed his view that it was useless with an official stenographer serving the court to claim the privilege then claimed, for the first time, so far as he was advised, since the court had been served by an official stenographer. That the proceeding was a useless ceremony is obvious when the purpose of the ancient rule, whereby the judge is required on request of the party to write out his charge, is considered—a purpose that is fully met and conserved by the law's provision for an official to take down the oral charge of the court. In *Phillips v. Beene*, 16 Ala. 720, it was pertinently said:

"It cannot be seriously contended that every expression of opinion by the court, during the progress of the trial, if erroneous, shall furnish ground for reversal. But such opinion must, in some manner, influence the result of the cause, or be supposed to do so, by being given in charge to the jury, or by a refusal to charge, or by being connected with the exclusion or admission of the evidence."

It requires, it seems to me, a most remarkable exercise of the most active imagination to conclude that this statement of the trial judge could have had any possible effect upon the verdict reached by the jury in this case.

I, therefore, dissent from the reversal of the judgment on the grounds on which that conclusion is builded.

(199 Ala. 387)

BURNETT v. ALABAMA POWER CO.

(5 Div. 618.)

Supreme Court of Alabama. Dec. 21, 1916.  
Rehearing Denied Feb. 15, 1917.)

1. PLEADING  $\S$  64(2)—COMPLAINT—SEPARATE CAUSES IN ONE COUNT.

A count in a complaint charging that defendant negligently caused logs, brush, etc., to

be and remain upon land, and also caused the same to be negligently submerged by water by means of a dam resulting in injury to plaintiff by decay of such vegetation, is not a claim for two separate and distinct causes of action in the same count, as defendant owed plaintiff no duty to keep its own land clear of brush, etc., and therefore the negligent submerging of the land is the gravamen of the action and the proximate cause; the vegetation on the land merely producing a condition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig.  $\S$  134-137.]

2. NEGLIGENCE  $\S$  111(1)—PLEADING—COMPLAINT—SUFFICIENCY.

A count, charging that defendant negligently submerged its land under conditions described "by means of a dam," although it does not attempt to set up the acts constituting negligence, but describes the conditions and charges generally, was sufficient as a general averment of negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig.  $\S$  182, 184.]

3. NEGLIGENCE  $\S$  46—DAMNUM ABSQUE INJURIA.

If defendant had the lawful right to have logs, brush, and other vegetation on its land, when submerging it with water, whether it did so negligently or not is immaterial, as its motive would produce no cause of action, for any injury resulting to plaintiff by the lawful and proper exercise by defendant of his own rights, is *damnum absque injuria*.

4. NEGLIGENCE  $\S$  62(1)—PROXIMATE CAUSE—INTERVENING INNOCENT ACT.

As an exception to the rule that damage to another resulting from lawful exercise of one's rights is *damnum absque injuria*, where an original act is wrongful and naturally calculated to prove injurious to another, and does actually result in injury through the intervention of other causes, which are not wrongful, the injury will be referred to the wrongful cause passing by those which were innocent.

[Ed. Note.—For other cases, see Negligence, Cent. Dig.  $\S$  76, 78.]

5. NEGLIGENCE  $\S$  111(1)—PLEADING—COMPLAINT—SUFFICIENCY.

A count which charges the negligent permitting of the logs, etc., to be and remain upon the land, with a knowledge that injuries would arise by having the same submerged by water, but avers that the defendant had the authority to back said water, and shows that the injuries would not have arisen but for the backing of the water, and concedes that the defendant had the authority to back the water, and, although averring that it became defendants' duty to remove the vegetation as a matter of law, does not charge that the water was negligently backed, held defective and subject to demurrer.

[Ed. Note.—For other cases, see Negligence, Cent. Dig.  $\S$  182, 184.]

6. WATERS AND WATER COURSES  $\S$  179(1)—FLOWAGE—PLEADING—PROOF.

To establish negligence, under an averment that defendant by means of a dam negligently caused water to back, producing injuries set forth, the dam must be shown to have been negligently or wrongfully constructed or maintained.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig.  $\S$  247.]

7. EMINENT DOMAIN  $\S$  92—DAMAGE TO PROPERTY—CONSTITUTIONAL PROVISION.

Consequential damages to persons caused by the decay of vegetable matter submerged by the construction of a dam involve no injury to property which is protected by Const. 1901,  $\S$  235, providing for compensation for property



taken, injured, or destroyed in construction of public works.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 236.]

**8. EMINENT DOMAIN — 92 — DAMAGES TO PRIVATE PROPERTY — NUISANCE — GOVERNMENTAL AUTHORITY.**

Where a dam was constructed by defendant in the aid of navigation under the authority of the government, and in strict compliance with the plans and specifications of the government under Act Cong. March 4, 1907, c. 2912, 34 Stat. 1288, which did not require the land to be cleared, the defendant, as the agent of the government, was relieved from liability for a nuisance, caused by decay of vegetable matter submerged, and is not liable for consequential damages except to property, since there can be no recovery for damages, or relief from consequences, incidentally resulting from acts or things, performed or conducted in a proper manner under legal authority, and which but for such legislation would constitute a nuisance, and the sovereign controls navigable streams, and the riparian owner acquires rights subject to such control and right of sovereign to make reasonable improvements, which may be delegated, and unless some constitutional right is invaded, there can be no liability for consequential damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 236.]

McClellan and Gardner, JJ., dissenting in part.

Appeal from Circuit Court, Chilton County; W. W. Pearson, Judge.

Action by W. R. Burnett against the Alabama Power Company for damages for overflow and otherwise. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The counts referred to in the opinion are as follows:

(B) Plaintiff claims of the defendant the sum of \$2,500 for that during the time of the grievances hereinafter complained of plaintiff resided with his family on a piece or parcel of land in Chilton county, Ala., in close proximity to Waxahatchee creek, a stream flowing into the Coosa river, and plaintiff avers that during the spring or summer of 1914, defendant by means of a dam across the Coosa river below the mouth of Waxahatchee creek negligently caused the water of said Waxahatchee creek to back back, or up, and cover with water a great area of land on each side of said creek, and negligently caused large amounts of stagnant water and many small pools of stagnant water to be and remain near plaintiff's said residence, and negligently caused large amounts of weeds, brush, logs, leaves, underbrush, and other vegetable matter to be and remain submerged and partially submerged in water, and negligently caused same to remain dying and decomposing, and great quantities of mud, slime, filth, and litter was thereby caused to accumulate, settle, and remain on said land so covered with water, and as a proximate consequence of said water becoming and being in the condition described above large numbers of frogs, tadpoles, mosquitoes, and other insects were attracted to, created by, and caused to multiply in and around said body of water, and said smaller pools of stagnant water, and to die and decay in and about said water and great quantities of noxious, odious, and offensive gases, vapors, and odors were caused to be created in and around said water, and plaintiff avers that defendant has constantly maintained said body of water and small pools of water in the condition described

above since, to wit, June, 1914, so close to plaintiff's said residence that as a proximate consequence thereof, he and his family have been forced to breathe said offensive gases, and smell said offensive odors continually by day and by night, and has continually been bit, stung, and annoyed by said mosquitoes and other insects, his said home has been caused to be infested with said mosquitoes and other insects, and has been permeated with said offensive and noxious gases and odors, and has been rendered unhealthy and unfit for a home. And plaintiff avers that as a proximate consequence of plaintiff and his family breathing said impure air, and smelling said offensive odors and being bit, stung, and annoyed by said mosquitoes and other insects as aforesaid, plaintiff and his family were caused to contract sickness, chills, fever, and malaria, and were for a long time rendered sick, and plaintiff and his minor children members of his family were thereby rendered unable to work and earn money, and plaintiff was caused to expend large sums of money for medicine and medical attention for himself and family, and to suffer much physical pain and mental anguish, and was caused to abandon his home, and plaintiff avers that he suffered said injuries and consequent damages as a proximate consequence of defendant causing said water to be and remain so near plaintiff's said residence as aforesaid, in the condition as aforesaid, and that same contributed to plaintiff's injuries as aforesaid.

(H) Plaintiff claims of the defendant the sum of \$2,500 for that during the time of the grievances herein after complained of, plaintiff resided with his family on a piece or parcel of land in Chilton county, Ala., in close proximity to Waxahatchee creek, a stream flowing into Coosa river, and that the defendant had authority to back the water of said creek up on its lands in close proximity to plaintiff's said residence, and that said lands upon which the defendant had authority to back said water had on them large quantities of brush, logs, stumps, weeds, leaves and other vegetation and vegetable matter, wherefore it became the duty of the defendant before it backed said water up to clean off said lands in close proximity to plaintiff's said residence so as to destroy said debris, and plaintiff avers that this they negligently failed to do, but that in the summer time during very hot weather, to wit, the month of June, 1914, the agents or servants of the defendant while acting within the line or scope of their authority, as such agents or servants of the defendant, negligently caused said debris to be and remain on said land, and to become submerged with water and to remain and to decay, and to decompose in said water, and as a proximate consequence thereof said water become stagnant and become infested with large quantities of mosquitoes and was caused to give off offensive odors and large quantities of mosquitoes and other insects were attracted to, created by and caused to multiply in and around said water in the condition above described, all in close proximity to plaintiff's said residence, and adjacent to lands that he and his family were cultivating, and as a proximate consequence thereof he and his family were forced to breathe offensive odors and gases, and to smell same, and were constantly caused to be bit, stung, and annoyed by said mosquitoes and insects, and his home was caused to be infested with said mosquitoes and other insects, and to be permeated with said offensive gases and odors, and was thereby rendered unhealthy and unfit for a home, and plaintiff was thereby caused to abandon his said home. Plaintiff avers that as a proximate consequence of plaintiff and his family breathing said impure air and smelling said offensive odors and being bit, stung, and annoyed by said mosquitoes and other insects that he and his family were caused to contract sickness, chills,



fever, and malaria, and were for a long time rendered sick and caused to abandon his crop, and plaintiff was caused to expend large sums of money for medicine and medical attention for himself, and plaintiff avers that he suffered said injuries and consequent damages as a proximate consequence of the negligence of the defendant's agents or servants while acting within the line or scope of their employment as aforesaid.

Amendment: Plaintiff amends count H of his complaint by inserting immediately after the word "Matter," where same first appears in said count, the following words, and that to submerge said logs, stumps, weeds, leaves, and other vegetables with water would cause same to become sickly and unhealthy, and cause breeding places for mosquitoes, and cause odors to permeate plaintiff's home, but to clean away said logs, stumps, brush, leaves, weeds, and other vegetation would cause same to be less liable to become sickly and cause odors and breeding places for mosquitoes.

(I.) Plaintiff claims of the defendant the sum of \$2,500 as damages for that during the time of the grievances hereinafter complained of plaintiff resided with his family on a piece or parcel of land in Chilton county, Ala., in close proximity to the Coosa river, and plaintiff avers that on or about the month of June, 1914, the defendant by means of a dam across the said Coosa river, down the river from where plaintiff resided with his said family as aforesaid, caused the water of said river to back back, or up, and cover with water a great area of land on each side of said river, and negligently caused large quantities of stagnant water and many smaller pools of stagnant water to be and remain near plaintiff's said residence, and negligently caused large amounts of logs, brush, weeds, leaves, underbrush, and other vegetation and vegetable matter to be submerged and partially submerged in said water near plaintiff's said residence, and negligently caused same to remain in said water dying, decaying and decomposing, and great quantities of litter, filth, slime, mud, muck, and other debris was thereby negligently caused to accumulate and settle on said lands, so covered with water as aforesaid, and as a proximate consequence of said water becoming and being in the condition described above, great quantities of noxious, odorous, and offensive gases, vapors, fumes and odors were caused to be created and generated in and about said water and large amounts of frogs, tadpoles, mosquitoes, and other insects were attracted to, created by, and caused to multiply in and around said body of water and said smaller pools of stagnant water, and died and decayed in and about said water, and plaintiff avers that the defendant has negligently maintained said water in the condition described above, continuously since, to wit, June, 1914, so close to plaintiff's said residence that he and his family have been caused to breathe said noxious and offensive vapors and gases, and to smell said offensive odors continually by day and by night, and have continually been bit, stung, and annoyed by day and by night, and have continually been bit, stung, and annoyed by said mosquitoes and other insects, and his home has continually been permeated with said odors and infested with said insects. And plaintiff avers that as a proximate consequence of plaintiff and his family breathing said impure air and smelling said offensive odors and being bit, stung, and annoyed by said mosquitoes and other insects as aforesaid, plaintiff and his family were caused to contract sickness, malaria, and fever, his home was rendered uncomfortable and unhealthy and uninhabitable, and plaintiff was caused to expend large amounts for medicine and medical attention for himself and family, and was caused to lose much valuable time and to suffer much mental anguish and physical pain to his great damage in the sum of \$2,500.

The following, among many other grounds of demurrer, were interposed to these counts:

(114) No facts are set forth which charge this defendant with knowledge or notice that the results which it is alleged followed from the commission of the act complained of would follow.

(123) No facts are alleged which imposed upon the defendant the duty by the exercise of due diligence to have ascertained the facts which it is alleged by due diligence it should have known.

(124) It does not appear the defendant knew that to submerge said logs, brush, stumps, weeds, and other vegetable matter would cause the injuries complained of.

(127) No negligence is charged against this defendant by averring that this defendant knew, or by due diligence should have known, that to submerge the said logs, stumps, brush, weeds, and other vegetable matter with water would cause the injuries complained of, but to clean off the same so that this defendant's land would be reasonably free therefrom would render it less likely to cause the injuries complained of.

Defendant's plea 8 to original and amended complaint is as follows:

(8) That the damages claimed and injuries alleged to have been suffered by the plaintiff arose from the maintenance by this defendant of a dam across the Coosa river in the state of Alabama at the location selected for lock and dam numbered 12 on said river, which dam was constructed and is being operated and maintained by this defendant pursuant to the act of Congress of March 4, 1907, entitled "An act permitting the erection of a dam across Coosa river, Ala., at the place selected for lock numbered 12 on said river"; which act of March 4, 1907, is in words and figures as follows, to wit:

"Grant to Alabama Power Company of Right to Build a Dam Across Coosa River at Place Selected for Lock Twelve.

"(Public—No. 247.)

"34 Stat. 1288, c. 2912.

"An act permitting the erection of a dam across Coosa river, Alabama, at the place selected for lock numbered twelve on said river.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the consent of Congress is hereby granted to the Alabama Power Company, a corporation organized under the laws of the state of Alabama, its successors and assigns, to build a dam, of such height as the chief of engineers and the Secretary of War may approve, across the Coosa river in Alabama, at the place selected for the location of lock and dam numbered twelve on said river, as located in the survey made by the engineers of the United States of the Coosa and Alabama rivers in Georgia and Alabama, in compliance with the requirements of the River and Harbor Act approved June thirteenth, nineteen hundred and two, for the development of water power, and such works and structures in connection therewith as may be necessary or convenient in the development of said power and in the utilization of the power thereby developed: Provided, that plans for the construction of said dam and appurtenant works shall be submitted to and approved by the chief engineers and the Secretary of War before the commencement of the construction of the same: Provided, further, that the Alabama Power Company, its successors or assigns, shall not deviate from such plans after such approval, either before or after the completion of said structures, unless the modification of said plans shall have previously been submitted to and received the approval of the chief of engineers and Secretary of War: Provided, further, that said dam and appurtenant works shall be limited to the use of the surplus water only of the river not required for the navigation of

the Coosa river, and that no structure shall be built and no operations conducted under the provisions of this act which shall at any time injure or interfere with the navigation of said river or impair the usefulness of any improvement by the government in the interests of navigation.

"Sec. 2. That the said dam shall be so constructed including a proper forebay, that the government of the United States may at any time construct in connection therewith a suitable lock or locks for navigation purposes, and may at any time, without compensation, control the said dam or other structures and the level of the pool caused by such dam so far as shall be necessary for purposes of navigation, but shall not destroy the water power developed by said dam and structures to any greater extent than may be necessary to provide proper facilities for navigation, and that the Secretary of War may at any time require and enforce, at the expense of the owners, such modifications and changes in the construction of such dam as may be necessary in the interest of navigation: Provided, that the Alabama Power Company, its successors or assigns, shall furnish the necessary electric current, while its power plant is in operation, to move the gates and operate the locks in connection with said dam and to light the United States buildings and grounds free of costs to the United States: Provided, further, that the Alabama Power Company, its successors or assigns, is hereby granted the right to use any lands which may belong to the United States of America and necessary for the construction and maintenance of said dam and appurtenant works, or which may be inundated with water by reason of the construction of said dam and appurtenant works, and in consideration thereof the said company, its successors or assigns, shall, upon request of the chief of engineers and the Secretary of War, convey free of cost to the United States of America such suitable tract or tracts of land as may be selected by the chief of engineers and the Secretary of War for the establishment of such lock or locks and approaches and other purposes as the needs of navigation may require.

"Sec. 3. That this act shall be null and void unless the dam herein authorized be commenced within three years and completed within seven years from the time of the passage of this act.

"Sec. 4. The authority herein conferred shall, except as herein specifically provided, be subject in all respects to the provisions of the act entitled 'An act to regulate the construction of dams across navigable waters,' approved June twenty-first, nineteen hundred and six.

"Sec. 5. The right to alter, amend, or repeal this act is hereby expressly reserved.

"Approved, March 4, 1907, 10 a. m."

And the defendant avers that it had the right to construct said dam and now has the right to maintain and operate the same, and the pool of water formed thereby, under said act of Congress of March 4, 1907, which right this defendant now specially sets up and claims; that the act of Congress approved June 13, 1902 (Act June 13, 1902, c. 1079, 32 Stat. 331) entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors," and known as the River and Harbor Act, contained a provision directing the Secretary of War to cause a survey to be made of the Coosa and Alabama rivers with a view of determining the advisability of securing six-foot navigation in said rivers and the probable expense thereof, said survey to contain a report upon the advisability of further prosecuting the plan for locks and dams in the said Coosa river upon which the United States was then engaged; that the aforesaid survey of the Coosa river and Alabama river was duly made by the engineers of the United States by the direction of the Secretary of War in compliance with the said act, and the said

engineers submitted their report by which it was provided among other things that such six-foot navigation could be secured from Gadsden, Ala., on the Coosa river to the mouth of the Alabama river, by the erection of locks and dams at certain places, on the Coosa river selected by the said engineers; that thereafter said act of Congress of March 4, 1907, was passed, and under the terms of said act the consent of Congress was granted to this defendant to build a dam of such height as the chief of engineers and the Secretary of War should approve across the said Coosa river at the place selected for the location of said lock and dam numbered 12 on said river as located in the said survey made by the engineers of the United States of the Coosa and Alabama rivers in Georgia and Alabama in compliance with the requirements of the said River and Harbor Act of June 13, 1902; that this defendant is a corporation organized and existing under the general laws of Alabama, and has by its charter the right to manufacture, supply and sell to the public power produced by water as a motive force, and this defendant did before this cause of action arose acquire by purchase, and not by condemnation, and still owns fractions B and C of section 19, township 23 north, range 16 east, in Coosa county, Ala., and fractional northeast quarter of section 24, township 23 north, range 15 east, in Chilton county, Ala., constituting a dam site or power site, and comprising not less than one acre of land upon each and opposite sides of said Coosa river, being the place selected for the location of said lock and dam numbered 12 on said river as located in said survey made by the engineers of the United States and referred to in said act of March 4, 1907; that such dams on the Coosa river were so located by said engineers that slack water pools would be formed over the natural obstructions therein, each such pool having a minimum depth of six feet, each of such dams to be erected with reference to the other and a lock to be erected around each of said dams for the passage of commerce; that the defendant avers that after the approval of said act of March 4, 1907, it caused plans to be prepared for the construction of said dam and appurtenant works, the dam to be of the height which would raise the waters of said river to the elevation at said dam of 420 feet above sea level, according to a datum plane assumed by the engineers of the United States in the said survey of said Coosa river, being an average height above the natural river bed of about 74 feet, and to abut on the east side of said river on said fractions B and C of said section 19, township 23 north, range 16 east, in said county of Coosa, and to abut on the west side of said river in the said fractional northeast quarter of section 24, township 23 north, range 15 east, in said county of Chilton, being the place selected as aforesaid for the location of said lock and dam numbered 12, and duly submitted said plans in accordance with said act to the chief of engineers and the Secretary of War for their approval; that in and by an instrument of date March 3, 1910, the aforesaid plans were duly approved, which instrument of approval is in words and figures as follows, to wit:

"Whereas, by an act of Congress approved March 4, 1907, entitled, 'An act permitting the erection of a dam across Coosa river, Alabama, at the place selected for lock numbered 12 on said river' (34 Stats. 1288), the Alabama Power Company, a corporation existing under the laws of the state of Alabama, was authorized, subject to the reservations, provisos and conditions of said act, to build a dam, of such height as the chief of engineers, United States Army, and the Secretary of War may approve, across the Coosa river in Alabama at the place selected for the location of lock and dam numbered 12 on said river, located as described in said act, for the development of water power and such works and structures in connection therewith, as may

be necessary or convenient in the development of said power and in the utilization of the power thereby developed;

"And whereas, it was provided that plans for the construction of said dam and appurtenant works shall be submitted to and approved by the chief of engineers, United States Army, and the Secretary of War, before the commencement of the construction of the same;

"And whereas, the said Alabama Power Company has submitted, for examination and approval, general plans for a dam proposed to be built across Coosa river, in Alabama, at the site selected for the location of lock and dam numbered 12, as described above, which general plans have been approved by the chief of engineers and recommended for the approval of the Secretary of War, subject to the reservations, provisos and conditions specified in said act of Congress, and also upon, and subject to, the conditions hereinafter specified:

"Now, therefore, this is to certify that the general plans submitted as aforesaid, and which are hereto attached, are hereby approved by the Secretary of War, subject to the reservations, provisos and conditions specified in said act of Congress and upon, and subject to, the following conditions, in addition thereto:

"(I) That a decision as to the location for a lock through the dam itself or in a canal around the end of the dam shall be left open for determination until such time in the future as provision shall be made by Congress for its construction.

"(II) That this approval applies only to the general plans of the structure now presented covering the location, height, and type of dam, and is expressly conditioned upon the use of material and workmanship in actual construction which shall be satisfactory to the Engineer Department, decision as to details of dam and appurtenant works being reserved until plans therefor shall have been formulated and furnished the department for consideration.

"(III) That should the United States in future construct storage reservoirs on the headwaters of the Coosa river for the benefit of navigation, the company shall pay a just and equitable charge for any increased power created by the reservoirs and utilized by the company.

"(IV) That the work of construction shall be subject to the supervision and approval of the engineer officer of the United States Army in charge of the locality.

"Witness my hand this 3d day of March, 1910.

"J. M. Dickinson, Secretary of War.

"Office, Chief of Engineers, 62225/44, War Department, March 4, 1910."

And the defendant avers that the work of construction at said site, in accordance with such approval plans, was duly commenced and prosecuted by this defendant; that thereafter the defendant submitted supplemental plans for the erection of said dam and appurtenant works to the chief of engineers and the Secretary of War, and by an instrument of date July 8, 1913, the said supplemental plans were duly approved; and in acting upon said plans, the defendant avers that the chief of engineers and the Secretary of War were directed by law to consider the bearing of said dam upon a comprehensive plan for the improvement of said Coosa river, with a view to the promotion of its navigable quality, and for the full development of water power; the said instrument of approval being in words and figures as follows, to wit:

"Instrument of approval (No. 2) of supplemental plans submitted by the Alabama Power Company of Alabama for the construction of a dam across the Coosa river in Alabama at the site selected for lock and dam numbered 12:

"Whereas, by an act of Congress approved March 4, 1907, entitled 'An act permitting the erection of a dam across Coosa river, Alabama, at the place selected for lock numbered 12 on said river' (34 St. 1288), the Alabama Power

Company, a corporation existing under the laws of the state of Alabama, was authorized, subject to the reservations, provisos and conditions of said act, to build a dam of such height as the chief of engineers, United States Army, and the Secretary of War may approve, across the Coosa river in Alabama at the place selected for lock and dam numbered 12 on said river, located as described in said act, for the development of water power and such works and structures connected therewith as may be necessary or convenient in the development of said power and in the utilization of the power thereby developed;

"And whereas, it was provided that plans for the construction of said dam and appurtenant works shall be submitted to and approved by the chief of engineers, United States Army, and the Secretary of War before the commencement of the construction of the same;

"And whereas, the said Alabama Power Company heretofore submitted for examination and approval general plans for the dam proposed to be built across said river at the said site as described above, which general plans were approved by the chief of engineers and by the Secretary of War, subject to the reservations, provisos and conditions specified in said act of Congress, and also upon and subject to certain special conditions specified in the instrument of approval dated the 3d day of March, 1910; and thereupon the work of construction at the said site, in accordance with the aforesaid approval, was commenced and prosecuted;

"And whereas, further study of the problems connected with the proposed constructions and the experience gained in actual operations have demonstrated the necessity of a modification of the original plans and specifications by new and supplemental plans of a general character, which new and supplemental plans are now submitted in accordance with the aforesaid act of Congress approved March 4, 1907, and with the act of June 23, 1910 (c. 360, 36 Stat. 593 [U. S. Comp. St. 1913, §§ 9976-9983]), entitled 'An act to amend an act entitled "An act to regulate the construction of dams across navigable waters," approved June 21, 1906,' to the Secretary of War and the chief of engineers for their approval:

"Now, therefore, this is to certify that the said plans now submitted, which are attached hereto, are hereby approved by the chief of engineers and the Secretary of War, subject to the reservations, provisos and conditions specified in the said act of Congress approved March 4, 1907, and to the following conditions in addition thereto:

"(1) That all the stipulations and conditions enumerated in the said instrument of approval of March 3, 1910, shall remain in full force and effect.

"(2) That the said Alabama Power Company will permit the continuous discharge past said dam of all water flowing in the Coosa river whenever the discharge into the pool created by the dam is 5,000 cubic feet per second or less, and, at all greater discharges into the pool or said dam, shall provide a minimum discharge past said dam of not less than 5,000 cubic feet per second. The measure of the water thus to be discharged as above specified shall include all the water discharged through any canal, lock, or system of locks that may hereafter be built in connection with said dam.

"(3) That the said Alabama Power Company shall reimburse the United States for all expenses which have been incurred by the United States in connection with said project, including the cost of any investigations necessary for the approval of the plans, and which may be incurred in connection with the supervision of construction.

"(4) That the construction, operation and maintenance of this dam and all appurtenant works shall be subject to all pertinent provisions of the act of Congress approved June 23,

1910, entitled 'An act to amend an act entitled "An act to regulate the construction of dams across navigable waters," approved June 21, 1906.'

"(5) That the plans hereby approved shall supersede those heretofore approved on March 3, 1910, except with respect to the location, height, and type of dam and power house.

"Witness our hands at the city of Washington this the 8th day of July, 1913.

"Lindley M. Garrison, Secretary of War.

"W. H. Bixby, Chief of Engineers.

"Office, Chief of Engineers, 62225/121, War Department, July 14, 1913."

And the defendant further avers that natural obstructions in the Coosa river exist to a very pronounced degree at and above the place selected by the said engineers of the United States for the location of lock and dam numbered 12, where this defendant did actually erect said dam, but by reason of the erection of said dam the waters of said river have been raised to the level of said dam for a distance of, to wit, 15 miles, and the desired 6-foot navigation thereby provided over said 15 miles of said river in accordance with the said plans of the engineers of the United States; and the defendant further avers that prior to impounding the waters of said river by said dam it caused surveys to be made to ascertain the land which would be overflowed or damaged by such impounding, and prior to such impounding this defendant acquired by purchase, or by condemnation, all lands or waters or interests or rights or easements in lands or waters likely or liable to be flooded or damaged by impounding or diverting the waters of said Coosa river and its tributaries by the construction of said dam and appurtenant works at said site, except certain lands belonging to the United States, which this defendant was authorized by said act of March 4, 1907, to use for that purpose; and the defendant avers that no part of the lands referred to in the complaint was overflowed or damaged by the waters of said pool, and that said lands referred to in the complaint do not abut on said pool, but other lands owned by T. J. Ponder and G. P. Wilson intervene between said lands and said pool, and that the said lands referred to in the complaint are thereby separated and removed from said pool a distance of, to wit, 800 feet, and the defendant avers that the damages alleged to have been sustained by the plaintiff cannot be recovered of this defendant because it was authorized in and by said act of Congress of March 4, 1907, to build said dam at said location and of such height as the chief of engineers and the Secretary of War might approve: that in said survey of said Coosa river said engineers of the United States concluded that the general plan of six-foot navigation for said Coosa and Alabama rivers required the erection of a dam across the Coosa river at the place selected for lock numbered 12, of such height as would raise the waters thereof at said dam to the elevation necessary to secure such six-foot navigation, to wit, the said elevation of 420 feet above sea level, thereby requiring a dam at said location of the average height above the natural river bed of about 74 feet, and the defendant prepared its plans upon that basis, which were duly approved, as aforesaid, by the Secretary of War and the chief of engineers, and this defendant proceeded with the erection of said dam in accordance with said plans, at said location, and at the height so fixed as aforesaid, and under the supervision of the engineers of the United States, and the defendant completed the erection of said dam at said location and at the height so fixed, as aforesaid, in accordance with said plans, within the time prescribed by said act, and impounded the waters of said river by said dam, thereby creating the said pool of water as a proximate and natural consequence of the erection of said dam, and the said act of March 4, 1907, reserves the control of said dam and

their structures and the level of the pool of water caused thereby, to the government of the United States; and the defendant avers that the erection of the said dam caused the waters of Waxahatchee creek, a tributary of the said Coosa river, and of Crawford branch, a tributary of said Waxahatchee creek, to be backed up said creek and said branch, and on lands of this defendant so acquired for that purpose, thereby submerging or partially submerging the said mud, slime, logs, brush, stumps, bark, weeds, leaves, and other sediment described in the plaintiff's complaint, and the defendant avers that it also completed the construction of said dam and appurtenant works as aforesaid in accordance with article 19 of chapter 69 of the Code of Alabama 1907, being sections 3627 to 3637 of said Code; and the defendant avers that the Congress of the United States, pursuant to the third clause of section 8 of article 1 of the Constitution of the United States, has power to regulate commerce among the several states, and that pursuant to that power the Congress of the United States passed the several acts before referred to, looking to the opening of said Coosa river for the benefit of commerce among the several states, and the said dam was constructed by this defendant of said height and at the said location in pursuance of the plans and policies of Congress as thus defined in said acts, and that the said dam and the pool of water thereby created are instrumentalities of the United States in the regulation of commerce among the several states by improving the navigable quality of said Coosa river, and therefore this defendant is not liable for the damages claimed by the plaintiff. (Record, pages 45 to 54, inclusive.)

Defendant's plea 9 to plaintiff's original and amended complaint is as follows:

(9) The defendant adopts all of plea No. 8, to and including the words, "And this defendant acquired by purchase or by condemnation the right to so overflow or damage all of such lands except certain lands belonging to the United States which this defendant was authorized by said act of Congress of March 4, 1907, to use for that purpose"; and adds thereto the following:

That on, to wit, the 12th day of February, 1912, the defendant filed its application in the court of probate of Chilton county, Ala., and thereafter filed an amended application in said court, setting up that the defendant was a corporation organized under the laws of this state; that by its charter it had the right to manufacture, supply, and sell to the public power produced by water as a motive force, and had acquired by purchase, and not by condemnation, the said dam site or power site, comprising not less than one acre of land upon each and opposite sides of the Coosa river in the state of Alabama at the said location which was also described in the application; that this defendant proposed to construct a dam across the Coosa river at said site, and thereby impound the waters of and back them up said river and its tributaries for the production of power by water as a motive force, in connection with the construction of a power plant and works connected with or useful to said dam and said power plant for the purpose of manufacturing and selling to the public electric current produced at its said plant, and of selling such power, heat, light or electricity in the manner required by section 3636 of the Code of Alabama of 1907; and that the uses or purposes for which the lands, rights, waters, interests, and easements in lands or in the waters therein proposed to be condemned and taken were for the uses of manufacturing, selling, and supplying heat, light, power, or electricity produced by the waters impounded and raised by said dam as a motive force to the public, and of selling such heat, light, power, or electricity to any person or persons, municipal or other corporations, in the manner required by section 3636 of the Code of Alabama of 1907;

and the petitioner sought in the application, as amended, to condemn the lands and waters therein described which would likely be flooded or covered by the impounded waters or the pool created by the erection of said dam, being those portions of each entire tract of land set out in the several paragraphs of article 4 of said application, and described as follows: That portion, part, or parcel of the lands described in the several paragraphs thereof that would be covered with, as well as those that would be entirely surrounded by, the waters of the Coosa river and its tributaries if raised and backed up to an elevation of 420 feet above a certain datum plane, which elevation of 420 feet was fixed and marked to conform to the elevations established and adopted by the United States above said datum plane in the survey of the Coosa river from lock 4 in Alabama to Wetumpka, Ala., made August 2, 1908, to December 19, 1908, under the direction of J. B. Cavanaugh, Corps of Engineers, U. S. A., and by D. M. Andrews, Assistant Engineer, and by N. A. Yuille, Chief of Party, which said established elevation by the United States are evidenced and fixed by bench marks or other elevation data marked on the left or east side of said river; and in paragraph 17 of said article 4 as amended this defendant described the following lands and alleged the same to be owned by T. J. Ponder and G. P. Wilson, to wit:

Paragraph 17: "The southwest quarter of the northwest (S. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ ) and the northwest quarter of the northwest quarter (N. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ ) that lies south and west of Waxahatchee creek, section 34; the northeast quarter of the northeast quarter (N. E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$ ) that lies west of Aiken branch and south of Waxahatchee creek, section 33; the south half of the southeast quarter (S.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$ ), the southeast quarter of the southwest quarter (S. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$ ), the north half of the southwest quarter (N.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$ ), the south half of the northwest quarter (S.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$ ) and the northwest quarter of the northwest quarter (N. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ ) that lies south and west of Waxahatchee creek, section 28; all of the north half of the northeast quarter (N.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$ ) that lies south of Waxahatchee creek, section 29; all of the southwest quarter of the southeast quarter (S. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ ), the south half of the southwest quarter (S.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$ ), the northwest quarter of the southwest quarter (N. W.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$ ), and the southwest quarter of the northwest quarter (S. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ ), that lies south and west of Waxahatchee creek, section 20; all the east half of the northeast quarter that lies south and west of Waxahatchee creek, section 19; all in township 24 north, range 15 east, Chilton county, Alabama."

And this defendant in said proceeding did also seek to acquire the lands and interests or easements therein that would be injured or damaged as a consequence of so impounding, raising, and diverting that waters of said river and its tributaries and so backing said waters upstream by said dam, the maintenance thereof and the pool created thereby; and this defendant in said amended application proposed to take and condemn the lands and waters therein described for the purposes therein named, and sought to construct said dam and to acquire the right thereby to back and impound waters over said lands for said purposes, and also sought to condemn the right to so back and impound said waters of said Coosa river and its tributaries over, on, and across said lands by said dam, and to maintain said dam and said waters so raised or impounded, for the purpose therein named, and applied to said court for an order of condemnation of said lands, waters and rights to such uses; that notice of such application and of the day for the hearing thereof was duly issued out of said court of probate to said T. J. Ponder and G. P. Wilson, and served upon them by a sheriff of the state of Alabama as required by law;

and the said cause having been duly considered, the said court granted said application by its decree of date December 30, 1913, and the defendant avers that the court in said decree of December 30, 1912, did order, adjudge, and decree that this defendant was entitled to the relief prayed in said petition and to the lands and waters and rights and interests therein described, and did condemn the same to the use of the petitioner, and appointed commissioners to assess damages and compensation to which the owners were entitled, including the lands described in said paragraph 17; and the defendant avers that a notice of the appointments duly issued to said commissioners as required by law, directing them to assess the damages and compensation to which the said T. J. Ponder and G. P. Wilson, owners of said described lands, were entitled on account of any injuries that might result to them by reason of this defendant's taking and condemning the said lands and waters, and by flooding, backing or raising the waters of the Coosa river and its tributaries over and on said lands, and also the injuries and damages resulting as a consequence of so impounding, raising and diverting the waters of said Coosa river and its tributaries, and so backing the waters up by said dam; and said commissioners duly made their assessments of damages for the owners of said lands including an assessment of \$3,000 for said T. J. Ponder and G. P. Wilson as the owners of the lands described in said paragraph 17, and returned such assessment to said court; that thereupon it appearing to said court of probate that this defendant had deposited in said court said damages and compensation of \$3,000 so ascertained and assessed by said commissioners for said T. J. Ponder and G. P. Wilson, together with all the costs of the cause the said court of probate of Chilton county, did by its decree of January 13, 1913, duly confirm the report of said commissioners, and did order, adjudge, and decree that the lands and waters, and the rights, interests, and easements prayed for in said amended petition, and granted and condemned in said decree of December 30, 1912, in said cause, be condemned, granted, and awarded to this defendant with the rights and for the uses and purposes set forth in said amended petition and in said former decree of December 30, 1912, and that all right, title, and interest prayed for in said petition as amended, and so condemned, granted, and awarded in and by said former decree, and in and by said decree of January 13, 1913, be and was thereby divested out of the said owners as to the said lands described in said paragraph 17 and vested in this defendant; that said T. J. Ponder and G. P. Wilson did thereupon appeal to the circuit court of said county of Chilton from said order of condemnation of said court of probate, and said T. J. Ponder and G. P. Wilson did thereafter dismiss their said appeal out of the said circuit court, leaving said order of condemnation in full force and effect, and the same still remains unreversed and in full force and effect; and the defendant attaches a copy of said condemnation on proceedings to this plea as a part thereof, making the same Exhibit A.

And this defendant avers that it completed the construction of said dam and appurtenant works as aforesaid in accordance with the provisions of article 19 of chapter 69 of the Code of Alabama of 1907, being sections 3627 to 3637 of said Code, and the said dam is therefore a dam authorized by the Legislature of the state of Alabama at the particular site so selected as aforesaid, and of the specific height and dimension so determined upon as aforesaid; that at the time said condemnation proceeding was instituted said Ponder and Wilson also owned the southeast quarter of the northeast quarter of section 29, township 24 north, range 15 east, in said county of Chilton, which land was immediately adjoining the following lands described in said application, to wit: The north half of the northeast quarter of said section 29, and the

west half of the northwest quarter of section 28 in said township 24 north, range 15 east, also owned by said Ponder and Wilson; that the plaintiff purchased the said southeast quarter of the northeast quarter of said section 29 from said T. J. Ponder and G. P. Wilson after said condemnation proceeding was so instituted and after said lands were so condemned by the aforesaid decree of said court of probate of Chilton county, and the plaintiff was residing on said land so purchased by him at the time he suffered the alleged injuries described in the complaint; that the said land on which the plaintiff so resided and said immediately adjoining lands described in said application constituted part of one entire tract of land owned by said Ponder and Wilson, and were so used by them, as parts of one and the same tract for farming purposes, at the time said condemnation proceeding was commenced; and the defendant avers that the erection of the said dam caused the waters of Waxahatchee creek, a tributary of the said Coosa river, and of Crawford branch, a tributary of said Waxahatchee creek, to be backed up said creek and said branch, and on part of said north half of said northeast quarter of said section 29 and part of said west half of the northwest quarter of said section 28, thereby submerging or partially submerging the said mud, slime, logs, brush, stumps, bark, weeds, leaves, and other sediment described in the plaintiff's complaint; and the defendant avers that it proceeded with and completed the construction of said power plant in connection with said dam, and thereafter acquired rights of way on which it constructed a system for the transmission and distribution of electric power produced at said dam site by the waters of said Coosa river as a motive force, which system is now and has been for some time past in operation, and the defendant is engaged in generating at said plant and selling through said system electric power to the public; that this defendant is therefore a public service corporation under the laws of the state of Alabama, and is obligated to manufacture and sell to the public electric current so produced at its said plant in the manner required by section 3636 of the Code of Alabama of 1907; wherefore this defendant avers that the damages alleged to have been sustained by the plaintiff cannot be recovered of this defendant because it was authorized in and by said act of Congress of March 4, 1907, to build said dam at said location and of such height as the chief of engineers and the Secretary of War might approve; that in the said survey of said Coosa river said engineers of the United States concluded that the general plan of six-foot navigation for said Coosa and Alabama rivers required the erection of a dam across the Coosa river at the place selected for lock numbered 12 of such height as would raise the waters thereof at said dam to the elevation necessary to secure such six-foot navigation, to wit, the said elevation of 420 feet above sea level, thereby requiring a dam at said location of the average height above the natural river bed of about 74 feet, and the defendant prepared its plans upon that basis, which were fully approved, as aforesaid, by the Secretary of War and the chief of engineers, and this defendant proceeded with the erection of said dam at said location and at the height so fixed as aforesaid, under the supervision of the engineers of the United States, and the defendant completed the erection of said dam at the said location at the height so fixed, as aforesaid, within the time prescribed by said act, and impounded the waters of said river by said dam, thereby creating the said pool of water as a proximate and natural consequence of the erection of said dam, and the said act of Congress of March 4, 1907, reserves the control of said dam and other structures and the level of the pool of water caused thereby, to the government of the United States; and the defendant avers that the Congress of the United States pursuant to the third clause

of section 8 of the Constitution of the United States has power to regulate commerce among the several states, and that pursuant to that power Congress of the United States passed the several acts before referred to, looking to the improvement of said Coosa river for the benefit of commerce among the several states, and the said dam was constructed by this defendant of said height and at the said location in pursuance of the plans and policies of Congress as thus defined in said acts, and of the statutes of the state of Alabama in such cases made and provided, and that the said dam and the pool of water thereby created are instrumentalities of the United States in the regulations of commerce among the several states by improving the navigable quality of said Coosa river, and therefore this defendant is not liable for the damages claimed by the plaintiff.

Acuff & Pitts, of Columbiana, and Middleton & Reynolds, of Clanton, for appellant. O. R. Hood, of Gadsden, Thomas W. Martin and Percy, Benners & Burr, all of Birmingham, and Knox, Acker, Dixon & Stewart, of Talladega, for appellee,

ANDERSON, C. J. [1] While count B of the complaint charges that the defendant negligently caused logs, brush, etc., to be and remain upon the land, and also caused the same to be negligently submerged by water, thus producing the injuries, etc., it is not a claim for two separate and distinct causes of action in the same count. The defendant owed the plaintiff no duty to keep its own land clear of brush, logs, and other vegetation, as having the same upon the land was but the lawful use of its own property, and the said count does not indicate that the conduct of the defendant in this respect would have produced the injury described but for the fact that the land upon which this matter existed was submerged by water by means of a dam across Coosa river. Therefore the negligent submerging of the land is the gravamen of the action, and was the proximate, intervening cause which produced the injuries.

[2] Indeed, the count charges that the injuries resulted as the proximate consequence of the defendant's causing said water to remain so near plaintiff's residence as aforesaid. The gravamen of the action was negligently submerging the land, under the condition described, "by means of a dam." The count does not attempt to set up the acts constituting negligence, but describes the conditions, and charges generally a negligent submerging of the land by means of a dam across the Coosa river, and this general averment of negligence seems to be sufficient under our system of pleading. Count B was not subject to the defendant's demurrer. It, in effect, charges results to be due to the backing of the water by the negligent, or wrongful, construction of a dam across the Coosa river.

[3] As above noted, the defendant had the lawful right to have logs, brush, and other vegetation on its own land, and whether it did so negligently or not matters not, as its motive would produce no cause of action.



"It is *damnum absque injuria* also if through the lawful and proper exercise by one man of his own rights damage results to another, even though he might have anticipated the result and avoided it. That which it is right and lawful for one man to do cannot furnish the foundation for an action in favor of another. Nor can the absence of commendable motive on the part of the party exercising his rights be the legal substitute or equivalent for the thing amiss which is one of the necessary elements of a wrong." *Cooley on Torts*, p. 142. Therefore the proximate cause of the injury, and the only theory upon which the count states a cause of action, was the negligent or wrongful backing of the water by means of the dam, and not in permitting the logs, etc., to be and remain upon the land. The vegetation on the land merely produced a condition, and the proximate intervening cause of the results was negligently backing the water. *Cooley on Torts*, p. 99; *Garrett v. L. & N. N. R. R.*, 71 South. 685; *Huntsville Knitting Mill v. Butner*, 73 South. 907.

[4] There seems to be an exception to the rule, when the original act was wrongful and was naturally, according to the ordinary course of events, calculated to prove injurious to some other person or persons and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause passing by those which were innocent. *Cooley on Torts*, p. 101. Here the original conduct was not wrongful and the plaintiff must rely, not only upon the conduct which was the proximate cause of the injuries, but the only wrongful conduct charged, the negligent backing of the water by means of the dam.

[5] Count H, as amended, seems to be an adroit attempt to avoid the principles of law governing counts B and L by an effort to put the cart before the horse. It charges the negligent permitting of the logs, etc., to be and remain upon the land, with a knowledge that injuries would arise by having the same submerged by water, but avers that the defendant had the authority to back said water. The count shows that the injuries would not have arisen but for the backing of the water, and concedes that the defendant had the authority to back the water. While the count avers that it became the duty of the defendant to remove the vegetation, as matter of law, it was not its duty to do so independent of backing the water, and if there is any cause of action against the defendant, it must be for doing the thing which proximately caused the injury, and as the count shows authority for this and does not charge that the water was negligently backed so as to submerge the logs, etc., it was defective and subject to the defendant's demurrer.

[6] Count L is quite similar to count B, as it charges that by means of the dam the

defendant negligently caused the water to back, thus producing the injuries set forth. This is a general averment of negligently doing the thing, by means of a dam, and the dam must, of course, have been negligently, or wrongfully constructed or maintained in order for the plaintiff to establish the negligence charged.

[7, 8] The counts to which pleas 8 and 9 were held to be good involve no injury to property which is protected by section 235 of the Constitution because of injury resulting from the construction, etc., of the dam, but claim consequential damages caused subsequent to the construction of same and to the person instead of the property. *Hamilton v. Ala. Power Co.*, 70 South. 737. Therefore said pleas are a complete defense to said counts. They, in effect, set up that the things complained of resulted from backing the water, by the construction of a dam across a navigable river, which was constructed by it, as a governmental agency, in the aid of navigation, under the law, federal and state, and in strict compliance with the plans and specifications required by the government. This not only relieved the defendant from the creation or maintenance of a nuisance, but the act being lawful in itself, and having been performed in strict compliance with scientific government specifications and requirements, there could be no negligence in doing the thing so sanctioned and which was the proximate cause of the damages claimed. This being true, the defendant could only be liable for injuries to property, as protected by the federal and state Constitutions, and which has been correctly discussed and declared in the *Hamilton Case*, *supra*. It is settled in England and Canada, as well as by the weight of authority in the United States, that there can be no recovery for damages, or relief from consequences, incidentally resulting from acts or things performed or conducted in a proper manner under legal authority, and which but for such legislation would constitute a nuisance. *Rainey v. Red River R. R. Co.*, 99 Tex. 276, 89 S. W. 768, 90 S. W. 1096, 3 L. R. A. (N. S.) 590, 122 Am. St. Rep. 622, 13 Ann. Cas. 580, and note; *Fisher v. Seaboard R. R. Co.*, 102 Va. 363, 46 S. E. 381, 1 Ann. Cas. 622, and note. The sovereign controls navigable streams, and the riparian owner as well as subjects generally acquire rights subject to the right of the sovereign to control said streams and to make and authorize all reasonable improvements, from time to time, to facilitate the use of the river by the public, even though the landowner thereby suffers inconvenience or loss, so long as none of his property is taken or injured in violation of his constitutional rights. As the manner in which improvements may be made, in aid of navigation, is a question within the discretion of the government, unless some constitutional right is invaded, there can be no liability for con-

sequential damages to the citizens as an incident to said improvement, and such injury is *damnum absque injuria*. *Brooks v. Cedar Brook Co.*, 82 Me. 17, 19 Atl. 87, 7 L. R. A. 460, 17 Am. St. Rep. 459; *Bedford v. United States*, 192 U. S. 217, 24 Sup. Ct. 238, 48 L. Ed. 414; *Gibson v. U. S.*, 166 U. S. 275, 17 Sup. Ct. 578, 41 L. Ed. 996. It might be that prudence would have suggested the removal of logs, brush, etc., from the land before the submerging of same by water, but the government, having at all times the welfare, comfort, health, and happiness of its subjects in mind, may not have deemed it necessary or prudent to have it done, and it was supreme, as to the location of the dam and as to all plans and specifications as well as other things in connection with the construction of the same, so long as no constitutional right was invaded. As the government had the authority to construct the dam, it could delegate this river improvement to another, and if its requirements as to construction were complied with by the agent, there could be no liability against the said agent. *Brooks' Case*, supra; *Nor. Trans. Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336. Had the act of Congress or the government plans and specifications required clearing the land of the matter in question, as a condition precedent to the constructing of the dam and raising the water, this defendant might not only be guilty of negligence, but also liable as for the creation or maintenance of a nuisance, for the reason that it did not comply with the requirements of the legal authority under which it acted; but as these pleas set up the acts of Congress, the Alabama statute and the government plans and specifications, and aver a strict compliance therewith, as the proximate cause of the things complained of by the plaintiff, they make out a complete defense to the action. Indeed this question was practically settled in the *Hamilton Case*, supra, where it was said:

"In the discussion of the general principles involved in this case and in reaching the conclusion that the bill does not contain equity, we did not intend to hold or intimate that this complainant could be liable in an action at law as for consequential damages, other than to property, which resulted from the erection or extension of its works in compliance with the law. In other words, the bill negatives a nuisance, and also sets up that the dam was constructed under the authority of Congress and in strict compliance with the federal law, and for the benefit of navigation, and that to all intents and purposes this complainant was a governmental agency in the construction and maintenance of the dam. This being true, there could be no liability upon the part of the government as for consequential damages, except to property, resulting from conditions caused by the construction and maintenance of the dam, and this complainant would be equally protected, and if it constructed the dam in compliance with the law it could not be guilty of negligence in causing the backing of the water. If it did what the law authorized, and proceeded under the rules prescribed, it could not be guilty of negligence so as to render it liable for resulting consequential damages. *Bedford v. United States*, 192 U. S. 217, 24 Sup. Ct. 238, 48 L. Ed.

414; *United States v. Lynah*, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539. On the other hand, the legal authority for the construction and maintenance of the dam, by the government or by this complainant, does not afford an exemption from damages for taking property as protected under the federal Constitution, or for taking property, or consequential damages there-to, under the state Constitution. *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638."

Much of the appellant's argument attacks the soundness of the principles announced in the *Hamilton Case*, supra, but we think that said case is sound, and are not inclined to depart therefrom.

While this case must be reversed because of the error in sustaining the demurrer to counts B and L, it is not improper to suggest as a guide upon the next trial that pleas 8 and 9 set up a good defense to said counts B and L.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

MAYFIELD, SAYRE, SOMERVILLE, and THOMAS, JJ., concur.

McCLELLAN, J., concurs in the opinion, except as to counts B and L. He thinks said counts bad, and that the case should be affirmed.

GARDNER, J. (concurring in result). I concur in that part of opinion holding counts B and L not subject to demurrer, and therefore concur in reversal of the cause. I do not agree, however, to construction given these counts in opinion, to the effect that the building of the dam can be said to be the proximate cause of the injuries alleged, but think the counts show that the proximate cause was the backing of the water upon accumulated debris and vegetable matter, the backing of the water on the land in its then condition, which was alleged to be negligently done. So construing these counts, I, therefore, cannot concur also in that part of the opinion holding pleas 8 and 9 complete answers to the cause of action set forth in said counts B and L.

McCLELLAN, J. In my opinion counts B and L proceeded on the theory that the defendant negligently exercised its lawful right in doing the things described therein; and that these counts did not undertake to state a cause of action as for a nuisance, as was the case of *Hosmer v. Republic I. & S. Co.*, 179 Ala. 415, 60 South. 801, 43 L. R. A. (N. S.) 871, and *Ogletree v. McQuaggs*, 67 Ala. 580, 42 Am. Rep. 112. The purpose in these counts being to state a case of negligence with respect to the exercise of a lawful right, the sufficiency of these counts as against demurrer were and are due to be determined with respect to their sufficiency to state a cause of action in such circumstances, rather than by tests which would be serviceable in



determining the sufficiency of counts purporting to state a cause of action because of damnifying consequences resulting from a nuisance. 29 Cyc. p. 1155; Town of Vernon v. Wedgeworth, 148 Ala. 490, 42 South. 749. The trial court was, in my opinion, correctly advised when it sustained the demurrers to these counts, particularly grounds 114, 123, 124, and 127.

In other respects I concur in the foregoing opinion. But my conclusion would lead to an affirmance of the judgment.

(199 Ala. 536)

**JACKSON LUMBER CO. v. TRAMMELL.**  
(4 Div. 612.)

(Supreme Court of Alabama. Feb. 15, 1917.)

**1. EVIDENCE — JUDICIAL NOTICE — MASTER AND SERVANT.**

The court judicially knows that in a sawmill enterprise much machinery is used, that the employment of laborers is necessary to its operation, and that accidents are likely to occur.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4.]

**2. CORPORATIONS — POWERS — CONFORMITY WITH BUSINESS PURPOSES — ULTRA VIRES ACTS.**

Employment of a physician by a sawmill corporation to look after the health of its employes is not in violation of Const. 1901, § 233, since it merely is a means of executing its express powers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1517, 1518.]

**3. PLEADING — DEMURRER — SUFFICIENCY.**

In an action for compensation by a physician where the replication contained two counts, one of which was valid, and demurrer was interposed to the entire replication, it was properly overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486, 487.]

**4. COSTS — COST BOND — TIME FOR FILING.**

Under Code 1907, § 3690, providing that if cost bond be not given at or before the next term of court after the term at which it is required, the suit must be dismissed, where a plaintiff removed from the state and was required to file a cost bond and filed one in time limited to \$150, it was not error for the court to allow him to file sufficient security at any time during the term, especially where he filed a sufficient bond on the second day of the term.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 479-481.]

**5. CONTRACTS — BREACH — EXECUTED CONTRACT — PLEADINGS.**

In an action for money due on a contract fully executed the same particularity of averment is not necessary as where the suit is for the breach of an executory contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1664-1676.]

**6. CONTRACTS — ACTIONS — PLEADING AND PROOF.**

Where one suing on an employment contract alleged that the compensation agreed upon was \$200 per month, there was no fatal variance where his testimony showed that it was agreed that he should be paid \$150 a month, and that \$50 additional should be re-

tained from his salary as security for faithful performance of his work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1737-1743, 1746, 1747, 1749.]

**7. EVIDENCE — JUDICIAL NOTICE — LOCATION AND POPULATION.**

Courts will take judicial notice of the location and population of a particular community.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 10, 17.]

**8. APPEAL AND ERROR — SCOPE OF REVIEW — FACT QUESTIONS — WEIGHT OF EVIDENCE.**

The rule that the court on appeal will not reverse for insufficiency of evidence where the evidence was in direct conflict is still in force, and unaffected by Acts 1915, p. 722, providing that no presumption in favor of the correctness of the judgment of the appellate court appealed from shall be indulged by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937.]

**9. TRIAL — MISCONDUCT OF COUNSEL — REMEDY.**

To put the trial court in error with respect to improper remarks of counsel, a ruling must be appropriately invoked promptly upon the utterance of such remarks.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 312.]

McClellan, J., dissenting.

**On Rehearing.**

**10. NEW TRIAL — GROUNDS — IMPROPER ARGUMENT OF COUNSEL.**

In an action against a corporation for compensation as a physician for its employes, argument of counsel as to disparity of wealth of parties and alleged improper methods of the corporation was sufficient to require new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 43, 44.]

Appeal from Circuit Court, Covington County; A. B. Foster, Judge.

Action by R. H. Trammell against the Jackson Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded on rehearing.

Suit by appellee against appellant to recover a sum claimed by the plaintiff to be due under a contract made between the plaintiff and the defendant on May 1, 1903, and terminating May 1, 1913, by the terms of which the plaintiff was engaged to attend the employes of the defendant company and render them medical and surgical aid and attention during the time the contract was in force, and for which services plaintiff was to receive the sum of \$200 per month. The case was tried on counts C, D, and E, which set up the substance of the contract, and the performance of the required services by plaintiff, and also on the common counts. The defendant interposed pleas of the general issue, payment, ultra vires, the statute of limitation, and the statute of frauds.

To the plea of ultra vires the plaintiff filed three replications, the first of which alleged in substance that the defendant is a corporation chartered under the laws of Alabama and empowered to operate sawmills and to manufacture lumber; that it has a number

of sawmills and employs a large number of hands in the carrying on of its business; that the plant is situated some distance from any other town or thickly settled community; that the plant is run by machinery, and that accidents are liable to occur; that for the comfort, protection, and well-being of the employes, and as an auxiliary of the main enterprise of the corporation, plaintiff was engaged as physician and surgeon, at a fixed salary, as set forth in the complaint, and that plaintiff did serve defendant under said contract for a number of years. The second replication was in substance the same as the first, and the third contained substantially the same averments as replications 1 and 2, with the additional averment that under this system of protection the defendant company received monthly contributions from its employes, which money went into the defendant's treasury and was retained by it, and that this arrangement, together with the fact of plaintiff's employment to give medical attention, was known to and ratified by the defendant corporation.

To the plea of the statute of limitation the plaintiff replied that partial payments were made on the matters claimed in said counts, within the period of the statute of limitation.

To the sixth plea, to the effect that the contract sued on was not to be performed within one year from the date thereof, and was not in writing, the plaintiff replied that the contract was to continue so long as both parties were satisfied, no definite period being fixed for its termination, but that it could be terminated by either party at pleasure.

On the trial of the cause plaintiff insisted that he was employed to give medical and surgical attention to the employes of the defendant company at a salary of \$200 a month, and that it was agreed that \$50 per month of this salary should be retained by the defendant until the termination of the contract; that his work under the contract (which was made with the general manager of the company) began May 1, 1903, and continued until May 1, 1913; that payments were made to him monthly, and usually in the sum of \$150, but on two occasions the monthly payment was in the sum of \$175, and on four other occasions in the sum of \$200; that under the contract his services were to continue until the company became dissatisfied; and that no payments had been made on the \$50 per month held back, except as stated above. Plaintiff also testified to some offer of settlement. Defendant offered proof to show that the employment of plaintiff was at a fixed salary of \$150 per month, which had been fully paid, and that nothing more was due him. Plaintiff's account with defendant and checks payable to him by the company were offered in evidence.

On the submission of the cause to the jury a verdict for plaintiff in the sum of \$6,678.50 was rendered, and judgment was entered

accordingly. From this judgment the defendant appeals.

The bill of exceptions shows the following:

During the argument of counsel for plaintiff on the question of the admissibility of the answer to interrogatory 5, the jury being present, the counsel stated to the court in the presence of the jury that the answer to said interrogatory would disclose that the Jackson Lumber Company had collected fees from its employes, and had to its credit on this system of collections over \$7,000, which belonged to the plaintiff, and further that one item of the account shown on it was \$300 paid to W. O. Mulkey, attorney for the Jackson Lumber Company. And counsel for the defendant protested at that time against the statement thus made to the court in the presence of the jury as being improper.

During the argument of the case before the jury by the plaintiff's counsel, in the opening argument, he stated that there was shown that the Jackson Lumber Company collected from its employes a large sum of money for the payment of the plaintiff, and that the plaintiff was entitled to it. The defendant objected to the remark, and moved the court to exclude it, and the court excluded the remark, stating that the argument was not proper, whereupon the counsel for plaintiff stated that he did not wish to make an improper argument, and did not want to do wrong. Also in the opening argument, attorney for plaintiff stated that the Jackson Lumber Company, the defendant, was a large and powerful corporation, and that a judgment against it could not hurt it.

In the concluding argument, which was made by Hon. W. L. Parks, he often stated to the jury that the defendant was a large and powerful corporation, and on one occasion that the plaintiff was a poor man. The defendant objected to the latter statement, and the court sustained the objection without comment, whereupon counsel for plaintiff then stated that he would withdraw the statement as to plaintiff being a poor man, and asked the jury to look at him and determine for themselves his condition.

Counsel for the plaintiff, in his closing argument, stated that the plaintiff had an honest contract, and was entitled to the money he is suing for, and the defendant comes forward with the Jackson Lumber Company's methods to defeat an honest claim. Defendant objected as to the statement of the Jackson Lumber Company's methods, and the court sustained the objection. And then the attorney for the plaintiff stated that he would add "according to the evidence in this case."

W. O. Mulkey, of Geneva, and Steiner, Crum & Well, of Montgomery, for appellant. W. L. Parks and J. M. Prestwood, both of Andalusia, for appellee.

GARDNER, J. The plaintiff (appellee here) seeks to recover for services rendered

as a physician, to the employes of the defendant company, under contract for a fixed salary. The defendant is engaged in the operation of a sawmill and the manufacture of lumber at Lockhart, Ala., and as one of the defenses interposed pleaded that it is a corporation, and was not authorized by its charter to so contract for the services of a physician.

The substance of the plaintiff's first replication is set out in the statement of the case, and is to the effect that the defendant company, being engaged in the sawmill business in which it is necessary to engage a large number of operatives, and in which accidents are liable to occur, recognized that the comfort and health of its employes is an aid to such company in the accomplishment of the ends for which it was organized; and that a physician employed to attend them in case of sickness or accident is in a sense an auxiliary of the main enterprise of the corporation. The action of the court in overruling the demurrer to this replication is the first question pressed upon our attention by counsel for appellant.

The subject of ultra vires has been much discussed, and is one upon which great diversity of opinion has been expressed. As said by another:

"There is no clearly defined principle of law that determines whether the particular act is ultra vires or intra vires. The courts are becoming more liberal, and many acts which 50 years ago would have been held to be ultra vires would now be held to be intra vires."

The question for consideration is whether the contract with the plaintiff was within the implied or incidental powers of the defendant corporation. Mr. Cook, in his work on Corporations (vol. 2, p. 683), after calling attention to the fact that an ultra vires act is one beyond the express and implied powers of a corporation, states that an intra vires act is one which is within the express or implied powers of either the board of directors or a majority of the stockholders, and that an act is intra vires if it can be legally carried out by the directors or a majority of the stockholders. The author further says:

"Intra vires acts are frequently spoken of as matters concerning the 'internal management' of the corporation."

In the same volume (section 681) he states that the implied powers of a corporation are not limited to those which are indispensably necessary, but include those which are appropriate and suitable to carry out the express powers. A like rule is also declared by the Supreme Court of Wisconsin, in *Madison Plank Road Co. v. Watertown Co.*, 5 Wis. 173, in the following language:

"The rule is, that if the means employed are reasonably adapted to the ends for which the corporation was created, they come within its implied or incidental powers, though they may not be specifically designated by the act of incorporation."

To similar effect is the language of the Supreme Court of Maine, in *Flaherty v. Portland, etc., Soc.*, 99 Me. 253, 59 Atl. 58:

"The implied powers of a corporation are not limited to such as are indispensably necessary to carry into effect those which are expressly granted, but comprise all that are necessary, in the sense of being appropriate, convenient and suitable for such purposes, including the right of a reasonable choice of means to be employed. *Cyclopedia of Law*, vol. 10, p. 1097; 1 *Cook on Corporations*, § 3."

In the case of *Colorado Spgs. Co. v. Am. Pub. Co.*, 97 Fed. 843, 38 C. C. A. 433, it was said that the acts of a corporation are not ultra vires if "they had a natural and reasonable tendency to aid in the accomplishment of the objects for which the corporation was created." As illustrative of this rule the Supreme Court of Illinois (Cen. Lbr. Co. v. Kelter, 201 Ill. 503, 66 N. E. 543) held that a corporation organized for "the purchase and sale of lumber, and all adjuncts for carrying on a general lumber business," has the implied power to execute a bond, for the performance of a building contract, on the part of a contractor, if the bond is executed for the purpose of securing a sale of lumber to the contractor. See, also, *Green's Brice's Ultra Vires*, p. 86 et seq. By these quotations from other jurisdictions we do not intend to indicate approval of all that is therein said, but refer thereto as by way of illustration only.

The language of our own cases is not out of harmony with the general principles as above referred to. In *Chewacla Lime Works v. Dismukes & Co.*, 87 Ala. 344, 6 South. 122, 5 L. R. A. 100, the following words, pertinent to this question, are used:

"Any transaction \* \* \* not necessary or proper to enable the corporation to answer the purposes of its creation is void."

See, also, *Steiner & Lobman v. Steiner Land Co.*, 120 Ala. 128, 26 South. 494; *U. S. Fdy. Co. v. Bailey*, 69 South. 825.

In *Steiner v. Steiner Land Co.*, 120 Ala. 128, 26 South. 494, is the following:

"The general rule which prevails in this country is, that corporations created by an act of the Legislature, or organized under the general laws, can exercise only the powers expressly granted, the implied power to do all acts necessary to enable them to exercise the powers expressly granted, and such incidental powers as pertain to the purposes of their creation."

We have not overlooked the recent case of *A. G. S. R. Co. v. Loveman Co.*, 72 South. 311, where, in discussing the question of ultra vires, the following expression was used:

"Expressly authorized by the charter or is necessarily incident to the powers for carrying out the objects of the charter."

By the use of the words "necessarily incident," this court did not intend to indicate that such action should be indispensably necessary to the purposes of the corporation, but only that they should be necessary in the sense of being appropriate and suitable for

the purposes for which the corporation was organized. 10 Cyc. 1079.

Even in regard to municipal corporations this court has held that such corporations can exercise those powers expressly granted, and those, also, "necessarily or fairly implied in or incident to the powers expressly granted." *Cleveland Co. v. Greenville*, 146 Ala. 559, 41 South. 862.

[1] The defendant was engaged in the operation of a sawmill. We judicially know, as it is a matter of common knowledge, that in such an enterprise much machinery is used, that the employment of laborers is essential to its operation, and that accidents are likely to occur. Without laborers the corporation would be powerless to carry out the purposes of its creation. It is therefore necessarily interested in the welfare of its employes. Much depends upon their health and their contentment in the service, and to conserve their physical comfort tends to their efficiency, and the greater their efficiency the greater the profits to the defendant company. It could hardly be denied that a private corporation engaged in the manufacture of lumber could, if it saw fit, erect houses for the use of its employes and surround them with such sanitary conditions as would tend to promote their general and physical welfare, even though its charter might contain no such provisions. These are matters which relate to what might be termed the "internal management" of the corporation, with which, in the absence of fraud or unfair dealing, the courts as a rule do not interfere.

[2] The employment of a physician to look after the health of the employes is but in line with the suggestions above made, and concerns one of those questions of internal management which we think may be fairly incidental to the objects of the corporation's creation. By contracting for such medical attention the corporation is not engaging in any business other than that expressly authorized in its charter (section 233, Constitution 1901), but merely adopts this as one of the means of executing its express powers (and as to such means the corporation must be held to have a right of reasonable choice), which we think can be said in this instance to have had a very natural and reasonable tendency to aid in the accomplishment of the purpose for which it was created. We therefore conclude that the demurrer to the replication was properly overruled.

[3] The third replication contains substantially the same averments as those above noted, and, in addition to these, matters are alleged to show ratification of any acquiescence in the employment of plaintiff on the part of the manager and other officers of the corporation. It may be conceded, for the purposes of this case, that under the rule in this state, if the act was ultra vires the corporation it could not be the subject of ratifi-

cation. *A. G. S. R. R. Co. v. Loveman Co.*, supra; *Chewacla Lime Wks. v. Dupree*, supra. The demurrer was addressed to the replication as a whole, however, and that portion of the replication which we have just discussed was not subject to demurrer. Under such circumstances, therefore, the trial court will not be put in error for overruling the demurrer interposed to the replication as a whole. *Ansley v. Bank of Piedmont*, 113 Ala. 467, 21 South. 59, 59 Am. St. Rep. 122.

The replication to the plea of the statute of limitation alleges that partial payments were made on the matters set forth in the plea, in each of the years from 1903 to 1913, inclusive. The demurrer to this replication was properly overruled. *Steele v. Steele*, 64 Ala. 438, 38 Am. Rep. 15.

[4] After suit was brought and before the trial was had, the plaintiff removed from the state, and motion was made that he be required to furnish security for the costs, which motion was granted. Before the next term of the court plaintiff executed bond with security for the costs, but the amount of the bond was limited to \$150. At the next term, defendant moved to dismiss the cause for plaintiff's noncompliance with the order of the court as to giving security for costs. The court held that the bond was insufficient, but that plaintiff had "during the term," within which to comply with the said order. The motion was made on Monday, the first day of the term. On the day following the case was again called for trial, when plaintiff tendered to the clerk proper security for the costs, which was duly approved. Defendant's motion to strike the cause from the docket was overruled. Section 3690, Code 1907, provides that if such security be not given at or before the next term of the court, the suit must be dismissed. Here the security was given in time but in insufficient amount, and plaintiff was allowed by the court to file sufficient security during the term, which was done on the second day of the term. In this there was no reversible error.

[5] It is insisted that the affirmative charge was due defendant because of a variance between the contract sued on and that disclosed by the evidence. It is to be noted that the suit is for the recovery of money due on a contract fully executed, and that in such a case the same particularity of averment is not necessary as where the suit is for the breach of an executory contract. *Vincent v. Rogers*, 30 Ala. 471; *Boylston v. Sherran*, 31 Ala. 538; *Jones v. King*, 81 Ala. 285, 1 South. 591; *Birmingham & Atl. Ry. v. Maddox*, 155 Ala. 292, 46 South. 780.

[6] In counts C, D, and E, the plaintiff sought recovery for a balance due under contract with the defendant, for services fully performed, alleging that the compensation agreed on was \$200 per month. Plaintiff so testified on the trial; but he also stated that, while the agreement was to pay \$200,

it was further agreed that \$50 per month of this sum was to be retained by defendant, from the beginning of the employment until its termination, as a guarantee of efficiency in services to be rendered, and that this balance should be paid when the contract terminated. The variance here insisted on relates more to the mode of payment than to any essential term of the contract itself. The suit was for recovery on a contract fully performed, and we are of the opinion that the variance urged does not suffice to reverse the court below for the refusal of the affirmative charge.

It is further insisted that the defendant was due the affirmative charge for that the plaintiff failed to offer proof to establish the averments of his replication. While the evidence was meager in this respect, we are not persuaded that it was so lacking in proof to support the material averments of the replication as to withdraw the same from the jury's determination. Some of the matters alleged are of common knowledge, such as that, in the operation of a sawmill, the employees are subject to accident in the use of the machinery. 16 Cyc. 876.

[7] The evidence showed that the defendant corporation is engaged in the manufacture of lumber, and to that end is operating a sawmill at Lockhart, Ala.; and the courts take judicial knowledge of the location, as well as of the population, of the particular community. While the evidence was silent as to the number employed at this mill at Lockhart, it was sufficient to afford the jury the inference that a large number of laborers were engaged in defendant's employ. The question is, then, reduced to one of law, as to whether the defendant was in the exercise of an implied or incidental power in the employment of plaintiff as a physician to attend these laborers and their families. There was no error in the refusal of the affirmative charge on this theory.

[8] Motion was made for a new trial, and the ground urged upon us here is that the verdict was contrary to the weight of the evidence. The trial court had the witnesses before him and the advantage of observing their manner on the stand. The familiar rule under these circumstances, announced in *Cobb v. Malone*, 92 Ala. 630, 9 South. 738, is still in force and unaffected by recent legislative enactment. *Acts 1915, p. 722; Hackett v. Cash*, 72 South. 52; *Finney v. Studebaker*, 72 South. 55; *Hatfield v. Riley*, 74 South. 380.

Under the rule announced in *Cobb v. Malone*, supra, it is not the duty of the court to set aside the judgment merely because the verdict of the jury may not correspond with its opinion as to the weight and sufficiency of the evidence. A discussion of the testimony is unnecessary. It has been carefully examined, and we are not persuaded that a reversal of the cause should be award-

ed on the action of the court in denying the motion for a new trial.

[9] Objection to statements of counsel for plaintiff made in argument were interposed by the defendant and sustained by the court; but it is insisted that the statements were prejudicial, and the court should have gone further, and more promptly removed any impression which such argument might have made on the minds of the jury. No action of the court to this end was invoked by the defendant.

The question here involved was fully discussed in *B. R. & P. Co. v. Gonzalez*, 183 Ala. 273, 61 South. 80, Ann. Cas. 1916A, 543, and in the light of the rule there announced we are not persuaded that the judgment should be reversed on account of the matters here complained of.

We find no reversible error in the record, and the judgment is accordingly affirmed.

Affirmed.

ANDERSON, O. J., and MAYFIELD, SAYRE, SOMERVILLE, and THOMAS, JJ., concur. McCLELLAN, J., dissents, on the ground that the court erred in overruling the demurrer to the third replication.

#### On Rehearing.

GARDNER, J. [10] It is urgently insisted by counsel for appellant upon this application for rehearing that reversal of the cause should be rested upon the denial of the motion for a new trial. This insistence is based upon two grounds: First, because the verdict was contrary to the great weight of the evidence; and, secondly, on account of improper argument of counsel for the plaintiff upon the trial of the cause before the jury, which argument appears on page 76 of the record, and will be set out in the report of the case.

This court has held that no horizontal rule can be laid down embracing questions of this character, but each case must be determined upon the situation there presented, and due consideration should be given to the "general atmosphere" of the particular case. *B. R. L. & P. Co. v. Gonzalez*, 183 Ala. 273, 61 South. 80, Ann. Cas. 1916A, 543; *Moulton v. State*, 74 South. 454, present term.

In view of the result which has been reached upon this application, we deem it proper to enter into no discussion of the evidence in the cause. It has been carefully considered in connection with the argument of counsel to which reference is made above. Upon a reconsideration of this question, the court has reached the conclusion that a new trial should have been awarded the defendant, and that for its denial the judgment should be reversed. The writer and Chief Justice Anderson entertained a contrary view and so voted, but as a majority of the court, consisting of Justices Mayfield, Sayre, Somerville, and Thomas, are of the opinion that a new trial should be granted, we are

not inclined to record a dissent, and have concluded to yield our view upon the question to that of the majority.

The application for rehearing is granted, the judgment of affirmance set aside, and the cause is reversed and remanded.

Reversed and remanded.

MCLELLAN, J. (concurring). Upon original submission a majority of the court affirmed the judgment below. I was unable to give my assent to that conclusion because, as it seemed to me, error was committed by the trial court in overruling defendant's (appellant's) demurrers to replications interposed by the plaintiff to plea 3. On rehearing the order of affirmance has been annulled and a reversal of the judgment entered, but, as appears, upon a different finding of error from that which, in my opinion, underlay the judgment below.

The complaint as amended contained some of the common counts, and also special counts declaring on a contract of employment between plaintiff and defendant, whereby plaintiff was to serve and did serve defendant as a physician to and for its employés, at an agreed compensation. Among the common counts was one (lettered A) whereby the claim was for money received by the defendant for the use of the plaintiff. It does not appear, so far as I have been able to discover, what disposition, if any, was actually made of this count. Whether the issue tendered by it was, in fact, submitted to the jury is not shown. The pleas, originally filed on November 17, 1913, do not appear to have been replied to the amended complaint, though it is fairly certain from the whole record that the trial was had on issues attributable alone to matters set forth in the original pleas. Plea 3 was thus framed:

"The defendant was without authority to enter into the contract, upon which the plaintiff bases his right of action, the defendant being a corporation and not having authority by its charter to employ a physician, or make the contract which is the basis of the suit."

No demurrer to this plea was filed. For the reasons the writer set down in his individual opinion in *Marengo Abs. Co. v. Hooper*, 174 Ala. at pages 507-509, 56 South. 580 (the views there expressed being based in part upon decisions of this court in *Savage v. Walshe*, 26 Ala. 619, 632, *Broad Street Hotel Co. v. Weaver*, 57 Ala. 26, and also *Thompson on Corp.* § 1237, and *S. & M. R. R. Co. v. Anderson*, 51 Miss. 829, 834), this plea was but the legal conclusion, the legal deduction, of the pleader, and was, in my judgment, subject to the demurrer on that account (16 Ency. Pl. & Pr. p. 564; 12 Ency. Pl. & Pr. p. 1024 et seq.; 31 Cyc. p. 49 et seq.; *Life Ass'n v. Cook*, 20 Kan. 19; *Chewacla Lime Works v. Dismukes*, 87 Ala. 344, 346, 6 South. 122, 5 L. R. A. 100; 10 Cyc. p. 1096). Reference is thus made to the sufficiency of this plea, not because any error is predicated of the ruling with respect to its sufficiency,

but because subsequent pleading of which review is required illustrates the at least confusing effect of permitting the defendant to assert *ultra vires* as a conclusion of law, instead of exacting the appropriate pleading of the corporation's charter from which alone its powers and their extent may be judicially ascertained and determined. While evidence may be taken by the court itself to advise its judgment in performing the court's function in interpreting and construing the corporate charter, the inquiry of corporate power to do an act or to consummate a contract can never be considered or tried on evidence presented to the jury. The question, when properly raised, is purely one of law for the court and not of fact for the jury. Authorities noted in 174 Ala. pp. 507-509, 56 South. 580.

To plea 3, above quoted, the plaintiff interposed special replications only. No general replication, no general traverse of that plea, was filed. Code, § 5338. According to elementary rules of pleading the effect of the interposition of special replications only to plea 3 was to confess the averments of plea 3, and to relegate and confine the special replications to the category of pleading in confession and avoidance of the matter undertaken to be set forth as a bar to recovery by plea 3. *Culberson v. Amer. Trust Co.*, 107 Ala. 457, 463, 19 South. 34; *Highland Avenue R. R. Co. v. South*, 112 Ala. 642, 653, 654, 20 South. 1003; *Bridges v. Tenn. Coal Co.*, 109 Ala. 287, 293, 19 South. 495; *Zirkle v. Jones*, 129 Ala. 444, 449, 29 South. 681; Code, § 5338; 6 May. Dig. pp. 721, 722.

Since it is settled in this jurisdiction by numerous decisions that a corporation is never estopped to assert *ultra vires*, even though a benefit has accrued under the engagement involved, it is manifest that the special replications cannot be soundly interpreted as undertaking to set up an estoppel of the corporation to plead *ultra vires* against a recovery on counts declaring or based upon an express contract between the plaintiff and the defendant, especially when, as is entirely clear, the failure to interpose any character of denial of the averments of plea 3, and the interposition of special replications alone, effected, as a matter of law, the confession that the corporation was without authority under its charter to engage as the special counts of the complaint declare. It is further obvious that the special replications, in so far as their effect may be attributed an effort to avoid plea 3 as an answer to the special counts declaring on the contract, were but an effort to set up in avoidance of the effect of that plea acts of the officers of the corporation to estop the corporation from asserting its confessed want of power to contract as the special counts aver. Of course, it is not possible, under our decisions, for any act of an officer to bind the corporation to the performance of an engagement to make or effect which the cor-

poration is without power to do. The demurrers to the replications taking this objection thereto were due to be sustained; and the grounds specifying the further objection that officers of a corporation are without power to ratify the ultra vires act of the corporation were likewise well taken. I have not overlooked the suggestion in brief for appellee, in response to the appellant's application for rehearing, that plea 3 should be interpreted as averring the absence of express power in this corporation to make the contract declared on in the special counts of the complaint; this as the premise for a contention that such a limitation of the plea's averment would serve to justify and to vindicate the plaintiff's replications as asserting the existence and the exercise of the incidental powers described in the replications. I cannot read plea 3, above quoted, to any such limited effect. It is broad enough in its averments to deny the existence of all power, express, incidental, or implied, to make the contract declared on.

Under our practice, a count, plea, or replication is an entity in pleading, and must be construed accordingly. A pleader, except in rare cases, may and does by the force of his allegation thereof constitute that material which otherwise might be immaterial. See *Highland Avenue R. R. Co. v. South*, 112 Ala. 642, 20 South. 1006. If the expression in *Bain v. Wells*, 107 Ala. 570, 571, 19 South. 774 (sixth headnote) can be regarded as a deliberate ruling by the court that a demurrer will lie to a part of a plea, it is manifestly unsound as shown by repeated adjudications here; among which see *Ansley v. Bank*, 113 Ala. 477, 478, 21 South. 59, 59 Am. St. Rep. 122—a decision opposed in this particular to *Bain v. Wells*, supra, on which counsel for appellant there relied as shown in the reproduction of the brief on page 473 of 113 Ala. The method for eliminating immaterial matter from a plea or replication, is by motion to strike. *Ansley's Case*, supra; *Walter v. Railroad Co.*, 142 Ala. 474, 482, 39 South. 87, among others.

Recurring to count A, as before stated: If it appeared from the record that plea 3 had been interposed to count A, there might have been ground for the contention that the adverse ruling on the appellant's demurrer to the replications was error without injury, though this is, in my opinion, very doubtful. It appears from the defendant's answers to interrogatories, offered in evidence, that the fund out of which a doctor to serve the employés of the defendant was to be paid was created through the payment to the defendant of monthly installments contributed by the employés, and was for the purpose of affording the employés medical attention, etc., while in the service of the defendant. The fund thus created was a trust fund, having impressed upon it the limitation fixed by the

purpose inspiring its contribution and payment to the defendant. "Where one man has money in his hands, which ex equo et bono belongs to another, if there be no contract, modifying or controlling the general liability to pay, the person entitled to the money may recover in an action for money had and received to his use." Third headnote to *Hitchcock v. Lukens*, 8 Port. 333; *Davis v. Orme*, 30 Ala. 540. If the express contract of employment declared on in the special counts or in the common counts based upon an express contract was void because the corporation was without power to make the contract with the plaintiff, it would seem that the law would imply a promise on the part of the agent—corporation—to deliver that much of the fund to which on a quantum meruit the plaintiff was entitled, thus eliminating from consideration or availability as a defense the doctrine of ultra vires. The decision of this court in *Westinghouse Machine Co. v. Wilkinson*, 79 Ala. 312, may be distinguished upon the ground that there the action was on the contract, and not expressed in the common count which, in its turn, is a declaration, in effect, upon a promise implied by law, not created by the express agreement of the parties.

In reviewing this record, I am unable to find support in the evidence for averments made material by their incorporation in the replications. I am not able to exercise judicial knowledge to supply the deficiency in the proof of these averments.

Upon the considerations indicated, I concur in the reversal of the judgment.

(73 Fla. 325)

GULF, F. & A. RY. CO. v. KING.

(Supreme Court of Florida. Feb. 9, 1917.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §87—EMPLOYERS' LIABILITY ACT—CONSTRUCTION.

Chapter 6521, Acts 1913, defines and enlarges the liability of employers for injuries to employés engaged in the hazardous occupations therein stated, and the language of the statute should be given its proper meaning and effect.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 138.]

2. MASTER AND SERVANT §180(1)—INJURY TO SERVANT—HAZARDOUS OCCUPATION—"RAILROADING."

The word "railroading," as used in chapter 6521, Acts 1913, is definite and comprehensive, and includes "work upon a railroad" and "the business of constructing railroads."

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 359, 368.]

3. MASTER AND SERVANT §180(1)—INJURY TO SERVANT—"HAZARDOUS OCCUPATION"—RAILROADING.

The work of hoisting piles with a steam crane to be used in constructing a railroad wharf is a part of the construction of a railroad, and is a hazardous occupation within the provisions of chapter 6521, Acts 1913.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 359, 368.]

**4. MASTER AND SERVANT §180(1)—INJURY TO SERVANT—FELLOW SERVANTS—NEGLIGENCE—STATUTE.**

Under section 3150 of the General Statutes of 1906, an employé who is not "without fault or negligence" cannot recover for damages "caused by negligence of another employé," while under chapter 6521, an employé who is "injured in part through his own negligence and in part through the negligence of another employé," may recover damages from the employer unless both employés were fellow servants and they were "jointly engaged in performing the act causing the injury."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359, 368.]

**5. MASTER AND SERVANT §180(1)—FELLOW SERVANTS—NEGLIGENCE—"JOINTLY ENGAGED IN PERFORMING THE ACT CAUSING THE INJURY."**

A fireman of a steam engine who has no part with the engineer in operating a steam crane attached to the engine and used in hoisting logs is not "jointly engaged in performing the act" of hoisting the logs so as to bar a recovery from the employer for injuries to the fireman caused by the negligence of the engineer in hoisting the logs by means of the steam crane.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359, 368.]

Taylor and Ellis, JJ., dissenting.

Error to Court of Record, Escambia County; Kirk Monroe, Judge.

Action by James W. King against the Gulf, Florida & Alabama Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Blount & Blount & Carter, of Pensacola, for plaintiff in error. C. M. Jones and Jno. C. Avery, both of Pensacola, for defendant in error.

**WHITFIELD, J.** The declaration filed herein by King against the railway company, on which verdict and judgment were rendered, is as follows:

"The plaintiff, by his attorneys, sues the defendant for that, to wit, on the 15th day of December, 1914, to wit, in the county and state aforesaid, the said defendant, by means of certain machinery which it was then and there operating, was engaged in hoisting wooden piles out of the water alongside of defendant's wharf and depositing them upon the land; that the machinery so used consisted of an engine and boiler, cranes, booms, wire ropes, winches and levers, by means of which such piles were taken hold of as they lay in the water alongside the defendant's wharf and hoisted up therefrom and then swung by means of said appliances and machinery to and over a certain place where they were to be deposited; that the plaintiff was then and there an employé of the defendant as fireman to fire the said engine by means whereof the said work was by the defendant accomplished, and was then and there actually engaged in the performance of such duty; that in hoisting by means of said machinery and appliances a certain wooden pile from the water and swinging it into place where it was to be deposited, the defendant then and there carelessly and negligently swung the said pile upon and against the right leg of the plaintiff, who was then and there in the exercise of due care upon his part, and the result was that his leg was jammed, crushed and lacerated, on account whereof he was compelled to and did have the same treated by doctors and nurses for many

days at a hospital at great expense, and plaintiff was, by reason of such injury, subjected to and suffered great physical pain and mental distress; and the said plaintiff further avers that he has never wholly recovered from the injury so inflicted, but has been permanently injured in so much that he will never have the full use of his said leg, and will never be able to work in the same manner, or as efficiently as before such injury, and he has sustained other great and grievous injuries.

"To plaintiff's damage of fifteen thousand (\$15,000.00) dollars, and therefore he sues."

Issue was joined on the following pleas:

"(1) It denies that this defendant on the day mentioned in the declaration or at any other time was operating certain machinery consisting of the appliances mentioned in the declaration and engaged in hoisting wooden piles out of the water alongside the defendant's wharf and depositing them upon the land as alleged in said declaration.

"(2) It denies that plaintiff was an employé of defendant as fireman or in any other capacity at the time of the alleged injury to the plaintiff as alleged in said declaration.

"(3) It denies that the plaintiff was at the time of the alleged injury actually engaged in the performance of any duty to the defendant as its employé as alleged in the declaration.

"(4) It denies that at the time of plaintiff's alleged injury he was then and there in the exercise of due care on his part as alleged in said declaration.

"And for further plea to the first count the defendant says:

"(1) It denies that the defendant in hoisting by means of the machinery and appliances mentioned in the declaration a certain wooden pile from the water and swinging it in the place where it was to be deposited carelessly and negligently swung said pile upon and against the plaintiff as alleged in the first count of the declaration."

Verdict and judgment for \$1,750 were rendered for the plaintiff, and defendant took writ of error.

It appears that the plaintiff below was at the time of the injury engaged as fireman of an engine which was mounted on a railroad flat car and run upon railroad tracks to operate a crane attached to the engine. When the injury occurred long wooden piles or logs were being lifted by the steam crane from the water alongside the defendant's wharf and placed on the land near the side of the flat car on which the engine and crane were mounted. The plaintiff while standing on the running board attached to the side of the flat car on which the engine and crane were mounted was injured by the end of a pile or log as it was being hoisted. Liability of the defendant is predicated upon the alleged negligence of the engineer in operating the steam crane to hoist the pile or log.

It also appears that the construction of the railroad on which the injury occurred was not yet complete, and that the plaintiff and the engineer of the steam crane had at different times been employed in different occupations by a construction company in building the railroad and by the railroad company as their services were engaged by the one or the other. Among the contentions for the plaintiff in error it is argued that the evi-



dence shows that both the plaintiff and the engineer were employed by the construction company at the time of the injury. While there is positive evidence that would have warranted a finding by the jury that the plaintiff and the engineer were both employed by the construction company at the time of the injury, yet there is evidence on which a contrary finding may be predicated. The intimate relations and the course of conduct between the railroad company and the construction company and the circumstances of the employment constitute a legal basis for a finding by the jury that both the plaintiff and the engineer were employed by the defendant railroad company at the time of the injury.

It is contended for the plaintiff in error that section 3150 of the General Statutes of 1906 is applicable to this case. Such section is as follows:

"If any person is injured by a railroad company by the running of the locomotives or cars, or other machinery of such company, he being at the time of such injury an employé of the company, and the damage was caused by negligence of another employé, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to a recovery. No contract which restricts such liability shall be legal or binding."

Assuming from the evidence that the plaintiff, a fireman, was himself negligent in being on the running board of the flat car on which the engine and crane were operated instead of being at the fire box of the engine, where he would not have been injured, it is argued that as "the damage was caused by negligence of another employé," the engineer, and as the plaintiff was not "without fault or negligence," he cannot recover under the above-quoted statute in view of the holdings in *Florida Cent. & P. R. Co. v. Mooney*, 40 Fla. 17, 24 South. 148; *Atlantic Coast Line R. Co. v. Ryland*, 50 Fla. 190, 40 South. 24; *Ryland v. Atlantic Coast Line R. Co.*, 57 Fla. 143, 49 South. 745.

Chapter 6521, Acts 1913, is as follows:

"An act to fix the liability of persons, firms and corporations engaged in certain hazardous occupations in this state for injuries to and death of their agents and employes in certain cases, and exempting money due or likely to become due on account of liability growing out of this act from garnishment, execution and other processes, and to declare illegal and void contracts, contrivances and devices relieving or exempting such persons, firms and corporations from the liability prescribed by this act.

"Be it enacted by the Legislature of the State of Florida:

"Section 1. That this act shall apply to persons, firms and corporations engaged in the following hazardous occupations in this state; namely railroading, operating street railways, generating and selling electricity, telegraph and telephone business, express business, blasting, and dynamiting, operating automobiles for public use, boating, when boat is propelled by steam, gas or electricity.

"Sec. 2. That the persons, firms and corporations mentioned in section one of this act shall be liable in damages for injuries inflicted upon their agents and employes, and for the death

of their agents and employes caused by the negligence of such persons, firms, and corporations, their agents and servants, unless such persons, firms and corporations shall make it appear that they, their agents and servants have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against such persons, firms and corporations.

"Sec. 3. That the persons, firms and corporations mentioned in section one of this act shall not be liable in damages for injuries to their agents and employes, or for the death of such agents and employes, where same is done by their consent, or is caused by their own negligence. If the employes or agents injured or killed, and the persons, firms and corporations mentioned in section one of this act, or their agents and employes are both at fault, there may be recovery, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to both, provided that damages shall not be recovered for injuries to an employé injured in part through his own negligence and in part through the negligence of another employé, when both of such employes are fellow servants, where the former and the latter are jointly engaged in performing the act causing the injury and the employer is guilty of no negligence contributing to such injury.

"Sec. 4. That the doctrine of assumption of risk shall not obtain in any case arising under the provisions of this act, where the injury or death was attributable to the negligence of the employer, his agents or servants.

"Sec. 5. That the writ of garnishment, execution of other processes shall not issue out of any court to reach any money due or likely to become due as damages under the provisions of this act.

"Sec. 6. That any contract, contrivance or device whatever, having the effect to relieve or exempt the persons, firms and corporations mentioned in section one of this act, from the liability prescribed by this act, shall be illegal and void.

"Sec. 7. This act shall take effect upon its becoming a law.

"Approved June 7, 1913."

[1, 2] This statute was intended to define the liability of employers for injuries to employes engaged in the hazardous occupations therein stated. Among these occupations is that of "railroading." While chapter 6521, Acts 1913, relates only to injuries to employes, yet in so far as it conflicts with sections 3148, 3149, and 3150, the former supercedes the latter, and chapter 6521 should be applied in cases covered by it.

The Century Dictionary defines "railroading" to mean: "The management of or work upon a railroad or railroads; the business of constructing or operating railroads (U. S.)." Webster's International Dictionary of the English Language (1916) defines "railroading" to mean: "The construction of, or work upon, a railroad. Colloq. U. S."

The manifest intent of chapter 6521, Acts 1913, is to extend and broaden the liability of employers for injuries to employes engaged in certain hazardous occupations. This enlargement applies to employes of railroad companies that prior thereto were covered by sections 3148, 3149, and 3150 of the General Statutes of 1906, which sections were originally enacted in 1891. The act of 1891, sections 3148, 3149, and 3150, General Statutes of 1906, was confined to "damage done \* \* \*

by the running of the locomotives, or cars, or others machinery of" "a railroad company." Chapter 6521 applies to "damages for injuries inflicted upon \* \* \* agents and employés," "caused by the negligence of \* \* \* persons, firms, and corporations, their agents and servants." And the terms of the latter act, read in the light of organic limitations, impose a liability for "injuries inflicted" upon an employé by the negligence of the employer or his servant or agents while the employé is engaged in the "hazardous occupations" named in the statute. The mere fact that the statute does not cover all hazardous occupations does not deny the equal protection of the laws, where there is no palpably arbitrary and oppressive discrimination in the classification and regulations made by the statute.

As the act of 1913 was designed to extend and not to curtail the liability of employers to employés engaged in hazardous occupations, the language used should be given its proper meaning and effect. The terms "engaged in" "railroading" by "persons, firms and corporations" are quite as definite as, and are much more comprehensive in their scope, meaning, and operation than the restricted terms "the running of the locomotives, or cars or other machinery of" "a railroad company."

The word "railroading" was, when used in the statute, defined by standard authorities to mean "work upon a railroad," and "the business of constructing railroads."

[3] The work of hoisting piles with a steam crane to be used in constructing a railroad wharf is a part of the construction of a railroad; and it is manifestly a "hazardous occupation." In these circumstances, the terms of the act of 1913 clearly apply to the employer's liability to its employés in this class of cases.

The obvious purpose of chapter 6521, Acts 1913, is to extend the liability of employers for injuries received by employés while engaged in the stated hazardous occupations, to modify the effect of contributory negligence, and to abolish the doctrine of assumed risk in cases covered by the act.

[4] Under section 3150 of the General Statutes of 1906, an employé who is not "without fault or negligence" cannot recover for damages "caused by negligence of another employé," while under chapter 6521, an employé who is "injured in part through his own negligence and in part through the negligence of another employé," may recover damages from the employer, unless both employés were fellow servants and they were "jointly engaged in performing the act causing the injury."

[5] If it be rightly assumed from the evidence and from the amount of the verdict that there was some appreciable contributory negligence on the part of the plaintiff, and even though the engineer of the defendant, whose negligence is stated to have been the

proximate cause of the plaintiff's injury, and the plaintiff, were fellow servants of the defendant, they were not "jointly engaged in performing the act causing the injury," therefore recovery by the plaintiff is permitted by the present statute, even though the employer was guilty of no negligence contributing to the injury. In "performing the act" of hoisting the pile or log, which caused the injury, the plaintiff was not "jointly engaged" with the engineer. The plaintiff was fireman for the engine, he had no part in the operation of the crane or in the movement and placing of the piles or logs.

There is substantial evidence upon which the jury could under the statute legally have found negligence of the defendant as alleged, and there is nothing to indicate that the jury were not governed by the evidence.

No prejudicial or reversible errors appear, and the judgment is affirmed.

BROWNE, C. J., and SHACKLEFORD, J., concur.

ELLIS, J. (dissenting). I think that chapter 6521, Laws 1913, extends the liability of persons engaged in certain hazardous occupations, for injuries received by their employés, but it was not intended by that act to abolish the fellow-servant doctrine. That doctrine has its basis in public policy, it rests upon the theory that servants engaged in a common or general employment should be watchful of each other to the end that carefulness in the performance of their duties may be promoted. The safety and welfare of the public is in a large measure secured by this rule, especially in this progressive age where steam, electricity, and other means for developing the greater power necessary to carry on the commerce of the day are utilized to operate the powerful machinery used.

The disastrous consequences to human life and to property which may at any time result from the careless operation of machinery, particularly in places to which the people have been drawn by their business interests, is too often manifested; the numerous "accidents" occurring in the operation of railroads and street car lines alone show to what a very great extent the public must depend upon the efficiency, skill, and carefulness of the men engaged in the actual handling of the machinery. It is important, therefore, that every means available, every reasonable precaution within the range of legislative activity, should be taken to secure on the part of men engaged in such occupations that degree of skill, efficiency, and carefulness that will reduce injury to life and property from the operation of such machinery to a minimum. The experience of many generations has proven that the fellow-servant doctrine makes for the accomplishment of that act.

The Legislature, however, by the act referred to has seen fit to narrow that doctrine

and reduce its scope from the common employment in which the employé may be engaged to the "act causing the injury"; holding the employer liable in all cases of injury to employés caused by the negligence of a fellow servant except where the injured employé is "jointly engaged" with his negligent fellow servant in "performing the act causing the injury" and is himself guilty of negligence.

The construction which the majority opinion places upon the words "act causing the injury," which appear in the statute, to all practicable purposes fritters away the substance of that salutary doctrine to a mere shadow. It practically removes from employés, even where they are engaged together in the particular work, all motive for co-operation, watchfulness of each other's movements, and regard for each other's skill, efficiency, and care. It practically relieves an employé from exercising that watchfulness over his coemployé's work which experience has taught is so necessary to protect the lives of the innocent from carelessness and inefficiency in the operation of powerful machinery.

The word "act" in the phrase "act causing the injury" should not be given that interpretation which narrows it to the particular negligent act resulting in injury, but should be taken to mean the act in which the employés were jointly engaged. As in the case at bar, the act in which the fireman and engineer were "jointly engaged" was the operation of a steam derrick.

In the operation of a railroad locomotive the engineer and fireman are jointly engaged, and if injury to the fireman results from the negligent handling of the machinery of the locomotive, the only question in a suit by him for damages against his employer would be whether he was negligent also. If he was also negligent, he would nevertheless be permitted to recover under the rule announced in the majority opinion, although the lives of the passengers on the train were in a large measure intrusted to his carefulness and prudence as well as that of the engineer.

The act should be construed in the interest of the people, so as to promote their safety and guard them as much as possible from the carelessness and inefficiency of men employed in hazardous occupations, and not so as to place a premium upon inattention and negligence on the part of those so employed which may result in injury to others.

TAYLOR, J. (dissenting). I agree with Mr. Justice ELLIS in his dissenting opinion, but go further in my construction of the words in the act: "Jointly engaged in performing the act causing the injury." My view is that the fellow servants included in the quoted words are all coemployés who are there present doing anything or part of anything

that contributes to the bringing about or production of the immediate act that causes the injury.

Illustration: In this case we had the fireman (the plaintiff) producing the steam or motive power by which the log that hurt him was moved at all, the engineer who manipulated the steam engine and ropes and tackle that hoisted the logs from the water, and another employé or two in boats adjusting the hooks into the logs by which they were hoisted. In the absence of the particular work that each of them did there could not have been a like accident. My view is that all of these employés were, within the words of the statutes, fellow servants who were conjointly engaged in the performance of the act that caused the injury.

(73 Fla. 269)

# ATLANTIC COAST LINE R. CO. v. HOLLIDAY.

(Supreme Court of Florida. Feb. 7, 1917.)

(Syllabus by the Court.)

## 1. APPEAL AND ERROR ⇨597(2), 702—WRIT OF ERROR—DISMISSAL—MOTION.

Where a writ of error purports to be taken to a final judgment, and no such final judgment as will support a writ of error appears in the transcript, the appellate court should dismiss such writ whether a motion is made for that purpose or not; but, in order to warrant the court in acting *ex mero motu* in the matter, such insufficiency or invalidity must appear on the face of the judgment itself or be affirmatively shown by the transcript; if evidence aliunde is necessary, the opposing party should file a motion to dismiss and introduce such evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2632, 2633, 3137-3141.]

## 2. JUDGMENT ⇨282—REQUISITES—SIGNATURE.

In this state there is no statute or rule of court requiring each separate judgment rendered in open court in term time to be signed either by the judge or clerk.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 554-556.]

## 3. MINUTE BOOKS—SIGNATURE BY JUDGE—STATUTE.

Section 1831 of the General Statutes of 1906 provides that the clerk of the circuit court "shall keep minute books, in which he shall keep regular and fair minutes of all the proceedings of the circuit court, and of the judge, in term or vacation, which shall be signed by the judge before the adjournment of each term."

## 4. JUDGMENT ⇨278—ENTRY—PRACTICE.

The better practice, as a general rule, is for the entry of a judgment rendered in term time to follow the verdict in the minutes of the court, as the date thereof would then be readily apparent, which is important, as section 1699 of the General Statutes of 1906 provides that all writs of error to judgments in civil actions shall be sued out and taken within six months from the date of such judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 546-551.]

## 5. JUDGMENT ⇨270—RENDITION—ENTRY.

A judgment in an action at law is rendered when it is entered or recorded in the minutes of the court during term time, or when in va-

cation it is put in form for such entry or record and is signed by the judge.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 501-503.]

#### 6. APPEAL AND ERROR ¶184(2)—WRIT OF ERROR—FINAL JUDGMENT.

Where the transcript shows that a case came on for trial before a jury on the 3d day of January, 1916, that a verdict was returned therein on the 6th day of such month, that the bill of exceptions therein was settled and signed on the 29th day of April, 1916, that a final judgment in sufficient form was rendered and entered in the minutes of the court, but it does not appear on what day or month such judgment was rendered or entered, and that a writ of error to such judgment was sued out on the 10th day of April, 1916, this judgment is such a final judgment as will support the writ of error, and the appellate court will not dismiss such writ of error *ex mero motu*.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 893.]

#### 7. ATTORNEY AND CLIENT ¶112—ENTRY OF JUDGMENT—DUTY.

It is the duty of an attorney at law to take all such steps as may be necessary for the due entry and enrollment of a judgment to which his client is entitled; and his neglect of such duty may render him liable for any loss sustained by the client.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 224-227.]

#### 8. APPEAL AND ERROR ¶761—ASSIGNMENTS OF ERROR—ARGUMENT.

Where one of the assignments of error is based upon the overruling of the demurrer to the declaration, the better practice is for the plaintiff in error to discuss such assignment first in his brief for the reason that, where there is no sufficient declaration in a case, and a demurrer should have been sustained thereto, the other questions in the record are not open for the consideration of the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3096.]

#### 9. APPEAL AND ERROR ¶725(2) — ASSIGNMENTS OF ERROR — ARGUMENT — ABANDONMENT.

While an assignment of error based upon the overruling of the demurrer interposed to the declaration is not required to designate or specify the particular grounds of the demurrer relied on, the plaintiff in error will be confined to the grounds stated in the demurrer and argued in the appellate court, the grounds thereof not argued being treated as abandoned, the only exception thereto being where there is an omission in the declaration of allegations of substantive facts which are essential to a right of action, so that the declaration wholly fails to state a cause of action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3004.]

#### 10. NEGLIGENCE ¶108(1) — ACTIONS—ALLEGATIONS OF PLEADING.

In actions for negligent injuries it may be necessary to allege only the relations between the parties out of which the duty to avoid negligence arises, and the act or omission that proximately caused the injury, coupled with a statement that such act or omission was negligently done or omitted.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 174, 180.]

#### 11. PLEADING ¶11 — DECLARATION — ULTIMATE FACTS.

A declaration should contain sufficient allegations of all the facts that are necessary to

state a cause of action. As a general rule, only ultimate facts need be alleged.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 31.]

#### 12. WITNESSES ¶270(1) — CROSS-EXAMINATION—COLLATERAL MATTERS.

Inquiry into collateral matters, on the cross-examination of a witness, should not be permitted unless there is reason to believe that it may tend to promote the ends of justice and it seems essential to the true estimation of the testimony of the witness by the jury.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 926, 955.]

#### 13. WITNESSES ¶405(1) — CROSS-EXAMINATION—DISCREDITING TESTIMONY.

The evidence adduced in an action should be confined to the issues, and a witness cannot be cross-examined as to any fact which is collateral or irrelevant to the issue merely for the purpose of contradicting him by other evidence if he should deny it, thereby to discredit his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1273, 1275.]

#### 14. WITNESSES ¶269(1) — CROSS-EXAMINATION—SCOPE.

No error is committed by the trial court in refusing to permit a witness, on his cross-examination, to answer a question which is not in cross of any matters elicited on the direct examination, and when the answer thereto, whichever way it might be, would not tend to prove the issues as made by the pleadings.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 949.]

#### 15. EVIDENCE ¶99—EXAMINATION — QUESTIONS IN GENERAL.

Objections are properly sustained to questions which seek to elicit testimony outside of the issues in an action.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 123, 137-143.]

#### 16. APPEAL AND ERROR ¶1064(4), 1067 — HARMLESS ERROR—INSTRUCTIONS.

Technical errors either in the giving of charges or instructions or in the refusal of requested instructions will not be sufficient to work a reversal of the judgment, if it appears that such errors could not reasonably have been prejudicial to the plaintiff in error and did not deprive it of any fundamental right to which it was entitled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4224, 4229; Trial, Cent. Dig. § 525.]

#### 17. EVIDENCE ¶29 — JUDICIAL NOTICE — STATUTE.

Even though both the plaintiff and the defendant ignore a statute and proceed as though such statute did not exist or had no applicability, and fail to bring the same to the attention of the trial judge, by whom it was also evidently overlooked, if such statute is applicable and controlling, it is the duty of an appellate court to take judicial cognizance of it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 36, 37, 39, 43-46, 48.]

#### 18. APPEAL AND ERROR ¶1062(5) — HARMLESS ERROR—TRIED ON ERRONEOUS OR IMMATERIAL ISSUE.

Notwithstanding that an action at law may have been tried in part upon an erroneous or immaterial issue, such immaterial issue will not work a reversal of the judgment rendered against a defendant, when it appears that such immaterial issue was brought about by the filing of a plea by the defendant, upon which the plaintiff joined issue, and that the case was also tried upon other issues which were material

and relevant, that the rights of the defendant were not thereby prejudiced, and that the rights of the parties litigant could be and were determined upon the other issues which were submitted to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4218.]

# 19. STATUTORY PROVISIONS.

Chapter 6521, Acts 1913, defines and enlarges the liability of employers for injuries to employes engaged in the hazardous occupations therein stated, and the language of the statute should be given its proper meaning and effect.

## 20. MASTER AND SERVANT §180(4) — HAZARDOUS OCCUPATION—"ENGAGED IN RAIL-ROADING."

The term "engaged in \* \* \* railroad-ing," as used in chapter 6521 of the Laws of Florida (Acts 1913, vol. 1, p. 383), is sufficiently comprehensive to apply to the liability of a railroad company to an employe whose duty it was under the terms of his employment to care for and look after a large number of artificial lights, situated in the yards and between and adjacent to the tracks of such railway company, and to see that such lights were kept burning and the lamps thereof properly filled in the daytime and in the nighttime.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 363-366.]

For other definitions, see Words and Phrases, First and Second Series, Engaged in Operation of Railroad.]

## 21. MASTER AND SERVANT §180(1) — MASTER'S LIABILITY—FELLOW SERVANTS.

Under section 3150 of the General Statutes of 1906, an employe who is not "without fault or negligence" cannot recover for damages "caused by negligence of another employe," while under chapter 6521, an employe who is "injured in part through his own negligence and in part through the negligence of another employe" may recover damages from the employer, unless both employes were fellow servants and they were "jointly engaged in performing the act causing the injury."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359, 368.]

## 22. MASTER AND SERVANT §180(1)—RECOVERY FOR INJURY.

Even if an employe of a railroad company, whose duty it was under the terms of his employment to care for the artificial lights of such company situated in the yards, and the conductor and engineer engaged in operating a train of the railroad company could be said to be fellow servants, such fact would not preclude such employe from recovering damages for personal injuries inflicted on him through the negligence of the railroad company, even if the proofs adduced established the fact that such employe's own negligence contributed in part to such injury, when such conductor and engineer and the plaintiff employe were not "jointly engaged in performing the act causing the injury."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359, 368.]

## 23. MASTER AND SERVANT §204(1)—ASSUMPTION OF RISK.

Where chapter 6521 of the Laws of Florida (Acts 1913, vol. 1, p. 383) controls and is applicable in an action, assumption of risk is not permissible as a defense, being expressly prohibited by section 4 of such chapter.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 544.]

## 24. APPEAL AND ERROR §1001(1)—VERDICT —SUFFICIENCY OF EVIDENCE.

When there is substantial legal evidence to support the verdict, and there is nothing to

indicate that the jury misapplied the law, and it does not appear by an overwhelming preponderance of the weight of the evidence or otherwise that the jury were not governed by the evidence in making their finding, the appellate court will not reverse the judgment on the ground that the verdict is not supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3933.]

## 25. TRIAL §143 — PROVINCE OF JURY —WEIGHT OF EVIDENCE.

The credibility and probative force of conflicting testimony are for the determination of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343.]

## 26. DAMAGES §131(1)—EXCESSIVE DAMAGES —PERSONAL INJURY.

Evidence examined, and found sufficient to support the verdict rendered.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357, 363, 364, 370.]

Error to Circuit Court, Hillsborough County; F. M. Robles, Judge.

Action by Sherman Holliday against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Sparkman & Carter, of Tampa, for plaintiff in error. Dickenson & Dickenson, of Tampa, for defendant in error.

SHACKLEFORD, J. Sherman Holliday brought an action at law against the Atlantic Coast Line Railroad Company, a corporation, for the recovery of damages for personal injuries received by the plaintiff, which are alleged to have been occasioned by the negligence of the defendant. A trial was had before a jury, which resulted in a verdict in favor of the plaintiff in the sum of \$3,000. The defendant seeks to have the judgment rendered thereon reviewed here by writ of error and has assigned numerous errors. We shall consider and discuss such of the assignments as are argued here which we deem necessary for a proper disposition of the case, but before taking up any of the assignments we must dispose of a contention which the plaintiff makes in limine.

[1] It is insisted that what purports to be a final judgment, copied in the transcript of the record, is not such a final judgment as will support a writ of error. We find that the transcript shows the following proceedings:

"On the 6th day of January, 1916, at a term of said court, came the respective parties by their attorneys and submitted said cause, on the issues joined between them, to a jury, who were duly sworn according to law, and who, having heard the evidence, the charge of the court and argument of counsel, returned the following verdict:

"Sherman Holliday v. A. C. L. R. R. Co.  
"We the jury find for the plaintiff and assess his damages in the sum of (\$3000.00). So say we all. J. B. Hundley, Foreman."

"On the — day of —, 1916, the following judgment upon the verdict of the jury was entered by the court:

"The record of the judgment, as the same ap-

pears in 'Minutes 28 Circuit Court' on page 380, is in the words and figures following:

"Thereupon it is ordered and adjudged that the plaintiff Sherman Holliday do have and recover of and from the defendant Atlantic Coast Line R. R. Co. a corporation the sum of (\$3000.00) as damages and a further sum of \$ Nine & 13/100 dollars his costs in this behalf expended, for which let execution issue."

[2, 3] Undoubtedly, if this is not such a final judgment as will support a writ of error, we would have to dismiss such writ, whether a motion be made for that purpose or not, as we have frequently held. See *Goldring v. Reid*, 60 Fla. 78, 53 South. 503. But in order to warrant this court in acting *ex mero motu* in the matter, such insufficiency or invalidity must appear on the face of the judgment itself or be affirmatively shown by the transcript. If evidence allunde is necessary, the opposing party should file a motion to dismiss and introduce such evidence. No such motion has been made in this case and no evidence allunde introduced. The case has been briefed on the merits by each party litigant, and the plaintiff has attempted to raise such point in his brief, relying upon the face of the transcript. He contends that such judgment is insufficient because the same is not signed either by the judge or clerk, and it does not appear when the same was entered. There is no merit in this contention. We have no statute or rule of court requiring judgments rendered in open court in term time to be signed either by the judge or clerk. Section 1831 of the General Statutes of 1906 provides that the clerk of the circuit court—"shall keep minute books, in which he shall keep regular and fair minutes of all the proceedings of the circuit court, and of the judge, in term or vacation, which shall be signed by the judge before the adjournment of each term."

See *McClerkin v. State*, 20 Fla. 879; *Simmons v. Hanne*, 50 Fla. 267, text 270, 89 South. 77, 7 Ann. Cas. 322; *Pittsburg Steel Co. v. Streety*, 60 Fla. 183, 53 South. 505.

[4, 5] The better practice, as a general rule, would be for the entry of a judgment rendered in term time to follow the verdict in the minutes of the court, as the date thereof would then be readily apparent, which is important, as section 1699 of the General Statutes of 1906 provides that all writs of error in judgments in civil actions shall be sued out and taken within six months from the date of the judgment. See *Eaton v. McCaskill*, 53 Fla. 513, 43 South. 447. It does appear by the transcript and the certificate of the clerk appended thereto that the judgment which we have copied above was rendered in the instant case, and that the same was entered in the minutes of the court, but it does not appear on what day and month the same was rendered or entered. Does this make such judgment so fatally defective that we should dismiss the writ of error *ex mero motu*? We do not think so. We cannot assume, in the absence of any proof to that effect, that the writ of error was not sued out within six months from the date of such judgment. As

we held in *Pittsburg Steel Co. v. Streety*, supra:

"A judgment in an action at law is rendered when it is entered or recorded in the minutes of the court during term time or when in vacation it is put in form for such entry or record and is signed by the judge."

[6, 7] The transcript shows that the case came on for trial on the 3d day of January, 1916, before a jury, that a verdict was returned therein on the 6th day of such month, that the bill of exceptions therein was settled and signed on the 29th day of April, 1916, that a final judgment in sufficient form was rendered and entered in the minutes of the court, and that a writ of error to such judgment was sued out on the 10th day of April, 1916. We must hold that this contention of the plaintiff has not been sustained. We think it is advisable to call attention to the fact, as is stated in 1 Thornton's Attorneys at Law, § 322, that:

"It is the duty of an attorney to take all such steps as may be necessary for the due entry and enrollment of a judgment to which his client is entitled; and his neglect of such duty will render him liable for any loss sustained by his client."

[8] We now direct our attention to the assignments of error. The fifty-ninth assignment, which is based upon the overruling of the demurrer to the declaration, though the last assignment argued, should be considered first, whether from a chronological, logical, or legal order, as we have repeatedly held:

"Where there is no sufficient declaration in a case, and a demurrer should have been sustained thereto, the other questions in the record are not open for the consideration of the appellate court." *City of Orlando v. Heard*, 29 Fla. 581, 11 South. 182; *South Florida Telegraph Co. v. Maloney*, 34 Fla. 338, 18 South. 280; *Florida Cent. & P. R. Co. v. Ashmore*, 43 Fla. 272, 32 South. 832; *Royal Phosphate Co. v. Van Ness*, 53 Fla. 135, 43 South. 916; *Kirton v. Atlantic Coast Line R. Co.*, 57 Fla. 79, 49 South. 1024.

If we should reach the conclusion that this error is well assigned, we would be precluded from going any further.

The first count of the declaration is as follows:

"Sherman Holliday, of Polk county, Florida, the plaintiff, by his attorneys, Dickenson & Dickenson, sues Atlantic Coast Line Railroad Company, a corporation under the laws of the state of Virginia, the defendant, which has been summoned to answer the plaintiff in a civil action, for that, whereas, to wit, on or about the 6th day of December, A. D. 1914, the defendant was a corporation under the laws of the state of Virginia, the defendant, which has been summoned to answer the plaintiff in a civil action, for that, whereas, to wit, on or about the 6th day of December, A. D. 1914, the defendant was a corporation under the laws of the state of Virginia, owning and operating a line of railroad as a common carrier, its cars being propelled by means of steam, with a line of tracks extending from the city of Lakeland, in Polk county, Florida, to the city of Tampa, in Hillsborough county, Florida, and having an agent, or other representatives in the said city of Tampa, Hillsborough county, Florida, the said defendant doing business in the state of Florida as a common carrier as aforesaid, and maintaining in or adjacent to the city of

Lakeland aforesaid, a certain line of tracks, side tracks and switching tracks, or railroad yards for the purpose of switching and transferring trains and cars, and making up trains, etc., and maintaining in the said yards and between and adjacent to said tracks a large number of artificial lights, to wit, about fifty (50) such lights, and the said plaintiff on the date and time aforesaid was in the employ of the said defendant for the purpose, and in the duty of looking after and caring for the said artificial lights, and seeing that said lights were kept burning, and the lamps thereof properly filled in the daytime and in the nighttime, and it became and was the duty of the defendant to move and operate its engines and trains in the said yards and upon the said tracks with reasonable and proper care and caution so as to avoid running into and injuring the plaintiff while engaged in his said employment, without negligence on his part, and to furnish the plaintiff a safe and suitable place to work while so engaged in his said employment as aforesaid, yet the said defendant, disregarding its duty as aforesaid, did, on or about the said 6th day of December, A. D. 1914, so carelessly and negligently run and operate a certain train composed of an engine and certain freight cars thereto attached and with such utter and reckless disregard of the safety of the plaintiff who was then and there, with all due care and caution, and without fault on his part, engaged in the performance of his duty in the care of said lamps as aforesaid; that the plaintiff was struck with great force and violence by the said train or by some article projecting therefrom, and the plaintiff was thereby thrown with great force and violence to the ground and was knocked down and badly cut and bruised, maimed and lacerated and received divers breaks, wounds, bruises, contusions on his body, whereby the right forearm of the plaintiff and wrist of the plaintiff was broken and the bones of the plaintiff's right arm and wrist were broken, whereby the said right arm and right hand of the plaintiff has become and is almost totally useless to him for the balance of his natural life, which the plaintiff could not reasonably expect would be less than seventeen years, and the plaintiff thereby temporarily lost his eyesight and the plaintiff was thereby forced to expend a large sum of money, to wit, about one hundred dollars (\$100.00), in and about endeavoring to be cured of his said injuries, for doctor's bills, medicines, etc., which the plaintiff alleges as special damages in this behalf by him sustained, and the plaintiff has lost divers large sums of money on account of loss of time and inability to labor at his occupation as aforesaid on account of the said injuries so received as aforesaid, and has ever since suffered great pain and anguish and mental suffering whereby the plaintiff was confined to his bed for a period of about three weeks and confined to his home for a long period of time thereafter and has been ever since deprived of his earnings as a common laborer at which he could have earned about thirty-five dollars (\$35.00) per month, all on account of the carelessness of the defendant as above set forth.

"Wherefore, the plaintiff brings this suit and claims damages against the defendant in the sum of three thousand dollars (\$3,000.00)."

The second count differs from the first in that it alleges that the defendant—

"at about 6 o'clock in the night so carelessly and negligently run and operate a certain train composed of an engine and certain freight cars thereto attached through the darkness, with a certain heavy bar, or rod, or other article, the further description of which is to the plaintiff unknown, projecting out from the side of said train with utter disregard of the safety of the plaintiff who was then and there, with all due care and caution, and without fault on his part,

proceeding along the side of said track on which said train was being drawn and operated, and at a safe and convenient distance from said train engaged in the performance of his duty in the care of said lamps aforesaid, whereby the plaintiff was struck with great force and violence by the said bar, rod or article projecting from said train as aforesaid."

[9] The demurrer was interposed to the declaration as an entirety and to each count thereof and a number of "substantial matters of law intended to be argued" were stated. We have examined all the grounds of the demurrer which the plaintiff has urged before us, restricting our investigation to those grounds that are argued and treating the other grounds as having been abandoned, in line with our holding in *Moore v. Lanier*, 52 Fla. 353, 42 South. 462, *Jacksonville Electric Co. v. Schmetzer*, 53 Fla. 370, 43 South. 85, and *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, 43 South. 318. The grounds so argued are that the declaration "showed that the plaintiff knew of the danger incident to his employment and failed to show that he exercised care therein, or want of care on the part of the defendant in the operation of its business"; that the declaration "failed to allege or show the article projecting from the train was so projecting through any defect in construction or appliance of said train, or that the condition of said train was not in the usual condition of ordinary trains of like description"; that the declaration "failed to show that the defendant knew of the projection of any instrument from said train or that by the exercise of reasonable care and diligence it could have known of the existence of said instrument." It is further urged that the first count of the declaration is demurrable "because it alleges that the plaintiff was struck by the train or by something projecting therefrom," and that the second count is demurrable "because it failed to show that the defect or projection was not an obvious one, the risk of which plaintiff assumed."

[10] We do not think that this assignment calls for any extended discussion. We have repeatedly held:

"In actions for negligent injuries it may be necessary to allege only the relations between the parties out of which the duty to avoid negligence arises, and the act or omission that proximately caused the injury, coupled with a statement that such act or omission was negligently done or omitted." *Ingram-Dekle Lumber Co. v. Geiger*, 71 Fla. 390, 71 South. 552, wherein prior decisions of this court are cited.

[11] It is true, as we also held therein:

"A declaration should contain sufficient allegations of all the facts that are necessary to state a cause of action. As a general rule, only ultimate facts need be alleged."

We think that the declaration sufficiently measures up to these requirements. See, also, the discussion in *Morris v. Florida Cent. & P. R. Co.*, 43 Fla. 10, 29 South. 541; *Tampa & Jacksonville R. Co. v. Crawford*, 67 Fla. 77, 64 South. 437; *Logan Coal & Supply Co. v. Hasty*, 68 Fla. 539, 67 South.



72. In fine, we do not think that either count of the declaration was open to the attack made by the demurrer. We would add that we have examined *Grover v. New York, S. & W. R. Co.*, 76 N. J. Law, 237, 69 Atl. 1082, the only authority cited to us by the defendant to support this assignment, and are of the opinion that it is not in point, and therefore fails to sustain the defendant's contention. Some of the matters of which the defendant seeks to avail itself by way of demurrer would have to be set up by way of plea, as they do not sufficiently appear on the face of the declaration to render the same demurrable.

After the overruling of the demurrer, the defendant filed the following pleas:

"First. That it is not guilty.

"And for a second plea to each count of said declaration, defendant says that plaintiff at the time in said declaration set out, when the alleged injury was sustained, the plaintiff was an employé of the defendant engaged in a hazardous employment, and that the plaintiff knew of the hazards attendant upon his said employment, and knew of the dangers to be apprehended in the course of his employment from passing trains; and defendant further says that the said plaintiff at the time aforesaid failed to exercise ordinary and reasonable care to avoid injury to himself, resulting from the dangers aforesaid, and failed to keep a proper lookout to avoid being struck by a passing train; and defendant further says that by such failure to observe a duty imposed upon him, the said plaintiff was guilty of contributory negligence directly contributing to his injury, which the defendant is ready to verify.

"And for a third plea to each count of said declaration, defendant says that at the time of the injury to the plaintiff, in said declaration mentioned, the plaintiff was an employé of the defendant engaged in a hazardous undertaking; that the plaintiff voluntarily accepted the employment and assumed all the ordinary and usual risks and perils incident to the same; that the defendant knew, or by the exercise of reasonable care and attention should have known, of the dangers incident to his employment, of being injured by moving trains; that the injury to the plaintiff complained of was due to the ordinary and usual risk and peril incident to his employment in which the said plaintiff was engaged, and was not caused and did not result from any negligence or want of care of the defendant, but resulted wholly from the failure of the plaintiff to exercise ordinary and reasonable care to avoid injury to himself."

The plaintiff joined issue upon all these pleas and the case was submitted to a jury, with the result as above stated.

[12] As we have previously said, numerous errors are assigned, 59 in all, but quite a number of them must be treated as abandoned for the reason that they are not argued. We have examined all of the assignments which have been urged before us, but, in view of the conclusion which we have reached, it becomes unnecessary to discuss them in detail. Of such assignments, the second to the seventh, inclusive, the eleventh and the twelfth to the sixteenth, inclusive, are all argued together and are based upon the sustaining of certain objections interposed by the plaintiff to questions propounded by the defendant to the plaintiff on his cross-

examination. All of these questions, as is stated by the defendant in its brief, were designed to elicit information as to whether or not the plaintiff after his injury made a report thereof to the defendant, directly or indirectly for a period of more than two weeks. We do not see the materiality or relevancy of the testimony so sought to be elicited from the plaintiff, since he was not required by law to make any report of his injury to the defendant within any specified time. It is contended that this testimony would have tended to affect the credibility of the witness. We have several times had occasion to discuss the rules which should govern the trial court in exercising its discretion in allowing or disallowing inquiries upon cross-examination into collateral matters to affect the credibility of a witness. See *Wallace v. State*, 41 Fla. 547, 26 South. 713, wherein we held that:

"Inquiry into collateral matters should not be permitted unless there is reason to believe it may tend to promote the ends of justice, and it seems essential to the true estimation of the witness' testimony by the jury."

[13] In *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, 43 South. 318, we held:

"The evidence adduced in an action should be confined to the issues, and a witness cannot be cross-examined as to any fact which is collateral or irrelevant to the issue merely for the purpose of contradicting him by other evidence if he should deny it, thereby to discredit his testimony."

[14] In *Hartford Fire Insurance Co. v. Brown*, 60 Fla. 83, 53 South. 838, we held:

"No error is committed by the trial court in refusing to permit a witness, on his cross-examination, to answer a question which is not in cross of any matters elicited on the direct examination and when the answer thereto, whichever way it might be, would not tend to prove the issues as made by the pleadings."

We must hold that these assignments have not been sustained.

[15] The twenty-fourth to the twenty-eighth assignments, inclusive, and the thirty-second to the thirty-fifth assignments, inclusive, are all argued together and are based upon the sustaining of the plaintiff's objections to certain questions propounded to G. Daniels and J. A. Moore, two witnesses introduced by the defendant in its behalf. Suffice it to say that these questions, as is stated by the defendant in its brief, were along the same lines on the direct examination of these witnesses as the questions propounded to the plaintiff on his cross-examination to which objections were sustained, and the assignments based on such rulings we have just discussed above. We think that the objections to these questions were properly sustained, as they sought to elicit testimony as to immaterial matters which did not tend to prove the issues made by the pleadings. As we have frequently ruled, objections are properly sustained to questions which seek to elicit testimony outside of the issues in an action. *Atlantic Coast Line R. Co. v. Crosby*, supra.



[16] These are the only assignments argued which are based upon the admission or exclusion of evidence. Assignments 48, 49, 50, and 52 are based upon instructions given at the request of the plaintiff, assignment 57 is based upon a paragraph of the charge given by the trial court of its own motion, and assignments 53 to 56, inclusive, are based upon the refusal of instructions requested by the defendant. We have examined all these assignments, but shall not discuss them. It may be that technical error was committed either in the giving or refusal of some of these requested instructions. Even so, if such errors could not reasonably have been prejudicial to the defendant, they would not be sufficient to work a reversal of the judgment. See *Southern Express Co. v. Williamson*, 66 Fla. 286, 63 South. 433, L. R. A. 1916C, 1208.

[17, 18] We feel that it is our duty to call attention to the fact that this case was tried in part upon an erroneous or immaterial issue. Both of the parties litigant ignored chapter 6521 of the Laws of Florida (Acts 1913, vol. 1, 383), proceeded as though it had never been enacted or had no applicability, and failed to bring it to the attention of the trial judge, by whom it was also evidently overlooked. If such chapter is applicable and controlling, it is our duty to take judicial cognizance of it. Of course, as we have held, if judgment has been entered upon a verdict recovered upon an immaterial issue, the appellate court should reverse it. See *Evans v. Kloeppel*, 72 Fla. —, 73 South. 180, and prior decisions of this court there cited. Such, however, is not the case here. Notwithstanding that there was one such immaterial or irrelevant issue, the case was also tried upon other issues which were material and valid, and we are of the opinion that such immaterial issue should not work a reversal of the judgment, as such immaterial issue was brought about by the third plea filed by the defendant, which we have copied above, upon which plaintiff joined issue, and we do not believe that the rights of the defendant were thereby prejudiced. In other words, we think that the rights of the parties litigant could be and were determined upon the other issues which were submitted to the jury.

[19-21] We recently have had occasion to consider and construe chapter 6521 and copied it in full in *Gulf, Florida & Alabama Ry. Co. v. King*, 74 South. 475, decided here at the present term and to which opinion we now refer, without repeating what we said there. We think that it necessarily follows from our reasoning and holding in this cited case that such chapter 6521 is alike applicable, and controlling in the instant case. We construed the term "engaged in \* \* \* railroading" as used in this chapter, and reached the conclusion that it was sufficiently comprehensive to apply to the employer's

liability to its employees in "the work of hoisting piles with a steam crane to be used in constructing a railroad wharf." We must likewise hold here that the term is sufficiently comprehensive to apply to the liability of a railroad company to an employee whose duty it was under the terms of his employment to care for and look after a large number of artificial lights, to wit, about 50, situated in the yards and between and adjacent to the tracks of such railroad company, and to see that such lights were kept burning and the lamps thereof properly filled in the daytime and in the nighttime, as the declaration alleges. That the work which the plaintiff was employed to perform was "a hazardous occupation" is not disputed. This being true, section 4 of such chapter 6521 applies, which provides as follows:

"That the doctrine of assumption of risk shall not obtain in any case arising under the provisions of this act, where the injury or death was attributable to the negligence of the employer, his agents or servants."

Therefore the defense attempted to be set up in the third plea was not permissible.

[22-24] It could not successfully be contended that the plaintiff, who was employed to care for the artificial lights, as we have just said, and the conductor and engineer, whose duty it was to operate defendant's train of cars, were "jointly engaged in performing the act causing the injury." This being true, even if the plaintiff and such conductor and engineer could be said to be fellow servants, which would not seem to be the case, such fact would not preclude the plaintiff from recovering damages for personal injuries inflicted on him through the negligence of the defendant, and even if the proofs adduced established the fact that the plaintiff's own negligence contributed in part to such injury. See section 3 of chapter 6521. The defendant had the benefit of his second plea in which it set up the contributory negligence of the plaintiff and of the proofs adduced thereunder, and instructions were also given to the jury as to the effect of the contributory negligence of the plaintiff, if established, upon the measure of damages. We shall not undertake to discuss the evidence. Undoubtedly it is conflicting upon certain material points, but such conflicts were settled by the jury. We are of the opinion that the evidence is ample to establish the liability of the defendant to the plaintiff for the injuries inflicted upon him. The jury so found and the trial judge concurred therein by overruling the motion for a new trial, some of the grounds of which question the sufficiency of the evidence. See *Florida East Coast Ry. Co. v. Pierce*, 65 Fla. 131, 136, 61 South. 237, and *Tampa & Jacksonville Ry. Co. v. Crawford*, 67 Fla. 77, 64 South. 437.

[25, 26] We have now disposed of all the errors assigned and argued, including the fifty-eighth, though we have not mentioned

it by number, which is based upon the overruling of the motion for a new trial, with the exception of the ground of such motion that the damages awarded are excessive. The testimony as to the nature and extent of the injuries inflicted is also conflicting, the medical experts introduced by the respective parties widely differing. Here again it was the province of the jury to settle these conflicts. See *Pensacola Electric Co. v. Bissett*, 59 Fla. 360, 52 South. 367. We are not prepared to declare that the amount of \$3,000 is so excessive as to shock our judicial conscience.

No reversible errors having been made to appear to us, the judgment must be affirmed.

BROWNE, C. J., and TAYLOR, WHITEFIELD, and ELLIS, JJ., concur.

(73 Fla. 426)

STATE ex rel. SLAY et al. v. WHITE, Tax Collector.

(Supreme Court of Florida. Feb. 22, 1917.)

(Syllabus by the Court.)

1. TIME ¶5—"MONTH."

The word "month," appearing in section 204 of the General Statutes of Florida of 1906, requiring the tax collector of each county to receive poll taxes properly tendered to him up to the "second Saturday of the month preceding the day of any general or special election," and to make a list of those who have paid their poll taxes in each year "prior to the second Saturday of the month preceding the day in any year in which any general or special election shall be held," and within "five days after the second Saturday in the month preceding the day in any year in which any general or special election shall be held" to make certified lists in duplicate of all persons who have paid their poll taxes for the two years next preceding the year in which such election is held "prior to the second Saturday in the month preceding the day upon which such election shall be held," etc., means "calendar month," or that period of time elapsing between a given date and the corresponding date of the next preceding month by name.

[Ed. Note.—For other cases, see *Time*, Cent. Dig. §§ 5-8.

For other definitions, see *Words and Phrases*, First and Second Series, *Month*.]

(Additional Syllabus by Editorial Staff.)

2. TIME ¶5—"MONTH."

The word "month," when used in a statute or contract without qualification, meant at common law a lunar month of 28 days (citing *Words and Phrases*, *Month*).

[Ed. Note.—For other cases, see *Time*, Cent. Dig. §§ 5-8.]

Original mandamus by the State of Florida, on relation of R. B. Slay and others, against Thomas D. White, as Tax Collector of Washington County, Fla. Alternative writ denied.

Will H. Price, of Marianna, and H. H. Wells, of Chipley, for relators.

ELLIS, J. A petition was filed by relators, praying for a writ of mandamus to be direct-

ed to Thomas D. White as tax collector of Washington county, commanding him forthwith to make a certified list in duplicate of all persons who have paid their poll taxes for the two years next preceding the year 1917 prior to the second Saturday in February, 1917, and as soon as completed deliver one of said lists to the supervisor of registration for Washington county, to be filed in his office, and forward the other to the comptroller of the State of Florida to be filed in his office.

The allegations of the petition upon which this prayer rests are, in substance, as follows: The county commissioners of Washington county, upon petition filed under the statute, ordered an election to be held at the several precincts in the county, to determine whether the location of the present county site of said county should be changed. The election was called to be held March 20, 1917, and notice of the said election was being given by publication in a newspaper as the statute directs. That the tax collector had refused to make certified lists in duplicate of all persons who have paid their poll taxes for the two years next preceding the year 1917 prior to the second Saturday in February, 1917, and more than five days have elapsed since that day.

The statute prescribing the tax collector's duty under such circumstances is section 204, General Statutes of Florida 1906, which is as follows:

"The tax collector of each county shall in person or by deputy be present in his office from 9 a. m. to 1 p. m. and from 2 p. m. to 6 p. m. each day, Sundays excepted, for twenty days immediately preceding the second Saturday of the month preceding the day of any general or special election, for the purpose of receiving all poll taxes properly tendered to him; and he shall as soon as practicable after receiving the same, give receipts therefor in due form of law, in which receipts shall be stated the color and age of the elector and the number of the election district in which such elector or person paying such poll tax resides. The tax collector shall make a list of those who have paid their poll taxes in each year prior to the second Saturday of the month preceding the day in any year in which any general or special election shall be held, and such list shall be alphabetically arranged. The tax collectors of the several counties of this state, within five days after the second Saturday in the month preceding the day in any year in which any general or special election shall be held, shall make a certified list in duplicate of all persons who have paid their poll taxes for the two years next preceding the year in which such election is held, prior to the second Saturday in the month preceding the day upon which such election shall be held; and one of said lists shall be delivered by the tax collector as soon as the same is completed to the supervisor of registration, to be filed in his office, and the other shall be forwarded to the comptroller of the state of Florida, which he shall file in his office."

[1] Relators contend that the word "month" as used in the sentence, "Second Saturday of the month preceding the day of any general or special election," etc., means the calendar month by name, which immediately

precedes that month in which the election is to be held. Following this interpretation of the word "month" as used in the statute, relators allege that, inasmuch as the election was called for the 20th day of March, 1917, the list which the tax collector is required to make of those who have paid their poll taxes should include only those electors who have paid their poll taxes prior to the 10th day of February, which it is alleged is the second Saturday of the month preceding the day on which the election is to be held; that within five days after that date, to wit, February 15th, the tax collector should have made the certified list in duplicate required by the statute.

Section 202 of the General Statutes of Florida of 1906 provides that the supervisor of registration shall note on the registration books, which he shall furnish to the inspectors, the names of all persons registered therein "who shall have paid on or before the second Saturday of the month immediately preceding the day of election, their poll or capitation taxes for two years next preceding the year in which such election is held," etc. Section 170 of the General Statutes prescribing the qualification of voters provides in paragraph 6 of that section that:

"No person shall be permitted to vote at an election who shall have failed to pay at least on or before the second Saturday in the month preceding the day of such election, his poll taxes for the two years next preceding the year in which such election shall be held."

The sections of the General Statutes providing for the holding of special elections to determine the location of county sites provide that the county commissioners, upon receiving the petition provided for, shall order an election to be held as directed in the statute, and "shall give not less than thirty days notice thereof," and no person shall be allowed to vote in such elections except those qualified to vote under the general election laws of Florida, and that all elections held under the provisions of that act shall be conducted in the manner prescribed by law for holding general elections in this state, etc. See sections 831-834, General Statutes 1906, as amended by chapter 6239, Laws of Florida 1911, Florida Compiled Laws 1914, §§ 831-834d.

It was the evident purpose of the Legislature by the above provisions of the statute to allow the electors all the time that could reasonably be allowed in which to pay their poll taxes in order to be qualified to participate in the election and at the same time allow sufficient time to the tax collector to make up in duplicate and certify to the list of persons who had paid their poll taxes for the two years next preceding the year in which the election is held. It was also the evident purpose of the act, in requiring a notice to be given of the special election to be held, that the electors of the county might be given an opportunity to pay their poll taxes and thus qualify themselves for

participation in the election. When any question of public interest is to be submitted to the decision of the people at an election to be held for ascertaining their will, it is certainly desirable to obtain, and the undoubted purpose of the law to secure as full, complete, and thorough an expression of the public will as possible, which can be done only by participation in the election of the entire electorate or all of the qualified voters. To secure this end the statutes require a notice to be given of the election and then provide for an opportunity in which each elector may, if he has not already done so, pay his poll tax, and thus qualify himself for voting in the election.

[2] The construction insisted upon by the relators defeats the purpose of the statutes as we have undertaken to point out. In the first place, such construction tends to decrease instead of to increase the days or time in which the elector may pay his poll taxes; his opportunity for qualifying himself for voting at the election is decreased instead of increased, the construction makes for suppressing the expression of the will of the people instead of encouraging it. In the second place, the construction contended for by relators would render it possible for the county commissioners to fix the date of the election so that, the 30 days' notice expiring on the day before the date fixed for the election, the term fixed by statute as the last day upon which poll taxes might be paid would have expired before the notice of the election called by the county commissioners had appeared in the newspaper. Such construction should not be placed upon the statute if it can be avoided. The word "month," when used in a statute or contract without qualification, meant, at common law, a lunar month of 28 days. See 5 Words and Phrases, 4574. In the United States, however, the word is construed to mean calendar time. See authorities cited in Words and Phrases, supra, and Guaranty Trust & Safe-Deposit Co. v. Buddington, 27 Fla. 215, 9 South. 246, 12 L. R. A. 770; Myakka Co. v. Edwards, 68 Fla. 382, 67 South. 217, where the words "four weeks" were construed to mean 28 days, and in the case of Bacon v. State, 22 Fla. 46, where an order was made allowing three months in which to make up a bill of exceptions, it was held that the time expired October 18th, and the word meant calendar month.

The word "month" as used in the statutes above quoted means a calendar month, or that period of time elapsing between a given date and the corresponding date of the next preceding month by name. See Heaston v. Cincinnati & F. W. R. R., 16 Ind. 275, 79 Am. Dec. 430; McGinn v. State, 46 Neb. 427, 65 N. W. 46, 30 L. R. A. 450, 50 Am. St. Rep. 617. According to this view the second Saturday of the month preceding the day of election occurs on the 3d day of March, and the time for the performance of the duty of

the tax collector under the statute has not arrived. The alternative writ therefore is denied.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and WHITFIELD, JJ., concur.

(73 Fla. 353)

HOWARD et al. v. SHEFFIELD.

(Supreme Court of Florida. Feb. 13, 1917.  
Rehearing Denied March 24, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR  $\S$  1001(1)—DECREE—REVERSAL.

A decree not sustained by the evidence will be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3923-3933.]

Appeal from Circuit Court, Alachua County; J. T. Wills, Judge.

Bill by G. A. Sheffield against J. B. Howard and others. Decree for complainant, and defendants appeal. Reversed.

E. G. Baxter, of Gainesville, for appellants. Evans Haile, of Gainesville, for appellee.

PER CURIAM. G. A. Sheffield filed a bill in equity alleging, in effect, that he is the owner in fee simple and is in possession of described real estate; that the lands were conveyed to complainant "as trustee" with power to sell and convey; that the conveyance to him "as trustee" was for the purpose of enabling him to convey without joining his wife; that subsequent to the conveyance to complainant a judgment was obtained against J. B. Sheffield, the grantor; that an execution on the judgment was levied upon the lands, and sale thereunder is advertised. An injunction was prayed against J. B. Howard, the judgment creditor, and the sheriff. A temporary injunction was granted. By answer the defendant Howard denied that complainant is the bona fide owner in fee simple and in possession of the lands, and in effect avers that the pretended deed of conveyance to complainant was not recorded till after the defendant's judgment was obtained against the grantor; that J. B. Sheffield is the owner and in possession of the lands; that the conveyance was made as a subterfuge and for the purpose of trying to defeat the judgment lien. A demurrer was incorporated in the answer. A dissolution of the injunction was denied. Testimony was taken, and the chancellor decreed for the complainant.

On appeal the defendants urge that the court erred in refusing to dissolve the injunction and in granting the relief to complainant.

The circumstances in evidence clearly indicate a lack of bona fides in the execution of the conveyance by the father to his son "as

trustee with full power to sell and convey." This view is strengthened by the nature of the alleged consideration and the dealings of the father with the property and other circumstances in evidence.

The decree is reversed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

(73 Fla. 402)

PHIFER v. ABBOTT.

(Supreme Court of Florida. Feb. 20, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR  $\S$  1096(3), 1097(1) — LAW OF CASE—MATTERS PRESENTED ON FORMER APPEAL.

All points adjudicated by an appellate court upon a writ of error or an appeal become the law of the case, and are no longer open for discussion or consideration, but this principle has no applicability to and is not decisive of points presented upon a second writ of error that were not presented upon the former writ of error, and consequently were not before the appellate court for adjudication.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4355, 4358, 4359, 4363, 4427.]

2. APPEAL AND ERROR  $\S$  1180(1)—SCOPE OF ADJUDICATION.

A judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4626, 4630, 4631, 4658, 4659.]

3. MORTGAGES  $\S$  424, 427(1)—ACTION TO ENFORCE—PARTIES—MORTGAGOR—STATUTE.

When a mortgagor has conveyed all her right, title, and interest to and in the mortgaged property, such mortgagor is not a necessary party defendant in a suit for the enforcement of a lien created by the mortgage, unless a personal decree is sought for any deficiency which might be found to exist after the sale of the mortgaged property. This principle likewise applies to the legal representatives of the mortgagor, when such suit is instituted after her death, and where no recovery or relief against the mortgagor's estate is sought, that portion of paragraph 2 of section 1715 of the General Statutes of 1906, which provides that "after ten years from the death of any person, his estate shall not be liable for any of his debts unless letters testamentary or of administration shall have been taken out within said ten years," is not applicable.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1263-1266, 1280.]

4. LIMITATION OF ACTIONS  $\S$  155(8) — ENFORCEMENT — SUSPENSION OF LIMITATION — PAYMENT.

A payment to the mortgagee or her legal representatives by a purchaser from the mortgagor is a binding admission that the mortgaged land is subject to the mortgage and operates to suspend the running of the statute of limitations of a suit for the enforcement of the mortgage lien.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 680.]

5. APPEAL AND ERROR  $\S$  874(4)—INTERLOCUTORY ORDER—SCOPE OF REVIEW.

Upon an appeal from an interlocutory order, the court will not consider whether the prayers of the bill are too broad, provided only

it prays for something that is proper and consequent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3535, 3537-3540.]

**6. EQUITY §=138, 222—SUFFICIENCY OF BILL—RELIEF—DEMURRER.**

If an equity appears from the allegations of the bill of complaint, defects, if any, in the prayer do not render the bill insufficient for the appropriate relief or open to attack by demurrer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 319-321, 501.]

**7. EQUITY §=233—ALLEGATIONS OF BILL—DEMURRER.**

Though the allegations of a bill of complaint be abstract and general and largely in the nature of asserted conclusions, yet if under the allegations a case entitling the complainant to relief as prayed can be made by appropriate and sufficient evidence, a general demurrer to the bill of complaint should be overruled.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 509.]

**8. EQUITY §=239, 241—DEMURRER—PRESUMPTION AGAINST BILL.**

In passing upon a demurrer to the whole bill in a suit in equity, every presumption is against the bill, but it is also true that such a demurrer operates as an admission that all the allegations in a bill which are well pleaded are true, and a demurrer to the whole bill should be overruled if the bill makes any case for equitable relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 494, 515.]

Appeal from Circuit Court, Alachua County; J. T. Wills, Judge.

Suit in Equity by Lucy B. Abbott, as administratrix cum testamento annexo of the estate of Margaret E. L. Abbott, deceased, against William B. Phifer, individually, and William B. Phifer, as executor of the will of Sallie J. Perry, deceased, and others. From interlocutory order overruling his demurrer, William B. Phifer, both individually and as executor, appeals. Affirmed.

See, also, 68 Fla. 10, 65 South. 869; 69 Fla. 162, 67 South. 917.

This is a suit in equity brought by Lucy B. Abbott as administratrix cum testamento annexo of the estate of Margaret E. L. Abbott, deceased, against William B. Phifer, individually, and William B. Phifer as executor of the last will and testament of Sallie J. Perry, deceased, and others for the enforcement of a mortgage lien upon certain described real estate. The bill of complaint was amended several times, by leave of court, so that finally the bill reads as follows:

"Your oratrix, Lucy B. Abbott, as administratrix cum testamento annexo of the estate of Margaret E. L. Abbott, deceased, of the county of St. Johns and state of Florida, complainant herein, brings this her amended bill of complaint against William B. Phifer, individually, and William B. Phifer, as executor of the last will and testament of Sallie J. Perry, deceased, of Alachua county, Florida, A. B. Zetrouer of Alachua county, Florida, J. R. Zetrouer, of Alachua county, Florida, E. G. Brown, of Alachua county, Florida, J. W. Crosby, of Marion county, Florida, Kelly McDonald Lumber Company, a corporation under the laws of the state of Florida, of Alachua county, Florida, J. D. Pope,

of Marion county, Florida, and James Holder of Citrus County, Florida, partners doing business under the firm name and style as J. D. Pope & Co., and Arthur Williams, of Marion county, Florida, and L. J. Knight, of Marion county, Florida, partners doing business under the firm name and style as Williams & Knight, defendants.

"And thereupon your oratrix complains and says that on the 4th day of August, A. D. 1883, Martha P. Perry was justly indebted to Margaret S. Abbott in the sum of thirty-five hundred dollars (\$3,500) lawful money of the United States of America, and there and then in the county of Alachua, state of Florida, made and delivered unto the said Margaret S. Abbott her promissory note, in writing, bearing date the 4th day of August, A. D. 1883, whereby the said Martha P. Perry, three years after date, for value received, promised to pay to Margaret S. Abbott or order three thousand five hundred dollars, with interest from date at the rate of ten (10) per cent. per annum until paid, interest payable annually, as will more fully appear by the said note ready to be produced in court and by the copy of the same herewith filed and marked Exhibit A and made a part of this your oratrix's bill of complaint. And that the said Martha P. Perry to secure the principal sum and interest mentioned in said note did, at the same time, execute under her hand and seal and deliver unto Margaret S. Abbott a mortgage deed upon and to the lands hereinafter described, which said lands the said Martha P. Perry was seised of in fee simple.

"And thereupon your oratrix says that on the said 4th day of August, A. D. 1883, the said Martha P. Perry conveyed to the said Margaret S. Abbott, in fee simple, the following described lands, with its appurtenances, situated in the county of Alachua, state of Florida, and better described as section thirty-two in township ten (10) south of range twenty-one (21) east, containing five hundred and fifty-nine (559) acres of land more or less. That said mortgage deed was made subject, however, to a condition of defeasance as follows: 'Provided always nevertheless, and this instrument is executed and delivered upon this expressed condition, that if I, the said Martha P. Perry, shall do well and truly pay or cause to be paid the full amount of the said promissory note for the sum of three thousand five hundred dollars, together with all annual interest thereon to accrue according to the legal tenor and effect of the said promissory note and the principal thereof at the time the same falls due, then this instrument to become wholly null and void, otherwise to be and remain in full force and virtue.' That said mortgage deed duly executed and acknowledged was by the said Martha P. Perry delivered unto the said Margaret S. Abbott on the 4th day of August, A. D. 1883, and on the 4th day of August, A. D. 1915, was filed for record and recorded same day in Mortgage Book F at pages 657, 658, in the public records of Alachua county, Florida, by the clerk of the circuit court of Alachua county, state of Florida; as appears by the said deed and its accompanying certificates of acknowledgments and record ready to be produced in court, and by certified copy thereof hereto attached to this bill of complaint and marked Exhibit B and made a part of this bill of complaint as fully as if the same had been recited in full and at length in said bill of complaint.

"Your oratrix further represents that on the 5th day of January, A. D. 1886, the said Martha P. Perry did make, execute, sign and seal and deliver unto her daughter Sallie J. Perry a certain quitclaim deed unto said section thirty-two (32), township ten (10) south, of range twenty-one (21) east, and other lands, which said quitclaim deed was filed for record January 6, 1886, and recorded in the public record, Alachua county, Florida, on January 8, A. D. 1886, by clerk of circuit court for said Alachua coun-

ty, Florida, which said deed was duly and legally executed and acknowledged.

"That the said Martha P. Perry in the month of April, A. D. 1886, died leaving no will, but left her daughter said Sallie J. Perry as her sole heir, who immediately went into possession of all of the lands and personal property left by her mother, said Martha P. Perry, deceased.

"Your oratrix further represents that Margaret S. Abbott, named in the note and mortgage, heretofore described and copies of which are attached to this bill of complaint as Exhibits A and B, respectively, was one and the same person as Margaret E. L. Abbott, and that on July 21, A. D. 1900, the said Margaret E. L. Abbott died leaving a will, wherein and whereby Lucy B. Abbott, your oratrix herein, was named and is the sole heir, legatee of said Margaret E. L. Abbott, as more fully appears by copy of said will hereto attached marked Exhibit C, and that the said Lucy B. Abbott immediately upon the death of said Margaret E. L. Abbott went into the possession of all of the property left by her mother the said Margaret E. L. Abbott, deceased, and became the owner of the note and mortgage described in this bill.

"That at the time of the death of the said Margaret E. L. Abbott the estate of said Margaret E. L. Abbott was not indebted, and that said estate has not since and is not now indebted.

"Your oratrix further shows and represents that in and by the will of the said Margaret E. L. Abbott, a copy of which said will is hereto attached and prayed to be made a part hereof, one John Starke was named as the executor, that said John Starke has never qualified as executor under and by virtue of the will of said Margaret E. L. Abbott, that the said John Starke is now deceased, and that no other person or persons have managed or controlled any of the estate of said Margaret E. L. Abbott except your oratrix Lucy B. Abbott, the sole heir and legatee named therein; that recently, to wit, on the 1st day of July, A. D. 1914, the will of the said Margaret E. L. Abbott was duly proven and probated, and your oratrix, upon proper application, was appointed administratrix cum testamento annexo to administer upon the estate and effects of the said Margaret E. L. Abbott.

"That the said Martha P. Perry in her lifetime paid at different times to Margaret S. Abbott divers sums of money on said note and mortgage. That the following sums of money were paid to Margaret S. Abbott as interest on said note: One hundred seventy-five and no/100 dollars from August 4, 1883, to February 4, 1884; interest was paid until August 4, 1884; one hundred seventy-five and no/100 dollars was paid as interest to February 4, 1885; three hundred fifty and no/100 dollars was paid as interest to February 4, 1886; that on January 11, 1888, Sallie J. Perry paid as interest one hundred and no/100 dollars, and on March 19, 1888, another one hundred and no/100 dollars, and on May 29, 1889, ninety-two and 12/100 dollars as interest; in January, 1890, Sallie J. Perry paid as interest ninety-seven and 08/100 dollars; on or about January 1, 1890, Sallie J. Perry gave a note for five hundred and no/100 dollars, being payable on January 1, 1891, a copy of said note being attached to complainant's amended bill of complaint as Complainant's Exhibit D; that said note has never been paid to Margaret S. Abbott (being the same person as Margaret E. L. Abbott) nor to Lucy B. Abbott as her sole heir, or to Lucy B. Abbott as administratrix of the estate of Margaret E. L. Abbott; that on January 21, A. D. 1890, Sallie J. Perry paid two thousand and no/100 dollars to be credited on the principal of the original note and mortgage herein sued on; that on January 26, A. D. 1891,

Sallie J. Perry paid one hundred and no/100 dollars on account of interest on original note and mortgage; in February, 1891, Sallie J. Perry sent Margaret E. L. Abbott check for two hundred seventy-eight and no/100 dollars, which said Margaret E. L. Abbott applied on the principal of five hundred and no/100 dollars note given by Sallie J. Perry in 1890; that on March 28, 1892, Sallie J. Perry paid to Margaret S. Abbott the sum of one hundred fifty and no/100 dollars to be applied on interest on original note and mortgage, and also made a one hundred dollar payment of interest to said Margaret S. Abbott in September, A. D. 1893; that Sallie J. Perry on February 2, 1895, paid Lucy B. Abbott for Margaret S. Abbott one hundred and no/100 dollars as interest on said note and mortgage; that Sallie J. Perry paid fifty and no/100 dollars October 9, A. D. 1895, on account of interest on note and mortgage.

"That since the last-mentioned payment made by the said Sallie J. Perry on October 9, 1895, as above stated, the said Sallie J. Perry has made no effort and has not paid to Margaret E. L. Abbott or to said Lucy B. Abbott, as sole heir at law of Margaret E. L. Abbott or as administratrix of the estate of said Margaret E. L. Abbott, deceased, or any one for her, any interest on the balance of the principal of note dated August 4, 1883, which same is secured by the mortgage herein sought to be foreclosed, or any interest on the balance of the principal of said note of January 1, 1900, given as payment of interest on the interest due on said original note and mortgage of August 4, 1883. But the said Sallie J. Perry has from time to time, in writing, by letters and notes, and in person, promised to pay to the said Lucy B. Abbott the said notes and mortgage, and said Sallie J. Perry has admitted by said letters that she owed the balance due on said notes and mortgage and would sell her property or part thereof and pay the said notes and mortgage, and the said Lucy B. Abbott, relying on her assurances, from time to time, and thinking before said Sallie J. Perry died that she was without funds, but had land sufficient to pay said debt, as represented by the said note and mortgage, permitted her, the said Sallie J. Perry, to continue without payment of interest or the principal sum of said note and mortgage dated August 4, A. D. 1883, except as hereinabove stated and also of the note for five hundred and no/100 dollars, except as hereinabove stated. That said Sallie J. Perry at divers times and up to and until her death on the 22d day of February, A. D. 1911, admitted by letters in writing that she owed the said Lucy B. Abbott the balance on the notes and mortgage and the unpaid interest thereon, and did frequently say that she recognized that the debt was an honest debt, and that she would pay it before she died or leave sufficient funds of hers to pay same upon her death, but she never paid said amount to Lucy B. Abbott, or any one for her.

"Your oratrix further shows unto your honor that she, said Sallie J. Perry, has failed to pay said amount of note and mortgage, and that Lucy B. Abbott, through her attorney E. N. Calhoun, filed a copy of said note and mortgage with said William B. Phifer as the executor of the last will and testament of Sallie J. Perry, deceased, and with the county judge of Alachua county, Florida, and that the said executor, W. B. Phifer, and W. B. Phifer, individually as the sole legatee and heir to said Sallie J. Perry, deceased, refused to pay the said note and mortgage or any part thereof.

"That Sallie J. Perry, on the 22d day of February, A. D. 1912, died at or near Rochelle, in the county of Alachua, state of Florida, and left a last will and testament, proof of which said last will and testament was duly made on the 24th day of February, A. D. 1912, and recorded in the public records of Alachua coun-

ty, Florida, by the county judge of said county on the 27th day of February A. D. 1912, and in said will said Sallie J. Perry devised and bequeathed unto William B. Phifer, all of her property real, personal or mixed, and in said will nominated said William B. Phifer as the sole executor of said will, and that said William B. Phifer entered into immediate possession of said property.

"That the said Martha P. Perry, Sallie J. Perry and W. B. Phifer, individually and as executor under the will of Sallie J. Perry, have not paid the said principal sum of three thousand five hundred and no/100 dollars, except as above set forth, and there remains due and owing and unpaid to your oratrix on said principal sum one thousand five hundred and no/100 dollars; the balance of the five hundred and no/100 dollars note less the two hundred seventy-eight and no/100 dollars credited thereon, said balance being two hundred twenty-two and no/100 dollars, and there remains due and unpaid to your oratrix the sum of two thousand nine hundred and no/100 dollars as interest on the balance of the principal of the original note. That although said amounts have long since become due, by means whereof the said mortgaged property has become forfeited, subject nevertheless to the redemption in equity by the legal representatives of said Martha P. Perry, deceased, said Sallie J. Perry, deceased, and of their heirs and assigns.

"Your oratrix further shows unto your honor that the said Sallie J. Perry did by warranty deed for the month of November, A. D. 1889, sell and convey to one A. B. Zetrouer the northwest quarter of the northwest quarter of section thirty-two, in township ten (10) south, of range twenty-one (21) east, which said land is subject to the mortgage of August 4, 1883. Said deed to said Zetrouer is of record in the public records of Alachua county, state of Florida, in Deed Book 50, page 255, filed and recorded 11-7-1899, 11-11-1899, and your oratrix says that said Zetrouer has never paid to her or to any one for her any of the interest or principal on said note or mortgage.

"And your oratrix further shows that Sallie J. Perry, deceased, and one J. R. Zetrouer, did by a writing recorded in the public records of Alachua county, Florida, in Miscellaneous Book 2, at page 15, filed and recorded 12-17-1903, convey timber on section 32-10-31 east to Kelly-McDonald Lumber Company, a corporation under the laws of the state of Florida, which said conveyance was made subsequent to the execution of the mortgage and note of August 4, A. D. 1883, and is subject to the lien thereof.

"And your oratrix further shows that one E. G. Brown of Alachua county, a defendant herein, made and executed a lease to one J. W. Crosby, of Marion county, Florida, which said lease is recorded in the public records of Alachua county, Florida, and which said lease is incorporated in a warranty deed from E. G. Brown to J. W. Crosby, and is recorded in Book 51, page 383, of the public records of Alachua county, Florida, filed for record March 1, 1900, and recorded on March 24, 1900; the lands attempted to be sold and leased in said instrument of section thirty-two, township ten, township twenty-one east, which said instrument was made subject to the mortgage and note of August 4, A. D. 1883, and subject to lien thereof.

"And your oratrix further shows that Sallie J. Perry did by a written turpentine lease recorded in the public records of Alachua county, Florida, in Miscellaneous Book 2, at page 250, filed and recorded by the clerk of the circuit court of said county 6-20-1905, 7-25-1905, convey by lease section thirty-two (32), township ten (10) south of range twenty-one (21) east, to Arthur Williams of Marion county, Florida,

J. D. Pope of Marion county, Florida, and James Holder, of Citrus county, Florida, partners doing business under the firm name and style of J. D. Pope & Co., which said instrument was made subsequent to the execution of the mortgage and note dated August 4, 1883, and is subject to the lien thereof.

"And your oratrix further shows that Arthur Williams and J. L. Knight, both of Marion county, Florida, partners doing business under the firm name and style as Williams & Knight, claim to have interest in the land sought to be foreclosed herein, which said interest is to your oratrix unknown. But your oratrix says that whatever said interest may be that the same has accrued since the execution of the note and mortgage dated August 4, A. D. 1883, and is subject to the lien thereof.

"Forasmuch, therefore, as your oratrix is without remedy in the premises, save in a court of equity, and to the end that the defendant to this bill may be required to make full and direct answer to same, but not under oath, the answer under oath being hereby specifically waived, and that an account may be taken of what is due your oratrix on the principal and for interest on said note and mortgage, and the cost, charges and expense of this suit. That the defendants William B. Phifer, individually, and William B. Phifer, as the executor of the last will and testament of Sallie J. Perry, deceased, and A. B. Zetrouer may be decreed to pay your oratrix the amount due on the principal and interest on said note and mortgage upon the taking of said account, together with the taxes, insurance, costs, charges and expenses of this suit, including reasonable attorney's fees, by a short day to be fixed by this court; that in default of such payment the mortgaged premises may be sold as the court may direct to satisfy such debt and costs, and that in case of such sale the said defendants William B. Phifer, individually, and William B. Phifer, as the executor of the last will and testament of Sallie J. Perry, deceased, and A. B. Zetrouer, J. R. Zetrouer, E. G. Brown, J. W. Crosby, Kelly-McDonald Lumber Company, a corporation under the laws of the state of Florida, J. D. Pope, Arthur Williams and James Holder, copartners doing business under the firm name as J. D. Pope & Co., and Arthur Williams and L. J. Knight, partners doing business under the firm name and style as Williams & Knight, defendants, and all persons claiming by, through or under them subsequent to the execution of this mortgage sought to be foreclosed, and all other persons, although not parties to this suit, who may have any liens by judgment or decree subsequent to the mortgage held by your oratrix, may be barred and foreclosed of all right or equity of redemption, and claim, of, in and to said mortgaged premises and every part and parcel thereof with the appurtenances; that a special master may be appointed to find and take an amount due your oratrix as principal and interest on the note and mortgage aforesaid and the costs, charges and expenses of this suit, including reasonable attorneys' fees, and that your oratrix may have such other and further relief in the premises as the nature of the case may require."

Then follows the prayer for process. We do not copy the exhibits attached to the bill.

To the bill as finally amended, William B. Phifer, individually and as executor, interposed the following demurrer:

"This defendant by protestation not confessing any or all of the matters and things of the complainant's amended bill of complaint contained to be true in such manner and form as the same is therein set forth and contained, doth demur to said bill and for causes of demurrer sheweth:

"(1) It appears from the bill that Martha P. Perry conveyed the property embraced in the



mortgage to Sallie J. Perry on the 5th of January, 1886; and that Sallie J. Perry has held the property for more than twenty (20) years since the maturity of the note and mortgage sued upon under claim and color of title.

"(2) The note and mortgage sued upon appearing from the allegations of complainant's amended bill to have matured more than twenty (20) years before the filing of the said amended bill in this case, both the mortgage and note are barred by the statute of limitations.

"(3) Because it appears in and by the allegations of complainant's bill that Martha P. Perry, the mortgagor, has been dead more than ten (10) years before the commencement of this suit and the filing of this bill, and no proceedings were had or taken herein within ten (10) years after the death of said Martha P. Perry.

"(4) Because this is a stale demand, and not enforceable in a court of equity.

"(5) It does not appear in and by the allegations of complainant's bill that there was any waiver of the statute of limitations, either on the part of Martha P. Perry or on the part of Sallie J. Perry, as would revive the right of action against Sallie J. Perry, or the defendant as the legal representative of the estate of Sallie J. Perry, or as the devisee under the will of Sallie J. Perry.

"(6) Complainant does not set forth or allege a new promise in writing, either on the part of Martha P. Perry or Sallie J. Perry, as would revive the cause of action against the estate of Sallie J. Perry, deceased, or the devisee under her will.

"(7) Complainant seeks to recover from this defendant for a promissory note given on January 1, 1890, that matured January 1, 1891, which appears upon the face of the bill to have been given as an independent payment on the mortgage sued upon, and there is no provision in the mortgage for the securing of said five hundred (\$500.00) dollars; but under the law the taking of said note by the mortgagee was a payment and discharge of that amount of money so far as the lien of the mortgage was concerned.

"Wherefore, for divers other good causes of demurrer appearing in the said amended bill of complaint, the defendant doth demur thereto, and humbly demands the judgment of this court whether he should be compelled to make any other or further answer to said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained."

This demurrer was overruled, from which interlocutory order Phifer, both individually and as executor, has entered his appeal.

Hampton & Hampton, of Gainesville, for appellant. E. Noble Calhoun and David R. Dunham, both of St. Augustine, for appellee.

SHACKLEFORD, J. (after stating the facts as above). [1, 2] This is the third appeal which has come to this court in this case, all of the appeals being from interlocutory orders. Upon the first appeal (Phifer v. Abbott, 68 Fla. 10, 65 South. 869), the only points decided were that:

"Upon the death of the mortgagee, his or her executor or administrator is the proper party complainant to enforce the mortgage lien upon real estate.

"In a suit to enforce a mortgage lien upon real estate, an allegation that the complainant is the sole heir of the deceased mortgagee, and that upon the death of the mortgagee the complainant as sole heir of the mortgagee 'went into possession of all the property left by her mother' is not sufficient to show a right of the complainant to maintain the suit."

Upon the second appeal (Phifer v. Abbott, 69 Fla. 162, 67 South. 917), the only point decided was that:

"An amendment stating that a complainant sues technically in a representative capacity and not individually in the same cause of action does not make a new suit or cause of action, particularly when the complainant is the sole party in interest and the suit is brought for her sole benefit."

This being true, the principle known as the law of the case will prove of practically no assistance to us. As we held in Florida East Coast Ry. Co. v. Geiger, 66 Fla. 582, 64 South. 238:

"All the points adjudicated by an appellate court upon a writ of error or an appeal become the law of the case, and are no longer open for discussion or consideration. \* \* \* That the principle has no applicability to and is not decisive of points presented upon a second writ of error that were not presented upon the former writ of error, and consequently were not before the appellate court for adjudication. \* \* \*

"A judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided."

[3] The point now presented for determination is as to whether or not the court erred in overruling the demurrer on any of the grounds thereof which was interposed to the bill of complaint as finally amended. We have copied such bill and demurrer in the foregoing statement in order that we might have the same fully before us, and thereby enable us to make this opinion the more readily intelligible.

It will be observed that the suit is not brought against the legal representatives of Martha P. Perry, deceased, the mortgagor, and no deficiency decree is sought against her estate. As we held in *Hinson v. Gammon*, 61 Fla. 641, 54 South. 374, Ann. Cas. 1913A, 83:

"When mortgagors have conveyed all their rights and interests in the mortgaged property to other parties, such mortgagors are not necessary parties to a suit to foreclose the mortgage."

In the opinion we quoted with approval the following excerpt from 2 Jones on Mortgages (6th Ed.) § 1404:

"The mortgagor, after he has conveyed the whole of the premises mortgaged is not a necessary party to the suit (foreclosure); nor indeed is he a proper party, unless a personal judgment for any deficiency there may be, after applying the property to the debt, is sought against him."

It is distinctly alleged in the bill that Martha P. Perry conveyed the mortgaged lands by quitclaim deed to Sallie J. Perry on the 5th day of January, 1886. As the complainant in this suit is not seeking any recovery or relief against the estate of Martha P. Perry, deceased, paragraph 2 of section 1715 of the General Statutes of 1906, upon which the appellant relies, has no applicability. Such paragraph reads as follows:

"*Actions Against Representatives of Deceaseds.*—If a person against whom a suit not relating to land may be brought, or judgment exists, die, such suit shall not be brought, nor



proceedings taken upon such judgment, against his executor or administrator after two years from the issuance of letters testamentary or of administration. After ten years from the death of any person, his estate shall not be liable for any of his debts unless letters testamentary or of administration shall have been taken out within said ten years."

As the bill alleges that the mortgage deed was executed on the 4th day of August, 1883, which was filed and recorded on the same day in the public records of Alachua county, and the quitclaim deed to Sallie J. Perry was not executed until the 5th day of January, 1886, it follows as a matter of law that Sallie J. Perry took the lands subject to the lien created thereon by the mortgage. If Sallie J. Perry wished to remove this incumbrance from her title to the lands, it became necessary for her to pay off and discharge this mortgage lien, which she evidently realized, for the bill alleges that she made different payments thereon on divers dates, which are specified, the last of such payments being for the sum of \$50 on the 9th day of October, 1895. We must now determine whether or not the statute of limitations as prescribed by paragraph 1 of section 1725 of the General Statutes of 1906, upon which the appellant also relies, applies. This paragraph reads as follows:

*"Within Twenty Years.*—An action upon a judgment or decree of a court of record in the state of Florida, and an action upon any contract, obligation, or liability founded upon an instrument or writing under seal."

[4] We have held that this paragraph applies to a mortgage upon lands, which is a written instrument executed under seal. *Browne v. Browne*, 17 Fla. 607, 35 Am. Rep. 96, and *Jordan v. Sayre*, 24 Fla. 1, 3 South. 329. It is conceded in the briefs of the respective parties that this statutory period of 20 years from the date of the last payment of \$50 had not elapsed when this suit was instituted. Did such payment prevent this statute from operating as a bar to this suit? This question must be answered in the affirmative. See 2 *Jones on Mortgages* (7th Ed.) § 1198, and the numerous authorities cited in the notes. As is stated in the text:

"A payment by a purchaser from the mortgagor is a binding admission that the land is subject to the mortgage and operates to suspend the running of the statute of limitations against a foreclosure of the mortgage."

Also see *McLane v. Allison*, 60 Kan. 441, 56 Pac. 747.

Neither do we think that the bill shows that the complainant was guilty of such laches as to prevent the successful maintenance of this suit. We are also of the opinion that sections 1717 and 2517 of the General Statutes of 1906, upon which the appellant also relies, have no applicability. Such sections read as follows:

*"1717. Promise to Pay Debts Barred—Must be in Writing.*—Every acknowledgment of, or promise to pay a debt barred by the statute of limitations, must be in writing and signed by the party to be charged.

*"2517. (1906.) Promise to Pay Another's*

*Debt, etc.*—No action shall be brought whereby to charge any executor or administrator upon any special promise to answer or pay any debt or damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person or to charge any person upon any agreement made upon consideration of marriage, or upon any contract for the sale of lands, tenements or hereditaments, or of any uncertain interest in or concerning them, or for any lease thereof for a period longer than one year, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof, shall be in writing and signed by the party to be charged therewith or by some other person by him thereunto lawfully authorized."

Since the payment of \$50 on the 9th day of October, 1895, by Sallie J. Perry operated to suspend the running of the statute of limitations, as we have just held, it becomes a matter of no particular moment whether Sallie J. Perry did or did not ever promise in writing to pay the amount of indebtedness secured by the mortgage. It may well be, as is suggested by the appellee in her brief that such allegations in the bill simply served to show why the complainant delayed so long to bring the suit.

[5, 6] We shall not discuss the effect of the giving of the promissory note for \$500, as that point is not properly before us for determination. "Upon an appeal from an interlocutory order, the court will not consider whether the prayers of the bill are too broad, provided only it prays for something that is proper and consequent." *Tampa & Jacksonville Ry. Co. v. Harrison*, 55 Fla. 810, 46 South. 592, and *Williams v. Black*, 74 South. 812, decided here at the present term. As we said in *L'Engle v. Overstreet*, 64 Fla. 339, text 361, 60 South. 120:

"If an equity appears from the allegations of the bill of complaint, defects, if any, in the prayer do not render the bill insufficient for appropriate relief."

[7] As we also held in *Johns v. Bowden*, 68 Fla. 32, 66 South. 155:

"Though the allegations of a bill of complaint be abstract and general and largely in the nature of asserted conclusions, yet if under the allegations a case entitling the complainant to relief as prayed can be made by appropriate and sufficient evidence, a general demurrer to the bill of complaint should be overruled."

[8] We have frequently held:

"In passing upon a demurrer to the whole bill in a suit in equity, every presumption is against the bill, but it is also true that such a demurrer operates as an admission that all the allegations in the bill which are well pleaded are true, and a demurrer to the whole bill should be overruled if the bill makes any case for equitable relief." *Holt v. Hillman-Sutherland Co.*, 56 Fla. 801, 47 South. 934.

It necessarily follows that the order appealed from must be affirmed.

BROWNE, C. J., and WHITEFIELD and ELLIS, JJ., concur. TAYLOR, J., disqualified.

(73 Fla. 422)

**BEXLEY v. HIGH SPRINGS BANK.**

(Supreme Court of Florida. Feb. 21, 1917.

Rehearing Denied March 24, 1917.)

*(Syllabus by the Court.)***1. REFORMATION OF INSTRUMENTS —45(1)—  
GROUNDS—MUTUAL MISTAKE.**

Equity will reform a written instrument, where because of mutual mistake it does not contain the true agreement of the parties only where the proof is full and satisfactory as to the mistake.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 157.]

**2. REFORMATION OF INSTRUMENTS —36(3)—  
PLEADING—MISTAKE.**

The allegations of a bill for the reformation of an instrument should be clear and specific as to the mistake claimed to have been made by the parties to the instrument.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 144.]

**3. QUÆRE.**

Whether a mortgage executed by a married woman jointly with her husband to secure a debt of the latter may be reformed upon the testimony of her husband or the creditor, questioned in view of the provisions of section 1, art. 11, of the Constitution of Florida of 1885.

**4. MISTAKE—EVIDENCE.**

Evidence examined and found insufficient to sustain the allegations of the bill as to a mistake of the parties concerning the description of lands contained in a mortgage.

Appeal from Circuit Court, Alachua County.

Suit by the High Springs Bank against Mrs. Willie Bexley and others to reform a mortgage. From a decree dismissing the bill as to part of the defendants and granting the relief prayed for against defendant Bexley, she appeals. So much of decree appealed from as orders and decrees reformation of the mortgage, reversed.

W. S. Broome, of Gainesville, for appellant. F. Y. Smith, of Alachua, for appellee.

**ELLIS, J.** An appeal was taken by the appellant from a decree rendered by the chancellor in the suit of High Springs Bank v. Mrs. Willie Bexley and others to reform a mortgage in the matter of the description of land and to enforce the lien of the mortgage upon the lands as described in the reformed instrument.

The decree dismissed the bill as to some of the defendants, and granted the relief prayed for against Mrs. Bexley, who was ordered to pay the debt within a certain time, in default of which the property described in the mortgage as reformed should be sold and the proceeds of the sale applied on the debt.

It is unnecessary to discuss the points raised by the pleadings and evidence in detail, as according to the view which we have of the case it should be determined upon the single question of whether there was any evidence before the chancellor upon which to base a decree reforming the mortgage in the matter of the description of the land.

The facts as we gather them from the record are succinctly as follows: In December, 1909, M. A. Bexley owed the High Springs Bank a sum of money, which debt was evidenced by his note payable to the bank the following year. To secure that debt, M. A. Bexley and his wife, the appellant here, executed and delivered to the bank a mortgage on "lot 4 in block 24, Foster's addition to the town of High Springs."

Now Mrs. Willie Bexley, the wife of M. A. Bexley, was the owner of the southwest corner of that block, which corner was known as lot 3. On this lot No. 3, in block 24, the home of M. A. Bexley and his wife was located, and it was the separate property of Mrs. Bexley. She did not own lot 4 in block 24 at that time, but acquired it about a year later. M. A. Bexley died some time before May, 1915, when the bill in this case was filed. The mortgage was executed in December, 1909, and not recorded until September in the following year.

In this proceeding the bank contends that there was an error in the description of the land as contained in the mortgage; that it was the intention of the parties to mortgage lot No. 3, the home place, instead of lot No. 4, the lot described in the instrument. The appellant denied in her answer that such allegation was true.

[1] Upon the subject of the reformation of instruments, this court has said that, while equity will reform a written instrument where by mistake it does not contain the true agreement of the parties, it will only do so when the mistake is plain and the proof full and satisfactory. See *Jacobs, Adm'r, v. Parodi*, 50 Fla. 541, 39 South. 833; *Griffin v. Societe Anonyme La Floridienne*, 53 Fla. 801, 44 South. 342; *Horne v. J. C. Turner Cypress Lumber Co.*, 55 Fla. 690, 45 South. 1016; *Prior v. Davis*, 58 Fla. 510, 50 South. 535; *Franklin v. Jones*, 22 Fla. 526.

[2] Not only were the allegations of the bill as to the mistake of the parties indefinite and lacking in that degree of clearness required by the rule as announced by this court, but the proof was less clear and wholly unsatisfactory. In fact, there is no evidence whatever that Mrs. Bexley ever intended to place a mortgage upon her home, unless it be the circumstance that she did own lot 3, and at the time the mortgage was executed did not own lot 4, and that she did sign the mortgage.

[3] The debt was that of her husband; the property, lot 3, the home, was her separate property.

Section 1, art. 11, of the Constitution of Florida of 1885, provides that a married woman's separate property shall not be liable for the debts of her husband without her consent given by some instrument in writing, executed according to the law respecting conveyances by married women. See *Ockla-*

waha River Farms Co. v. Young et al., 74 South. 644, decided at this term.

If an instrument of this character may be reformed at all, in the absence of some writing showing the mistake of the parties, executed by the married woman with the same formalities required by law for the execution of conveyances by her, it is of great importance that the proof of the mistake should be full, clear, and satisfactory to the degree of moral certainty. Otherwise, a married woman's separate property may be subjected to the payment of her husband's debt, upon the statements of her husband that it was so intended, or upon the oral declarations of a creditor seeking to recover his money, and thus may be accomplished an end by a means which the Constitution forbids.

[4] The evidence that Mrs. Bexley intended to mortgage her home to secure the debt of her husband is not full, nor is it clear; but is on the contrary meager, indefinite, vague, and wholly unsatisfactory. Being of this opinion, we think that so much of the decree appealed from as orders and decrees a reformation of the instrument should be reversed, and it is so ordered.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and WHITFIELD, JJ., concur.

478 Fla. 446)

**WILLIS et al. v. SPECIAL ROAD AND  
BRIDGE DIST. NO. 2, OSCEOLA  
COUNTY.**

(Supreme Court of Florida. Feb. 23, 1917.)

(Syllabus by the Court.)

**1. ACTION  $\Leftrightarrow$  35—STATUTORY REMEDY—EX-  
CLUSIVENESS.**

Action taken pursuant to a statute must accord with the provisions of the statute, and must not conflict with the requirements of organic law.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 273-294.]

**2. STATUTES  $\Leftrightarrow$  181(1)—CONSTRUCTION — IN-  
TENT.**

The intent of a statute is the gist of the enactment, and a material disregard of the statutory intent is a violation of the substance of the enactment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 259.]

**3. TAXATION  $\Leftrightarrow$  29—TAXING DISTRICT—STAT-  
UTE—REVIEW.**

Where a statute merely authorizes the formation of a taxing district through action taken by persons or officials, the statutory intent should be observed in substance, and the legality and reasonableness of the action taken under the statute are subject to judicial review.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 60.]

**4. TAXATION  $\Leftrightarrow$  28—TAXING POWER — STAT-  
UTE.**

A statute does not contemplate an unreasonable exercise of authority conferred by it, particularly when the taxing power and material property and personal rights are involved.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 60.]

**5. HIGHWAYS  $\Leftrightarrow$  90—ROAD DISTRICT—OBJECT  
OF FORMATION.**

A purpose of the statute authorizing special road and bridge districts to be formed in counties is to avoid unfair tax burdens upon persons and property so remote from roads constructed by general county taxation as to receive no advantage therefrom commensurate to their tax contributions for such purposes.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302.]

**6. HIGHWAYS  $\Leftrightarrow$  90—ROAD DISTRICTS—STAT-  
UTE.**

The statute authorizing the formation of special road and bridge districts in a county contemplates the formation of districts with some fair reference to the advantages accruing therefrom to the persons and property bearing the tax burdens assumed for the construction and maintenance of such roads and bridges.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302.]

Appeal from Circuit Court, Osceola County; J. W. Perkins, Judge.

Statutory proceedings by Special Road and Bridge District No. 2, Osceola County, Florida, to validate bonds proposed to be issued by the district, in which Robert E. Willis and others, taxpayers, intervened, and objected to the validation. From an order validating the bonds, the interveners appeal. Order reversed.

Johnston & Garrett, of Kissimmee, and W. H. Baker and E. J. L'Engle, both of Jacksonville, for appellants. John S. Cadel, of Kissimmee, and Massey & Warlow, of Orlando, for appellee.

WHITFIELD, J. Statutory proceedings were brought to validate bonds proposed to be issued by special road and bridge district No. 2 in Osceola county. Certain taxpayers intervened with objections to the validation. The court ordered a validation, and the interveners appealed pursuant to the statute. Chapter 6868, Acts of 1915. Among the grounds of objection to validation that were presented by the intervening taxpayers is one that the petition on which the special road and bridge district was formed and all the proceedings thereunder are "contrary to the intent, meaning, and spirit of the said special road and bridge act as herein stated"; numerous specifications being made. The act is chapter 6206, Acts of 1911, as amended by chapter 6879, Acts of 1915.

An assignment of error is that the court erred in finding and holding that special road and bridge district No. 2 is such a district as is provided for and intended to be established by the statute. As a basis for argument under this assignment, it is stated by counsel for appellants:

"That the spirit of the special road and bridge act was to provide for the construction, repair, and maintenance of roads and bridges of a permanent nature in a contiguous and homogeneous territory on the initiation of the electors who are freeholders residing in such territory for their own benefit primarily and at their own costs; and the spirit of the act

is violated by an attempt to graft on the territory so benefited a vast area with small voting population and defenseless."

The proposition is to issue \$250,000 of district bonds, and to spend \$200,000 in constructing less than 30 miles of road with brick and a few miles with dirt, clay, or marl in the northern end of the district that is perhaps 80 miles or more in length, and the remaining \$50,000 in constructing or improving much more than twice as many miles of road with dirt, clay, or marl in other portions of the district very remote from the section in which four-fifths of the common fund is to be used.

[1] Action taken pursuant to a statute must accord with the provisions of the statute, and must not conflict with the requirements of organic law. See *State ex rel. Railroad Com'rs v. Florida East Coast R. Co.*, 69 Fla. 165, 182, 67 South. 906; *State ex rel. Railroad Com'rs v. Louisville & N. R. Co. et al.*, 62 Fla. 315, 57 South. 175.

[2] The intent of a statute is the gist of the enactment, and a material disregard of the statutory intent is a violation of the substance of the enactment. *Axtell v. Smedley & Rodgers Hdw. Co.*, 59 Fla. 430, 52 South. 710; *Curry et al. v. Lehman*, 55 Fla. 847, 47 South. 18.

[3, 4] Where a district or other subdivision to constitute a unit for taxation is formed by direct legislative enactment, the reasonableness of the statute is ordinarily not a subject of judicial inquiry. But where a statute merely authorizes the formation of a taxing district through action taken by persons or officials, the statutory intent should be observed in substance, and the legality and reasonableness of the action taken under the statute are subject to judicial review. A statute does not contemplate an unreasonable exercise of authority conferred by it, particularly when the taxing power and material property and personal rights are involved. A statute complete in itself may authorize the details of its execution to be formulated by specified persons or officers, within the limits fixed in the statute. But an arbitrary exercise of authority conferred is not contemplated and may be prevented or redressed in due course of law. Unreasonable action taken under color of authority that materially affects substantial rights of persons is contrary to the principles upon which our system of government is founded.

[5, 6] A purpose of the statute authorizing special road and bridge districts to be formed in counties is to avoid unfair tax burdens upon persons and property so remote from roads constructed by general county taxation

as to receive no advantage therefrom commensurate to their tax contributions for such purposes. In this view, the statute contemplates the formation of districts with some fair reference to the advantages accruing therefrom to the persons and property bearing the tax burdens assumed for the construction and maintenance of such roads and bridges. Of course, considerable latitude was contemplated and should be allowed in forming districts to meet the varying situations that may arise; but an arbitrary inclusion of large areas of territory in a district for purposes of special taxation, when such territory is very remote and perhaps disconnected from the location of roads on which the greater part of the bond money is to be expended, so as to unreasonably and arbitrarily impose taxes upon property and persons, is clearly a violation of the intent and purpose of the statute; and relief against such arbitrary action taken under the statute may be had in the courts by due course of procedure. Similar principles and limitations control action taken in locating roads, in the character of the roads constructed, and in expenditures made under the statute.

In this case it appears that the greater part of the territory included in special road and bridge district No. 2, Osceola county, Fla., is a score and more miles away from, and only remotely connected with, the more populous portion of the district which covers relatively only a fractional part of the territory, but in which relatively small territory nearly all the bond money is to be spent on a very small portion of the roads contemplated, while the large area will receive a fraction only of the expenditures and the advantages to accrue therefrom. It is no answer to say that a majority of the voters in the district have approved the action taken, since the electors could only approve or reject the proposal as made by the petition and the action taken thereon. The petition suggests the territory to be included, the roads to be constructed, and the funds to be raised; and the territory included may designedly or otherwise contain a majority of electors to approve the proposal, leaving the minority remediless if the courts do not redress wrongs that may result from an improper use made of the authority conferred by the statute to formulate districts and impose tax burdens. While the courts will not interfere with the exercise of discretion within proper and reasonable bounds, yet, where there is a clear misapprehension of authority conferred or an abuse of discretion or authority, relief may be obtained.

The order validating the bonds is reversed.

(73 Fla. 482)

**BARNWELL et al. v. SEABOARD AIR LINE RY.**

(Supreme Court of Florida. Feb. 24, 1917.)

*(Syllabus by the Court.)***1. CARRIERS — §314(2) — PERSONAL INJURY — DECLARATION.**

In an action by a passenger for injuries received by the operation of a railroad train, it is in general sufficient to allege ultimate facts showing that the relation of passenger and carrier existed, and that the defendant negligently did or omitted the act or acts that proximately caused or contributed to causing the injury as stated; the specific fact that actually caused the injury being duly alleged so that a definite issue may be presented for trial.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1275½.]

**2. CARRIERS — §314(2) — PERSONAL INJURY — SUFFICIENCY OF DECLARATION.**

While general allegations as to duty and negligence in performing it, standing alone, may with other appropriate allegations state a cause of action yet, if other allegations contained in the count state specific material facts that show there was no duty within the meaning of the general allegations as to duty and negligence, the declaration may be bad on demurrer.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1275½.]

Error to Circuit Court, Duval County; Daniel A. Simmons, Judge.

Suit by Isabell Barnwell and Woodward Barnwell, her husband, against the Seaboard Air Line Railway. Verdict and judgment for defendant, and plaintiffs bring error. Judgment affirmed.

A. H. King and Roswell King, both of Jacksonville, for plaintiffs in error. Fleming & Fleming, of Jacksonville, for defendant in error.

**PER CURIAM.** The amended declaration herein is as follows:

"Comes now the plaintiffs, Isabell Barnwell and Woodward Barnwell, her husband, and by leave of the court first had and obtained amends their declaration and alleges as follows, to wit:

"(1) That during the time herein set forth and for a long time thereafter the defendant, Seaboard Air Line Railway was, and still is, a corporation doing business in the state of Florida, and owning, maintaining, and operating for the transportation of freight and passengers by the use of cars and steam locomotives operated thereon a line of railway and system of railroads in the state of Florida, a portion of which extends from the town of Fernandina, therein, to the city of Jacksonville, therein; that on the morning of the 6th day of May, 1914, the plaintiff Isabell Barnwell, having procured transportation in due course on the passenger train of defendant from the said town of Fernandina to the said city of Jacksonville, boarded and took passage on the passenger train of defendant then and there provided for her passage, and proceeded for the city of Jacksonville; that on arriving at or near the city of Jacksonville, to wit, where the track of the defendant crosses Main street at about Twelfth or Thirteenth streets, said train was brought to a standstill, and the plaintiff Isabell Barnwell then and there proceeded to alight from said train, and while so engaged the defendant carelessly and negligently ran said train forward; that by reason of such carelessness and negli-

gence of the defendant, the plaintiff Isabell Barnwell was precipitated to the ground with great force and violence, whereby said plaintiff was painfully, seriously, and permanently injured in and throughout her body, and her right hip was thereby injured, thereby rendering said plaintiff a hopeless cripple for life; and plaintiff Isabell Barnwell's right wrist was thereby also painfully and seriously sprained, and she was thereby otherwise injured in and throughout her body, and plaintiff Isabell Barnwell was thereby subjected to great shame and mortification, by reason whereof said plaintiff has suffered great pain and anguish at all times between said date and the date hereof, and is still suffering the same, and by reason of such hurting, wounding, and injuring said plaintiff then and there became lame, sick, sore, and disordered, and has suffered great pain and anguish, and has so continued to suffer for a long time, to wit, from then to this time, and said plaintiff was thereby permanently injured and will continue permanently to suffer pain and anguish, and plaintiff Isabell Barnwell was then and thereby during that time, and still is, incapable of performing her duties and services by her to be done and performed.

"And plaintiff Woodward Barnwell was at the time of said hurting, wounding, and bruising, and has ever since been, and still is the husband of the said Isabell Barnwell, and was then and thereby and has since been deprived of the services, companionship, and wifely attention, society, and aid of the plaintiff Isabell Barnwell, and that plaintiffs were obliged to and did necessarily lay out diverse sums of money, to wit, \$500, in and about endeavoring to have the plaintiff Isabell Barnwell cured of her wounds, sickness, soreness, and disorders as aforesaid, occasioned as aforesaid, all to the damage of the plaintiffs of \$25,000.

"Wherefore plaintiffs bring their suit and claim \$25,000 damages of defendants.

"(2) And for a second count plaintiffs allege that during the time herein set forth and for a long time theretofore the defendant, Seaboard Air Line Railway, was, and still is, a corporation doing business in the state of Florida, and owning, maintaining, and operating for the transportation of freight and passengers by the use of cars and steam locomotives operated thereon a line of railway and system of railroads in the state of Florida, a portion of which extends from the town of Fernandina, therein, to the city of Jacksonville, therein; that on or about the 6th day of May, 1914, the plaintiff Isabell Barnwell, having procured transportation in due course on the passenger train of defendant from the said town of Fernandina to the said city of Jacksonville, boarded and took passage on the passenger train of the defendant then and there provided for her passage and proceeded to her destination, the said city of Jacksonville; that upon the arrival of said train of defendant at or near said city of Jacksonville, to wit, where the tracks of defendant cross Main street at or about Twelfth or Thirteenth streets, and after said train of defendant had come to a standstill at said place, said plaintiff Isabell Barnwell prepared and undertook to leave said train of defendant, and had proceeded for said purpose as far as, to wit, the steps of the platform of the passenger coach of defendant attached to defendant's said train, upon which said plaintiff had been riding as aforesaid, whereupon said train of defendant was started and run forward, whereby said plaintiff was then and there precipitated to the ground with great force and violence, and plaintiff alleges that defendant was guilty of carelessness and negligence in the premises, in this, to wit, that it caused said train to be started and run forward as aforesaid while said plaintiff was in the act of alighting as aforesaid from said train and before said plaintiff had time

to alight; that by reason of such carelessness and negligence of the defendant the plaintiff Isabell Barnwell was precipitated to the ground with great force and violence, whereby said plaintiff was painfully seriously, and permanently injured in and throughout her body, and her right hip was thereby injured, thereby rendering said plaintiff a hopeless cripple for life, and plaintiff Isabell Barnwell's right wrist was thereby also painfully and seriously sprained, and she was thereby otherwise injured in and throughout her body, and plaintiff Isabell Barnwell was thereby subjected to great shame and mortification, by reason whereof said plaintiff has suffered great pain and anguish at all times between said date and the date hereof, and is still suffering the same, and by reason of such hurting, wounding, and injuring said plaintiff then and there became lame, sick, sore, and disordered, and has suffered great pain and anguish, and has so continued to suffer for a long time, to wit, from then to this time, and the said plaintiff was thereby permanently injured and will continue permanently to suffer pain and anguish, and plaintiff Isabell Barnwell, was then and thereby during that time, and still is, incapable of performing her duties and services by her to be done and performed.

"And plaintiff Woodward Barnwell was at the time of said hurting, wounding, and bruising, and has ever since been, and still is the husband of the said Isabell Barnwell, and was then and thereby and has since been deprived of the services, companionship, and wifely attention, society, and aid of plaintiff, Isabell Barnwell, and that plaintiffs were obliged to and did necessarily lay out divers sums of money, to wit, \$500, in and about endeavoring to have the plaintiff Isabell Barnwell cured of her wounds, sickness, soreness, and disorders, as aforesaid, occasioned as aforesaid, all to the damage of the plaintiffs of \$25,000. Wherefore plaintiffs bring this their suit and claim \$25,000 damages of defendant.

"(3) And for a third count plaintiffs further allege that during the time herein set forth and for a long time theretofore the defendant, Seaboard Air Line Railway, was, and still is, a corporation doing business in the state of Florida, and owning, maintaining, and operating for the transportation of freight and passengers by the use of cars and steam locomotives operated thereon a line of railway and system of railroads in the state of Florida, a portion of which extends from the town of Fernandina therein to the city of Jacksonville, therein; that on or about the 6th day of May, 1914, the plaintiff Isabell Barnwell, having procured transportation in due course on the passenger train of defendant from the said town of Fernandina to the said city of Jacksonville, boarded and took passage on the passenger train of the defendant then and there provided for her passage and proceeded to her destination, the said city of Jacksonville; that upon the arrival of the said train of defendant's at or near the said city of Jacksonville, to wit, where the tracks of defendant cross Main street at or about Twelfth or Thirteenth streets, and after said train of defendant had there come to a standstill, at which place passengers of the defendant habitually got off its passenger trains, said plaintiff Isabell Barnwell proceeded to alight from said train of defendant, and to that end had proceeded as far as, to wit, the steps of the platform of the passenger coach of defendant, upon which said plaintiff had been riding as a passenger, as aforesaid, whereupon, without warning or notice to said plaintiff, the train of defendant was started and run forward suddenly, whereby said plaintiff was then and there precipitated to the ground with great force and violence, and plaintiff alleges that defendant was guilty of carelessness and negligence in the premises, in this, to wit, that it caused said train to be started and run forward suddenly without warning or

notice to said plaintiff, and while said plaintiff was in the act of alighting, as aforesaid, from said train and before said plaintiff had time to alight; that by reason of said carelessness and negligence of defendant in so causing said train to be started and run forward as aforesaid, without warning or notice to said plaintiff, as aforesaid, and while said plaintiff was in the act of alighting, as aforesaid, from said train, and before said plaintiff had time to alight, as aforesaid, said plaintiff was precipitated to the ground with great force and violence, whereby said plaintiff was painfully, seriously, and permanently injured in and throughout her body, and her right hip was thereby injured, thereby rendering said plaintiff a hopeless cripple for life, and plaintiff Isabell Barnwell's right wrist was thereby also painfully and seriously sprained, and she was thereby otherwise injured in and throughout her body, and plaintiff Isabell Barnwell was thereby subjected to great shame and mortification, by reason whereof said plaintiff has suffered great pain and anguish at all times between said date and the date hereof, and is still suffering the same and by reason of such hurting, wounding, and injuring said plaintiff then and there became lame, sick, sore, and disordered, and has suffered great pain and anguish, and has continued to suffer for a long time, to wit, from then to this time, and the said plaintiff was thereby permanently injured, and will continue permanently to suffer pain and anguish, and plaintiff Isabell Barnwell was then and thereby during that time, and still is, incapable of performing her duties and services by her to be done and performed.

"And plaintiff Woodward Barnwell was at the time of said hurting, wounding, and bruising, and has ever since been, and still is the husband of said Isabell Barnwell, and was then and thereby and has since been deprived of the services, companionship, and wifely attention, society, and aid of plaintiff Isabell Barnwell, and that plaintiffs were obliged to and did necessarily lay out divers sums of money, to wit, \$500 in and about endeavoring to have the plaintiff Isabell Barnwell cured of her wounds, sickness, soreness, and disorders as aforesaid occasioned as aforesaid, all to the damage of the plaintiffs of \$25,000."

The court sustained demurrers to the first and second counts, and overruled a demurrer to the third count. Trial was had on the third count with verdict and judgment for the defendant. On writ of error the plaintiffs contend that harmful error was committed in sustaining the demurrers to the first and second counts of the declaration; a ground of the demurrers being that no cause of action was stated.

Without determining whether the trial had on the third count did not cover all the issues that could have been made under the first and second counts, the correctness of the ruling of the court in sustaining the demurrers to the first and second counts will be considered. The correctness of the verdict and judgment on the third count of the declaration is not questioned here.

[1] In an action by a passenger for injuries received by the operation of a railroad train, it is in general sufficient to allege ultimate facts showing that the relation of passenger and carrier existed, and that the defendant negligently did or omitted the act or acts that proximately caused or contributed to causing the injury as stated; the specific fact that actually caused the injury being du-

ly alleged so that a definite issue may be presented for trial. *Warfield v. Hepburn*, 62 Fla. 409, 57 South. 618.

[2] While general allegations as to duty and negligence in performing it, standing alone, may with other appropriate allegations state a cause of action, yet if other allegations contained in the count state specific material facts that show there was no duty within the meaning of the general allegations as to duty and negligence, the declaration may be bad on demurrer. See *Florida Cent. & P. R. Co. v. Ashmore*, 43 Fla. 272, 32 South. 832.

The allegation of the first count is

That "on arriving at or near said city of Jacksonville, to wit, where the track of the defendant crosses Main street at or about Twelfth or Thirteenth streets, said train was brought to a standstill, and the plaintiff Isabell Barnwell then and there proceeded to alight from said train, and while so engaged the defendant carelessly and negligently ran said train forward; that by reason of such carelessness and negligence of the defendant the plaintiff Isabell Barnwell was precipitated to the ground with great force and violence" and injured.

It is not alleged that the place at which the train stopped was a station or a depot or that passengers customarily or habitually alighted there or that the defendant's servants knew or should have known that the plaintiff contemplated alighting or was proceeding to alight at the place where the train stopped or when "the defendant carelessly and negligently ran said train forward" as alleged. This being so, and the necessary inference from the specific allegations being that the train was not at a station or depot or a customary or habitual alighting place when "said train was brought to a standstill," the defendant was not charged with any knowledge or notice that the plaintiff intended to alight so as to raise a duty to see that she had ample opportunity to alight safely. The relation of carrier and passenger was shown; but no duty is alleged directly or inferentially that was violated even if the train was negligently run forward after it had stopped. It does not appear that the plaintiff would have been injured when "the defendant carelessly and negligently ran said train forward," as alleged, if she had not been then endeavoring to alight at a point where the defendant, on the showing made, owed no duty to afford a safe opportunity for alighting to a passenger.

The second count alleges that:

"Upon the arrival of said train of defendant at or near said city of Jacksonville, to wit, where the tracks of defendant cross Main street at about Twelfth or Thirteenth streets, and after said train of defendant had come to a standstill at said place, said plaintiff, Isabell Barnwell, prepared and undertook to leave said train of defendant and had proceeded for said purpose as far as, to wit, the steps of the platform of the passenger coach of defendant attached to defendant's said train, upon which said plaintiff had been riding as aforesaid, whereupon said train of defendant was started and run for-

ward, whereby said plaintiff was then and there precipitated to the ground with great force and violence, and plaintiff alleges that defendant was guilty of carelessness and negligence in the premises, in this, to wit, that it caused said train to be started and run forward as aforesaid while said plaintiff was in the act of alighting as aforesaid from said train and before said plaintiff had time to alight; that by reason of such carelessness and negligence of the defendant the plaintiff Isabell Barnwell was precipitated to the ground with great force and violence, whereby said plaintiff was painfully, seriously, and permanently injured."

There is a general allegation:

"That defendant was guilty of carelessness and negligence in the premises, in this, to wit, that it caused said train to be started and run forward as aforesaid while said plaintiff was in the act of alighting as aforesaid from said train and before said plaintiff had time to alight; that by reason of such carelessness and negligence of the defendant the plaintiff was precipitated to the ground" and injured.

But this general allegation of breach of duty refers to the previous specific allegations of fact which show there was no such duty as is alleged to have been violated. It having been alleged that the plaintiff was on "the steps of the platform of the passenger coach," when the other allegations do not show that the plaintiff was entitled to expect a safe exit from the train to be afforded by the defendant at the time and place, the negligence alleged does not appear to have been a proximate cause of the injury for which the defendant is liable. Under the particular facts alleged the injury to the plaintiff appears to have been "caused by her own negligence" within the meaning of the statute forbidding a recovery. It does not appear that the alleged negligence in starting the train violated a duty to the plaintiff, since she was injured while she was alighting at a time and place when it does not appear that she had a right to expect a safe landing. It cannot be assumed that the negligent starting of the train would have injured her if she had not been trying to alight when she should not have done so.

Conceding, but not deciding, that the general allegations of negligence, together with the other allegations consistent therewith contained in the second count, would state a cause of action, yet the specific facts stated in the count to which the general allegations refer as the basis of liability show that the injury was caused by the plaintiff's own negligence in attempting to alight when and where she should not have so attempted, at least without some showing that the defendant knew or reasonably should have known that a passenger might attempt to so alight.

In *Florida East Coast R. Co. v. Carter*, 67 Fla. 335, 65 South. 254, Ann. Cas. 1916E, 1299, and 69 Fla. 153, 67 South. 916, the declaration alleged that the train stopped "at the station of the defendant." In *Seaboard Air Line Ry. v. Parker*, 65 Fla. 543, 62 South. 589, the repugnant allegations were imma-



terial surplusage and did not affect essential allegations.

Judgment affirmed.

**BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.**

(73 Fla. 494)

**SEABOARD AIR LINE RY. CO. v. HESS.**

(Supreme Court of Florida. Feb. 24, 1917.

Rehearing Denied March 20, 1917.)

(Syllabus by the Court.)

**1. APPEAL AND ERROR §745—BILL OF EXCEPTIONS—RULE OF COURT—STATUTE.**

Special rule 1 of the Rules of Circuit Courts in law actions (37 South. x), requiring the plaintiff in error at the time of presenting a bill of exceptions to the judge of the circuit court to be made up and settled, and to present with such bill an assignment of errors specifically mentioning each point intended to be presented by such bill as grounds of reversal, and that such assignment of errors shall be made a part of the bill of exceptions, is intended to provide a guide for making up the bill of exceptions; and, if not actually incorporated in the bill of exceptions and made a part of it, such omission cannot be ground for striking the assignments of error based upon matter appearing in the bill of exceptions if the assignment of errors was actually presented to the judge of the circuit court at the time of presenting to him the bill of exceptions to be made up and settled, and is filed in this court within three days after filing the copy of the record as provided in section 1706 of the General Statutes of 1906.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3039, 3042.]

**2. COURTS §85(2)—RULE OF COURT—STATUTE.**

A rule of court should be so construed to be in harmony with a statute if possible, and not so as to subordinate the statute to it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 296.]

**3. PLEADING §204(2)—DEMURRER—RULING.**

A demurrer to a declaration, in its entirety containing more than one count, should be overruled if one count states a cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486, 487.]

**4. MASTER AND SERVANT §258(4)—DECLARATION—CAUSE OF ACTION.**

A declaration, in an action against a railroad company for damages for personal injuries, in which the allegations show that the injured person and his coemployee were together engaged in performing the work of their employer, and that the plaintiff became injured while so engaged as the result of the other's negligence, carelessness, or wantonness, states a cause of action.

**5. DAMAGES §143 — ACTION FOR INJURY—PLEADING—DAMAGES.**

In an action for damages for personal injuries, general allegations of the damages sustained which are the direct, natural, and necessary result of the injury received are sufficient.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 410, 433.]

**6. COMMERCE §8(6)—ACTION FOR INJURY—REMEDY—FEDERAL EMPLOYERS' LIABILITY ACT.**

The exclusive remedy for injuries received by railroad employes while engaged in interstate commerce is under the Federal Employers' Liability Act (April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]).

**7. COMMERCE §8(6)—ACTION FOR INJURY—PLEADING—EMPLOYERS' LIABILITY ACT.**

In an action for damages for personal injuries against a railroad corporation, it is unnecessary for the defendant to plead the federal Employers' Liability Act to obtain the benefits of the provision that no action shall be maintained under it unless begun within two years from the day the cause of action accrued.

**8. APPEAL AND ERROR §1039(5)—HARMLESS ERROR—PLEA.**

Where a railroad corporation is sued by an employe for damages for personal injuries sustained by such employe while engaged in interstate commerce, it is not harmful error for the trial court to refuse the defendant's motion for leave to file a plea setting up the fact that the injury occurred while the employe was engaged in interstate commerce and the action was not brought within two years from the day the injury occurred, provided the court permitted the defendant to introduce evidence tending to establish such facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4078.]

**9. TRIAL §242—MISLEADING INSTRUCTION—EVIDENCE.**

An instruction which permits the jury to determine from the "evidence" a fact which is not in dispute and which is undenied and appears from the record in the case, and such fact is a material part of the defendant's defense, is erroneous and misleading and constitutes reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 569-576.]

Error to Circuit Court, Alachua County; J. T. Willis, Judge.

Suit by Roy O. Hess against the Seaboard Air Line Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Hampton & Hampton, of Gainesville, for plaintiff in error. W. S. Broome, of Gainesville, and A. V. Long and D. E. Knight, both of Starke, for defendant in error.

**ELLIS, J.** The defendant in error, Roy O. Hess, brought suit in the circuit court for Alachua county against the Seaboard Air Line Railway to recover damages for personal injuries alleged to have been inflicted upon him by the negligent act of the engineer on one of the defendant's locomotives in sounding the whistle of the locomotive at a time when the plaintiff who was employed as fireman on the locomotive was adjusting the whistle, which negligent act resulted, as it is alleged, in producing deafness in one of the plaintiff's ears. There was a verdict and judgment for the plaintiff below, and the defendant took a writ of error.

[1, 2] In making up the bill of exceptions the assignment of errors which special rule No. 1 requires to be presented to the judge of the circuit court who tried the cause, as a guide for making up the bill of exceptions, and to be made a part thereof, was not incorporated in and made a part of it. Assignments of error numbered from 3 to 11, inclusive, rest upon alleged errors which appear only by the bill of exceptions. The defendant in error moved to strike those as



signments of error because the assignment of errors was not made a part of the bill of exceptions, as required by special rule No. 1. It is admitted that when the bill of exceptions was presented to the judge to be made up and settled, an assignment of errors, specifically mentioning each point which the plaintiff in error intended to present by the bill of exceptions as grounds for reversal, was presented to the judge, and a copy thereof served upon counsel for defendant in error, with notice of the application for settling the bill of exceptions. A complete assignment of errors, including those presented to the judge at the time of applying for the bill of exceptions, as well as those based upon matters apparent upon the record proper, was filed by the plaintiff in error, in the office of the clerk of the circuit court, when it applied for a transcript of the record, and such assignment of errors is incorporated in the record.

Section 1706 of the General Statutes of Florida of 1906, Florida Compiled Laws 1914, provides that:

"The plaintiff in error shall file in the appellate court his assignment of errors within three days after the filing of the copy of the record. If this be omitted, except for good cause shown, the writ of error shall, on motion of the defendant in error, be dismissed, unless the court shall allow further time."

This statute was complied with by the plaintiff in error, inasmuch as the complete assignment of errors is included in the transcript of the record. The reason for the rule requiring an assignment of errors to be presented to the judge at the time application is made to him to make up and settle the bill of exceptions is, as the rule states, to provide a guide for making up the bill of exceptions. Otherwise the bill of exceptions may contain matters in pais upon which no assignment of error rests, and the record thereby be incumbered with surplus and unnecessary matter. If this guide has been supplied to the judge and opposing counsel served with a copy of the assignment of errors as the rule directs, the full purpose of the rule has been accomplished. The provision requiring the assignment of errors to be made a part of the bill of exceptions merely preserves the evidence of a compliance with the rule as to the making up and settling of the bill of exceptions which should present only those matters in pais upon which the plaintiff in error bases his assignment of errors. The cases cited by defendant in error in which this court has held that matters not of the record proper must be presented by a bill of exceptions or they will not be considered are not applicable to the point here. Matters occurring at the trial which are not of the record proper, but merely in pais, are preserved only by the means of a bill of exceptions which, when made up, settled, and signed by the judge and filed in the office of the clerk of the court, and not until then, become a part of the record in the cause. Under the statute above quoted, the

plaintiff in error may file his assignment of errors after the record in the cause has been made up and a transcript thereof certified to by the clerk under the rules has been filed in this court. The motion of the defendant in error, therefore, strikes at this statute. If granted, the plaintiff in error would be deprived of his assignments of error based upon matters appearing in the bill of exceptions, notwithstanding it had complied with the provisions of the statute. The statute would thus be subordinated to the rule, which, instead of facilitating the administration of justice, would hamper and impede it. See *Thomas Bros. Co. v. Price & Watson*, 56 Fla. 694, 48 South. 17. The motion of the defendant in error is overruled.

[3, 4] The declaration alleges, in substance, that the defendant corporation is a common carrier and operates a line of railroad from Starke, in Bradford county, to Wannee, in Alachua county, Fla.; that plaintiff was an employé of the company, as fireman on one of the locomotive engines then being operated over the line of road; that while the engine upon which the plaintiff was employed as fireman was standing upon the track at Sampson City, a junction point on the line of road, it became necessary to adjust the whistle on the locomotive; that W. H. Porter, who was in the service of the company as engineer, instructed the plaintiff to go out upon the engine and adjust the whistle; that in obedience to that order he went out "on the top of said engine by the side of the dome," and while adjusting the whistle as directed by his superior, the latter, who had been warned not to blow the whistle while plaintiff was adjusting it, "carelessly and negligently," and "not regarding his duty in the premises," sounded two blasts upon the whistle, which gave the plaintiff a severe shock in his right ear, whereby he has lost the sense of hearing in that ear and suffered great pain, etc.

The defendant demurred to the declaration upon the ground that it did not allege that the engineer was acting within the scope of his authority in sounding the whistle, nor that it was the duty of the engineer to sound the whistle at the time, that the declaration failed to allege any act of negligence on the part of the engineer for which his employer could be held, and that it failed to allege in what manner the plaintiff had sustained financial loss. This demurrer was overruled.

The defendant below by its counsel also moved the court to require the plaintiff to reform and amend the declaration, by setting forth the authority under which, and for what purpose, the engineer "blew the whistle," and by setting forth the amount paid for medicines and doctor's bills by plaintiff, and how he had sustained financial loss. This motion was overruled. The ruling of the court upon the demurrer and motion constitute the basis for the first and second assignments of error.

It is true the declaration shows that the engine upon which the alleged injury occurred was then and there being operated over the defendant's said line of road, and that the plaintiff was employed on it as fireman, and W. H. Porter as engineer. It also appears that the engine was "standing upon the track" at Sampson City. That is to say, while there were fires in its fire box and steam in its boiler, it was, at the time of the injury, idle in the sense that it was not actually in operation. If at this time the engineer sounded the whistle, not because he was required by any rule of the company to do so prior to moving on, but in a spirit of wanton mischief to startle the fireman, the defendant might not have to respond under the law to any resultant injury to the fireman. But it is alleged in the second count of the declaration, and the demurrer admits such allegations to be true, that while the engine was standing at Sampson City it became necessary, in the operation of the engine, to repair the whistle; that it was the plaintiff's duty to repair it upon being instructed so to do by the engineer, who gave such instruction to the plaintiff. From these allegations it appears that in repairing the whistle both engineer and fireman were about the employer's business, and one became injured as the result of the other's negligence, carelessness, or wantonness. Upon this reading of the second count of the declaration, it is apparent that the authorities cited by counsel for plaintiff in error in support of the doctrine that a master is responsible for the act of his servant only when the latter is acting within the scope of his employment are in support of the court's ruling on the demurrer. The second count of the declaration meets the test of the master's responsibility for the act of his servant, as laid down by the authorities cited in the brief of counsel for plaintiff in error; the test being whether the act was done in the prosecution of the master's business. See 2 Labatt's Master & Servant, § 537; 4 Wait's Actions & Defenses, 413; Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405. The rule is very generally followed that a master is not liable for the acts of his servant performed by him without the scope of his employment solely for his own purpose, whether these purposes be malicious or merely sportive. See note in 13 L. R. A. (N. S.) 1193.

In the case of Medlin Milling Co. v. Boutwell, 104 Tex. 87, 133 S. W. 1042, 34 L. R. A. (N. S.) 109, injury occurred to the employé while other employés of the corporation in sport were subjecting him to a process called "initiation." The court held that no liability of the corporation was shown, although it was shown that it was a custom among the officers and employés, from the president down, to indulge in such sport.

In the case of Soderlund v. Chicago, Milwaukee & St. Paul Railway Company, 102 Minn. 240, 113 N. W. 449, 13 L. R. A. (N. S.)

1193, the plaintiff, an employé, was injured by falling from a hand car which at the time was propelled by other employés at a high rate of speed thoughtlessly and in a spirit of fun. The hand car was provided by the company for the employés for the purpose of conveying them to and from their work. The court held the company liable for the injury resulting from the careless and negligent operation of the car. In this particular the second count of the declaration states a cause of action, and as the demurrer attacks the declaration in its entirety, it was properly overruled as to the first, second, third and fifth grounds.

[6] As to the fourth ground of the demurrer, viz., that the declaration fails to allege how and in what manner the plaintiff sustained financial loss, we have to say that the allegations as to such loss are not required to be specific or possess a very high degree of certainty. A general allegation of the damages sustained which are the direct natural and necessary result of the injury seems to be sufficient upon the theory that the defendant is presumed to know the damages that directly and necessarily result from the negligence, and consequently will not be taken by surprise when evidence of such damage is admitted. See Jacksonville Electric Co. v. Batchis, 54 Fla. 192, 44 South. 933; Seaboard Air Line Ry. v. Moseley, 60 Fla. 186, 53 South. 718. The second count of the declaration alleges that as a result of the negligent act of the engineer the plaintiff's hearing in the right ear has become permanently impaired, that he has suffered great pain, his health has been impaired, and he is unable to pursue his business, and his earning capacity has been greatly reduced. Such damages seem to us to be the direct, natural, and necessary result of the injury, and were alleged with sufficient particularity.

The declaration was filed February 1, 1915. The præcipe was filed and the service of summons made on the defendant January 18, 1915. The defendant pleaded to the declaration, and the case went to trial. The injury was alleged to have occurred September 30, 1912. When the case was called for trial January 12, 1916, the defendant moved the court for leave to file additional pleas, setting up the defense that the defendant was engaged at the time of the injury in transporting interstate freight by the train on which the plaintiff was employed, and that more than two years had elapsed between the alleged injury and the institution of the suit.

[8-8] This court has said that whenever a valid federal regulation covers a subject within the sphere of the federal law, it is paramount, and the action must be brought within the time fixed by the statute. See Flanders v. Georgia Southern & F. R. Co., 68 Fla. 479, 67 South. 68. What was said by this court in the above cause as to the applicability of the federal law on the subject

of employers' liability it is unnecessary to repeat here. It is sufficient to say that it was there held that the exclusive remedy for injuries received by railway employes while engaged in interstate commerce is under the federal Employers' Liability Act. See *Chicago, R. I. & P. Ry. Co. v. Devine*, 239 U. S. 52, 36 Sup. Ct. 27, 52 L. Ed. 140; *Chicago, R. I. & P. Ry. Co. v. Wright*, 239 U. S. 548, 36 Sup. Ct. 185, 60 L. Ed. 431; *Wabash R. R. Co. v. Hayes*, 234 U. S. 86, 34 Sup. Ct. 729, 58 L. Ed. 1226.

[9] Section 6 of the federal Employers' Liability Act provides that no action shall be maintained thereunder unless begun within two years from the date the cause of action accrued. See *Shannon v. Boston & M. R. R.*, 77 N. H. 349, 92 Atl. 167. It is unnecessary to plead the act to obtain the benefit of it, because it is generally held that when neither the declaration nor the plea shows that the injury occurred while the employe was engaged in interstate commerce, yet if during the taking of evidence the fact develops, the federal law controls the cause. *Flanders v. Georgia Southern & F. R. Co.*, supra. It was not harmful error, therefore, to overrule the motion for leave to file the plea, if the court subsequently admitted evidence to show that the injured employe was in fact engaged in interstate commerce when he sustained the injury. This the court permitted the defendant to introduce evidence to establish. The court, however, erred in giving the following instruction, which is made the basis of the fifth assignment of error, viz.:

"The court further instructs you that if you find that the plaintiff was injured, as alleged in the declaration, and that in the train at the time of the alleged injury there was a carload of cotton consigned from Alachua to Shelby, N. C., then the employe Heas was engaged in interstate commerce; and, although you may find from the evidence that the company was guilty of negligence, yet if you find from the evidence that more than two years had elapsed from the time of the alleged injury to the time of the bringing of the suit, you should find a verdict for the defendant, the cause of action being barred under the federal Employers' Liability Act."

In this instruction the court left to the jury a question of fact which was undenied. There was no issue joined on the question of whether two years had elapsed between the day of the injury and the commencement of the suit. The declaration showed upon its face that such was the case, yet by this instruction the jury were told that it was a matter for them to determine from the evidence and there was no evidence before them, at least in the form of testimony which they may have understood was meant by evidence, as to when the suit was commenced. The court should have instructed them that two years had elapsed between the day of the injury and the commencement of the suit according to the allegations of the declara-

tion and the return upon the summons, and that there was no dispute between the parties on that point. We think that the instruction was misleading and harmful, in that it denied to the defendant the right to have the jury informed that the time limit prescribed by the act for commencement of the suit had elapsed. For this error the judgment is reversed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and WHITFIELD, JJ., concur.

(73 Fla. 478)

ATLANTIC COAST LINE R. CO. v. BRASH.

(Supreme Court of Florida. Feb. 24, 1917.)

(Syllabus by the Court.)

1. DAMAGES  $\S$  163(1) — PERSONAL INJURY — BURDEN OF PROOF—PROXIMATE CAUSE.

Where a recovery is sought in damages against a railroad corporation by one who as a passenger sustained injuries resulting from the negligent operation of the train, and that a disease affecting his nerves was superinduced by the physical injuries sustained in the railroad accident, it is incumbent upon the person seeking compensation in damages to show with reasonable certainty that the diseased nervous condition from which he suffers resulted from the injuries sustained in the railroad accident.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig.  $\S$  454, 455.]

2. EVIDENCE  $\S$  553(2)—HYPOTHETICAL QUESTION—CONTENT.

A hypothetical question propounded to a physician as to whether a diseased nervous condition of the plaintiff resulted from a certain railroad accident should embrace what, if any, physical injury the evidence tended to show the plaintiff sustained in such accident.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig.  $\S$  2370.]

3. APPEAL AND ERROR  $\S$  1048(5)—HARMLESS ERROR—HYPOTHETICAL QUESTION.

A hypothetical question improperly framed, but allowed over proper objection, does not constitute reversible error, if the person to whom it is directed admits his inability to answer the question as framed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig.  $\S$  4148, 4151, 4158, 4159.]

4. APPEAL AND ERROR  $\S$  1171(1)—AMOUNT OF DAMAGES—REVERSAL.

Where it appears from the evidence that a verdict for damages is excessive, and the evidence does not disclose the extent of the injuries actually sustained, nor their consequences, a judgment based upon such a verdict will be reversed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig.  $\S$  4546, 4552, 4554.]

Error to Circuit Court, Hillsborough County; F. M. Robles, Judge.

Action by Henry Brash against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Sparkman & Carter, of Tampa, for plaintiff in error. Horace C. Gordon, Victor H. Knight, and M. Henry Cohen, all of Tampa, for defendant in error.

**PER CURIAM.** Henry Brash recovered a judgment against the Atlantic Coast Line Railroad Company for the sum of \$4,100 in the circuit court for Hillsborough county in an action for damages for personal injuries sustained by him while riding as a passenger on the railroad of the company. A writ of error was taken by the defendant below to that judgment, and so it is here for review.

[1] Henry Brash on the 4th day of May, 1914, became a passenger on the defendant's railroad to be carried from Tampa to Plant City. Before the train arrived at the passenger's destination, through negligence of the defendant's employes, the train collided with other cars of the defendant standing upon the track. The defendant in error Brash claimed to have sustained some injuries as the result of the accident, that he became sick and disordered, and has suffered from a nervous disease, and is still so suffering, and has suffered pain, all of which has prevented him from attending to the duties required of him by his business and occupation.

The motion for a new trial, which was overruled, attacked the verdict upon the grounds that it was contrary to law, contrary to the charges of the court and to the evidence, and was excessive. The overruling of this motion constitutes the basis of the first assignment of error. Counsel for plaintiff in error discuss all the grounds of the motion together. Counsel for plaintiff in error insist in the discussion of the first assignment that the evidence was not sufficient to show that the disease from which Brash was suffering was caused by the accident referred to in the declaration, but on the contrary the testimony of two physicians called as witnesses by the defendant shows that the disease could not have been caused by the accident.

There was ample evidence to show that Brash is a sufferer from a nervous disease; one physician called it "neurasthenia." Brash has been treated by this physician for that disease since a day or two after the accident, who had not treated him for any disease prior to that time since January, 1910, prior to which date Brash had been treated by him for chronic neuralgia, but had been discharged. When the accident occurred Brash seemed to have sustained no personal injuries like bruises, cuts, and wounds and broken limbs, but he was as he said jostled and thrown backward and forward in his seat. His "head struck the seat in front and very forcibly" and threw him back, and he was thrown upon his left hand and struck his side against something. There was much confusion and noise, dust and showers of broken glass, but Brash left the

car, mingled with the other passengers, complaining slightly of a sprained wrist, and his back which he said "hurt him." That evening his pains increased; he treated his own ailments without success, and returned home. According to his testimony his present condition is that of one suffering from a "nervous breakdown." He cannot sleep at times; when he is quiet and composed he can attend to his business, but little exertion incapacitates him, and his business suffers from lack of his attention. His back gives him much trouble, and his neck pains him, and his "spinal column is all curved," he said.

There are some facts appearing in the evidence which were used as circumstances from which the inference was sought to be drawn that the disease, from which the defendant in error is suffering, was attributable to the accident of May 4, 1914.

The verdict was undoubtedly rendered upon the theory that the nervous condition of the defendant in error was not only a permanent condition, but that it was the result of the accident. This is apparent from the fact that the injuries sustained by Brash so far as any outward or bodily evidences of them were concerned were very slight. The jury therefore must have relied upon his statements as to the nature of his injuries, and their consequences. As to their probable duration and permanent character there is no evidence, expert or otherwise, upon which to base a conclusion reasonably certain. It should appear from the evidence with reasonable certainty that the diseased condition of the defendant in error resulted from the injuries received by him in the railroad accident, and not be left to speculation and guesswork on the part of the witness materially interested, in the recovery of damages.

[2, 3] The hypothetical question propounded to the witness Dr. Helms was, we think, improperly allowed, because the question omitted a very material fact, namely, the physical injury actually sustained, or the injury which the evidence may have tended to show was sustained. The reply, however, seems not to have been harmful, as the witness acknowledged his inability to answer.

[4] We think the verdict was excessive, and as we are not advised from the record of the extent of the injuries actually received, nor their consequences, we cannot direct a remittitur.

The judgment is reversed.

**BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.**

(73 Fla. 333)

ANSLEY et al. v. GRAHAM et al.

(Supreme Court of Florida. Feb. 20, 1917.)

(Syllabus by the Court.)

1. DEEDS  $\S$ 118—LOCATION OF LAND—PRESUMPTION.

Where the state and county are omitted from the description of the lands conveyed in a deed, but the lands are so described that they can be located by a surveyor, the fact that the grantor and grantee are described as being of a certain county and state, and the deed is acknowledged and recorded in that county, in the absence of anything to the contrary, the presumption is that the land is situated in the county and state where all the parties reside, and where the deed was executed, acknowledged, and recorded.

2. DEEDS  $\S$ 88(1) — DESCRIPTION — SUFFICIENCY.

If a surveyor, by applying the rules of surveying, can locate the land, the description is sufficient; and a deed will be sustained if it is possible to ascertain and identify the land intended to be conveyed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig.  $\S$  65.]

3. DEEDS  $\S$ 105—INTENTION—CONSTRUCTION.

Where the evident intention of a grantor can be carried into effect by construing the word "her," before the word "heirs," in the habendum of a deed, to be intended for "their," such construction will be followed, rather than one which defeats the clearly expressed intention of the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig.  $\S$  278-291, 372-374.]

Error to Circuit Court, Duval County; George Couper Gibbs, Judge.

Ejectment by J. C. Ansley and others against Dora Graham and others. Plaintiffs' motion for nonsuit granted, and they bring error. Reversed and remanded.

Axtell & Rinehart, of Jacksonville, for plaintiffs in error. D. M. Gornto and Carter & McCollum, all of Jacksonville, for defendants in error.

BROWNE, C. J. On August 26, 1915, plaintiffs in error, who were the plaintiffs below, brought suit in ejectment against the defendants in error, in the circuit court of Duval county. A plea of not guilty was filed, and on the trial the plaintiffs offered in evidence the deed under which they claimed title, as follows:

"This indenture, made this 17th day of October, A. D. 1901, between J. C. Greeley, as trustee for Mellen C. Greeley, with power to sell, of the county of Duval, in the state of Florida, party of the first part, and Emma Tallock, during her natural life, then Mattie Ansley and her children, of the county of Duval, in the state of Florida, party of the second part,

"Witnesseth, that the said party of the first part, for and in consideration of the sum of one hundred and sixty dollars, to him paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold to the said party of the second part, her heirs and assigns forever, the following described land, to wit:

"Part of the Sand Hills tract, also being part of the Willie Brown tract, begin in William

Ballard east line 206 feet north of the base line, thence continue north in the said Ballard line 588 feet, thence easterly at right angles with first line 330 feet, thence southerly parallel with first line 588 feet, thence westerly 330 feet to the place of beginning, containing 4 acres.

"And the said party of the first part does hereby fully warrant the title to said land and will defend the same against the lawful claims of all persons whomsoever.

"In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

"J. C. Greeley, [Seal.]

"As Trustee for Mellen C. Greeley.

"Signed, sealed and delivered in presence of:

"Carrie Harrison.

"Allan Greeley.

"State of Florida, County of Duval.

"I hereby certify, that on this 17th day of October, A. D. 1901, before me, Allan Greeley, notary public, personally appeared J. C. Greeley, as trustee for Mellen C. Greeley, to me known to be the person described in and who executed the foregoing conveyance to E. Tallock, and acknowledged the execution thereof to be his free act and deed for the uses and purposes therein mentioned.

"Witness my signature and official seal at Jacksonville, in the county of Duval and state of Florida, the day and year last mentioned.

"[Notarial Seal.] Allan Greeley,

"Notary Public, State of Fla. at Large.

"I certify that on this 19th day of October 1901, I recorded the foregoing instrument in the public records of Duval county, Florida.

"P. D. Cassidey, Clerk Circuit Court,

"[Court Seal.] By E. O. Clark, D. C."

Whereupon the defendants objected to its introduction on the following grounds:

"(1) It appears to have been executed under a power, and the power is not first shown.

"(2) The deed is vague and indefinite in describing the land and does not furnish the means of identifying the tract intended to be conveyed, and is therefore void for uncertainty in description.

"(3) The deed is vague and uncertain as to the person taking the grant, and it is impossible to determine therefrom who takes what estate, if any, is granted.

"(4) The granting clause is repugnant to the introductory clause, and therefore the deed is void for repugnancy.

"(5) The fee-simple estate is granted to Emma Tallock and her heirs, and the plaintiffs have not shown that they derived title under Emma Tallock.

"(6) The fee-simple estate is granted to Emma Tallock and Mattie Ansley and her children.

"(7) The fee-simple title is granted to Emma Tallock and Mattie Ansley and her children, and thus is created an estate in cotenancy. The plaintiffs, as tenants in common, have not shown that ejectment lies as against their cotenants in this cause."

To these objections the court made the following order:

"I sustain the objections of the defendants to the introduction of this deed. I have construed the deed in the particular instance. Had there only been the first objection, of showing the power, I would have permitted the deed to go in. If you had failed to show possession, then I should have sustained the objection on that first ground. If you had relied on your documentary title to the land and had not in addition thereto shown possession, other objections, having been raised to this particular deed, made it necessary for the court to construe the deed.

The court has construed the deed to mean just as stated in the granting clause that the deed is to the second party, and that the second party is Emma Tallock, her heirs and assigns.

The plaintiffs then offered to prove that Emma Tallock went into possession of the property about the date of the deed and remained in possession until her death in December, 1909; that Mattie Ansley, together with her husband and children, lived upon the land with Emma Tallock for two or three years, beginning at or about the date of the deed; that Mattie Ansley died during the year 1908; that she left, surviving her, her husband, J. C. Ansley, and her children, Ernest M. Ansley, Elbert O. Ansley, John M. Ansley, and Millie May Ansley; that the real parties in interest, E. P. Axtell and C. D. Rinehart, have by proper conveyances acquired the interests of the said nominal plaintiffs in this cause; that the plaintiffs offered to prove, by a surveyor, that the description in said deed is sufficient to locate the land; and that the land therein described can be located by a surveyor from the description contained in the deed, when the said description is considered with reference to the land of William Ballard and the land known as the Sand Hills tract, which are mentioned in said deed.

The defendant objected to the introduction of this evidence because it was irrelevant and immaterial, and, upon this objection being sustained, the plaintiff moved for a nonsuit with bill of exceptions, and sued out writ of error to this court, and assigns as errors the refusal of the trial judge to permit the introduction of the deed from J. C. Greeley as trustee for Mellen C. Greeley to Emma Tallock and others, and his refusal to allow plaintiffs to prove the facts set forth above.

[1, 2] In ruling on the objection to the introduction of the deed, the court below stated that, if there had only been the first objection, he would have permitted the deed to be introduced, subject to subsequent proof which would establish its relevancy. In view of the fact that the attorney for defendant in error discusses his first objection, and as the case will go back for a new trial, we feel it incumbent upon us to pass upon this objection, and we find that the ruling of the trial judge was correct. The judge did not rule definitely on the second objection, which was that the description of the land sought to be conveyed did not furnish means of identifying the tract, and, as this question may arise in another trial, it is necessary here to determine its merits. The description is as follows:

"Part of the Sand Hills tract, also being part of the Willie Brown tract, being in William Ballard east line 206 feet north of the base line, thence continue north in the said Ballard line 588 feet, thence easterly at right angles with first line 330 feet, thence southerly parallel with first line 588 feet, thence westerly 330 feet to the place of beginning, containing 4 acres."

This description seems sufficient to identify the land. The grantor and grantees are described as being of the county of Duval and state of Florida, and the deed is recorded in that county, and, in the absence of anything to the contrary, the presumption is that the land is situated in the county and state where all the parties reside, and where the deed was executed, acknowledged, and recorded.

In the case of *Horton v. Murden*, 117 Ga. 72, 43 S. E. 786, the land was referred to as "my lot 50 front of Fortune street, running back 155 feet, joining on the north side by Murden and on the south side by Horton." The state, county, and city in which the lot was located were not referred to. It was claimed that the instrument was void for want of adequate description. The document was dated, "Atlanta, Ga.," and the court said:

"In the absence of anything to the contrary, it will be presumed that Fortune street was in the city of Atlanta."

In *Butler v. Davis*, 5 Neb. 521, objection was made to admission of a deed because the description was void for uncertainty, and did not describe any property. The land was described as the south half of the northwest quarter and the north half of the southwest quarter of section 35, in township 15 north, of range 12 east, without designating the county and state in which the lands were situated. The court held that the deed was properly admitted in evidence, and based its decision on the fact that the deed was signed and acknowledged in Douglas county, and immediately thereafter filed for record in the office of the register of deeds of that county.

If there is a Sand Hills tract, or a Willie Brown tract, or a William Ballard place, which can be located, the land sought to be conveyed seems easily identified. In the case of *Lente v. Clarke*, 22 Fla. 515, 1 South. 149, this court held that a promise to sell "my forty near the Garrison Lands in Hernando county" was a sufficient description to identify and furnish means of finding the land. The plaintiff herein offered to prove, by a surveyor, that the description in the deed is sufficient to locate the land, and that the land therein described can be located by a surveyor from the description contained in the deed. Even if a layman might not have been able to locate the land—although we see no reason why not, if the Sand Hills tract, the Willie Brown tract, and the Ballard place, are sufficiently well known in the county to be identified—still the offer of the plaintiff to prove by a surveyor that it could be located brought it within the rule laid down by this court in *Campbell v. Carruth*, 32 Fla. 264, 13 South. 432, and followed in *Hoodless v. Jernigan*, 46 Fla. 213, 35 South. 656, *Walker v. Lee*, 51 Fla. 360, 40 South. 881, and in *Conroy v. Woodcock*, 53 Fla. 582, 43 South. 693, that:

"If a surveyor, by applying the rules of surveying, can locate the land, the description is

sufficient; and the deed will be sustained if it is possible from the whole description to ascertain and identify the land intended to be conveyed."

[3] This brings us to the other objections which the trial judge considered together and construed the deed to mean that it is "to the second party, and that the second party is Emma Tallock, her heirs and assigns." To reach this conclusion, he had to treat the words "to Mattie Ansley and her children" as surplusage, and make no attempt to reconcile all parts of the instrument.

There has been much discussion by courts of the value of the relative position of conflicting clauses in deeds, some holding to the old rule that the first of two repugnant clauses shall be given effect, and others that this rule will only be applied when the premises and the habendum are irreconcilable, and it does not appear from the other parts of the instrument which is intended to be controlling. The modern and generally accepted rule is thus discussed in *Utter v. Sidman*, 170 Mo. 284, 70 S. W. 702:

"Numberless other cases could be cited bearing upon the questions here involved, but the foregoing are sufficient to illustrate the intricacies, the pitfalls, and the obstacles that the conveyancers of olden times encountered, and that the courts had to grapple with. They are interesting and instructive, but they are not all controlling nowadays. Then great care was observed to confine to each part of a deed its assigned function. The several parts of the instrument were given an important and controlling meaning, and the place in the instrument where the meaning of the testator was to be expressed was considered of the gravest importance. The premises included all that was contained in the deed preceding the habendum, and embraced the names of the parties, such recitals as were deemed necessary, the consideration, and the description of the property. Then followed the habendum, the tenendum, the reddendum, the conditions, the warranty, the covenants, and the conclusion. 1 *Dev'l. Deeds* (2d Ed.) § 176. No one provision was allowed to impinge on the province of another. The general rule was that, 'if there be a repugnancy, the first words in a deed, and the last words in a will, shall prevail.' Sir James Mansfield, C. J., in *Leicester v. Biggs*, 2 Taut. 113. In short, that a grantor might convey as he pleased, and his intention and wishes would be observed by the courts, but with this qualification: That he must express his intention in set and technical language, and at the proper places, and in the right order and clause of the deed. Failing so to do, the courts did not feel called on to bother about his intention, but took what he said first as expressing conclusively his intention and discarded everything else as void for repugnancy. Such a rule of construction made it almost impossible for any one except a very expert conveyancer to draw an instrument that would stand the test of the rule, and likewise made it very easy for the courts in construing complicated instruments; but it is not so clear that the real intention of the grantor was ascertained or effectuated. The modern rule, which prevails in this state, is much simpler, and much more calculated to carry out the wishes of the grantor. The intention of the grantor, as gathered from the four corners of the instrument, is now the pole star of construction. That intention may be expressed anywhere in the instrument, and in any words, the simpler and plainer the better, that will impart it; and the court will enforce it no

matter in what part of the instrument it is found."

In construing deeds, specific and particular words and expressions will control over those more general. The grantor in this case seemed to have had a very clear and fixed intention as to the disposition of the property, and expressed such intention specifically and particularly; that is, to "Emma Tallock during her natural life, then to Mattie Ansley and her children." To hold that by the use in a subsequent part of the deed of technical words found in the statute, of which he may not, and probably did not, know the meaning and effect, he defeated his own intention, which is expressed in words so clear and simple that a child could understand them, would do violence to all rules of construction.

The attorney for defendants in error contends that to so construe the deed that Emma Tallock had only a life estate, and that the fee was granted to Mattie Ansley and her children, "would do violence to grammatical construction." To construe the deed otherwise would do violence to the clearly expressed intention of the grantor, even if such intention is not grammatically expressed.

"Mala grammatica non vitiat chartam, neither false Latin, nor false English, will make a deed void when the intent of the parties doth plainly appear." Sheppard's Touchstone, 87. "The manifest intention of the grantor will prevail over the doubts which might be raised by a strict grammatical construction." May v. May, 7 Fla. 207, 68 Am. Dec. 431.

So far as the instrument under consideration is concerned, any interpretation placed upon it will do violence to grammatical construction.

The deed under consideration is in the form of a warranty deed, provided for in the Florida statute, except that in the second paragraph the words "in hand" are omitted, and "his" is changed to "her." The blank spaces in the statutory form found in chapter 4083, Acts of 1891, are for the date, names of parties, county and state, amount of consideration, and description. The grantor knew who were to be the grantees, and the quantity of the estate he intended to convey to each, and he did what was the most natural thing for one not an experienced conveyancer; he followed the names of the grantor and grantees, with the estate each was to take under the deed. We do not see how an unskilled scrivener could have more clearly shown his intention than the grantor did in this instance.

In *McNair & Wade Land Co. v. Adams*, 54 Fla. 550, 45 South. 492, this court said:

"In construing the deed, the design of the maker must be gathered from the whole instrument. We have the right to look to the subject-matter embraced in the instrument, and to the intention of the parties and the conditions surrounding them. If clauses in the instrument are repugnant to each other, they must be reconciled if possible, and the intent, and not the words, is the principal thing to

be regarded. *Stewart v. Preston*, 1 Fla. 10; *Fry v. Hawley*, 4 Fla. 258; *First Nat. Bk. of Florida v. Savannah, F. & W. Ry. Co.*, 36 Fla. 183, 18 South. 345; [*Langley v. Owens*, 52 Fla. 302], 42 South. 457 [11 Ann. Cas. 247]; *Hall v. Eastman, Gardner & Co.*, 89 Miss. 588, 43 South. 2 [119 Am. St. Rep. 709]; *Henderson v. Mack*, 82 Ky. 379; *Langley v. Owens*, 52 Fla. 302, 42 South. 457 [11 Ann. Cas. 247].

"The deed should be so construed to make every part of it effective if possible." *Black v. Skinner Mfg. Co.*, 53 Fla. 1088, 43 South. 922.

We cannot see that there is such a repugnance or contradiction in this deed as requires any part of it to be ignored. There is some slight ambiguity, but it is not such as is incapable of satisfactory elucidation. The grantor apparently knew that he was "the party of the first part," and that the grantees should be designated the party or parties "of the second part." He was not, however, familiar with the formal parts of a deed of conveyance, and did not know that it was unusual to designate the quantity of the estate conveyed when naming the parties; but, whatever may have been his ignorance in other respects, he had a clear and positive knowledge of the parties who were to receive the property conveyed, and what interest or estate he intended for each to take, and, with that dominant thought and intention, he named their respective estates when he wrote their names, to wit:

"Emma Tallock during her natural life, then Mattie Ansley and her children, of the county of Duval in the state of Florida, party of the second part."

The next clause in the deed reads:

"Witnesseth, that the said party of the first part, for and in consideration of the sum of one hundred and sixty dollars, to him paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold to the said party of the second part, her heirs and assigns forever, the following described land, to wit."

In naming Emma Tallock, and Mattie Ansley and her children, he designates them as "party" of the second part, both in the premises and in the granting clause. To whom, then, does he refer when he says "her heirs and assigns forever"? To say that he refers to Emma Tallock would make the grantor contradict himself and defeat his avowed purpose and give to her in fee simple what he said she should have "during her natural life." Moreover, we would have to reject the words, "then Mattie Ansley and her children," as surplusage. If, on the contrary, we construe it to mean Mattie Ansley and her children, we give life and meaning to every part of the instrument.

"One of the most important rules in the construction of deeds is so to construe them that no part shall be rejected. The object of all construction is to ascertain the intent of the parties, and it must have been their intent to have some meaning in every part. It never could be a man's intent to contradict himself; therefore we should lean to such a construction as reconciles the different parts, and reject a construction which leads to a contradiction." *Wager*

*v. Wager*, 1 Serg. & R. (Pa.) 374; *Prior v. Quackenbush*, 29 Ind. 475; *Carson v. McCaslin*, 60 Ind. 334.

It is contended that, because the grantor used the singular pronoun, "her," he did not mean Mattie Ansley and her children as the parties who were to take the estate in fee simple upon the death of Emma Tallock. If he had used the plural pronoun, "their," ambiguity would still have resulted, and in attempting to follow the statutory form of a deed, after having emphatically named the grantees, and stated the estates they were to take, he was led into a situation where he could not escape ambiguity; but he placed, as a pole star to guide us to his intention, the words, "Emma Tallock during her natural life, then Mattie Ansley and her children."

In the case of *Sease v. Sease*, 64 S. C. 216, 41 S. E. 898, a deed was construed which contained in the granting clause the words, "unto Esther C. Sease and her children," and in the habendum the words, "unto Esther C. Sease and her children, her heirs and assigns forever." The court in that case said:

"It is impossible to construe the deed so as to give force and effect to all its parts, without changing the phraseology in some respects. The appellant contends that the intention of the grantor can be carried into effect by construing the word 'her,' before the word 'heirs,' in the habendum of the deed, to be intended for the word 'their,' so that it would read, \* \* \* \* \* Unto the said Esther C. Sease and her children, their heirs and assigns. \* \* \* \* \* If, by construing a word to be intended for another word, effect can then be given to every part of a deed, that construction will be preferred to one which, not only changes the meaning of a word, but likewise refuses to give any force and effect whatever to certain other words of the deed. This effect can be accomplished by construing the word 'her' to be intended for 'their.'"

In the case of *Keith v. Perry*, 1 Desaus. (S. C.) 353, the word "her" was construed to mean "their," to give effect to the instrument.

Under our construction of the deed, that it gave a life estate to Emma Tallock, with remainder over to Mattie Ansley and her children, the sixth and seventh objections were not well taken, and afford no grounds for excluding the deed from being introduced in evidence.

The second assignment of error relates to the ruling of the court in refusing to allow the plaintiff in error to make proof of certain facts set forth in his offer. The admissibility of the matters which plaintiff in error offered to prove depended upon whether or not the circuit judge was correct in his construction of the deed. We find that he was not, and that the deed should have been admitted in evidence, and that the court below erred in excluding it. It therefore follows that he erred in refusing to allow the plaintiff to make proof of the matters offered.

The case is reversed, and remanded to the



court below for further proceedings in accordance with this opinion.

TAYLOR, SHACKLEFORD, WHITFIELD,  
and ELLIS, JJ., concur.

(73 Fla. 504)

BOLLES v. CARSON.

(Supreme Court of Florida. Feb. 24, 1917.)

(Syllabus by the Court.)

**1. APPEAL AND ERROR §755—DUTY TO FILE BRIEF.**

It is the duty of counsel for appellee or defendant in error to file in this court a brief, maintaining the correctness of the proceedings and judgment of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3060.]

**2. CONTINUANCE §7—DISCRETION OF TRIAL COURT—MOTION FOR CONTINUANCE.**

An application for the continuance of a cause is always addressed to the sound discretion of the court, and must be left to the tribunal which has the parties before it, and who must determine from a variety of circumstances occurring in its presence whether such applications are made in good faith.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 17, 18.]

**3. CONTINUANCE §48—AFFIDAVIT FOR CONTINUANCE—SUFFICIENCY—PRESUMPTION.**

In deciding upon the sufficiency of an affidavit for continuance, no presumption favorable to the applicant is to be indulged.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 140, 142.]

**4. APPEAL AND ERROR §966(1)—DISCRETION OF TRIAL COURT—RULING ON MOTION FOR CONTINUANCE.**

An appellate court will not reverse a judgment because the trial court denied a motion for a continuance of a cause, unless there has been a palpable abuse of discretion by the trial court, to the detriment of the party applying for the continuance, clearly and affirmatively shown by the transcript of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837.]

Error to Circuit Court, Broward County;  
H. Pierre Branning, Judge.

Action by James M. Carson against R. J. Bolles. Judgment for plaintiff, and defendant brings error. Affirmed. Motion for new trial overruled.

Thos. B. Norfleet, of Ft. Lauderdale, for plaintiff in error.

PER CURIAM. James M. Carson instituted an action at law against R. J. Bolles. The declaration contains the common counts, and also a count upon a contract alleged to have been entered into by and between the plaintiff and the defendant whereby the plaintiff was employed by the defendant as an attorney at law to perform certain services for the defendant, which services are alleged to have been performed in part, and that the plaintiff stood ready and willing at all times to perform the contract in full, but that the defendant had repudiated the contract and had refused to pay to the plain-

tiff the amount which still remained due thereon. A bill of particulars was attached to the declaration. The defendant filed the following plea in abatement:

"R. J. Bolles, defendant, by his attorney, P. A. Vans Agnew, for plea in abatement of the writ and declaration herein filed, says:

"First. That he is not a resident of the county of Broward and the state of Florida, but he is a resident of the county of Duval and the said state of Florida.

"Second. That the several supposed promises and undertakings and causes of action in the said declaration mentioned (if any such were made) did not occur and accrue in the said county of Broward and state of Florida, but so occurred and accrued in the said county of Duval and state of Florida.

"And this the said R. J. Bolles, defendant, is ready to verify.

"Wherefore this defendant prays judgment of the said writ and declaration, and that the said suit may be abated."

The plaintiff joined issue upon this plea, and the case was called for trial on the 29th day of April, 1916, when the defendant filed the following motion for a continuance:

"Comes the defendant, by his attorneys P. A. Vans Agnew and Thos. B. Norfleet, and moves the court to grant him a continuance of the above cause until the next term of this court, and for reasons of said motion says:

"That the defendant who is a material witness in his own behalf in this cause, has, within the last few days, become sick and is now in such a physical condition that it is unsafe and almost impossible for him to travel from his home in Jacksonville, Fla., to Ft. Lauderdale, Fla., in order to be present at this hearing; that such sickness and consequent inability to travel is of such recent development that it has been impossible to take his deposition, but that, if present, defendant would testify that he is not a resident of Broward county, Fla., but is a resident of Duval county, Fla.; that the contract relied upon by the plaintiff in this cause and upon which this suit is based was not entered into in Broward county, Fla., and that the cause of action set out in plaintiff's declaration did not accrue in said county of Broward. "That such facts are very material to the defense in this cause, and cannot be proved by any other witness."

To this motion was attached the following affidavit:

"Personally appeared before the undersigned authority, Thos. B. Norfleet, who upon his oath states that he is one of the attorneys for the above-named defendant, and that as such he files the foregoing motion; that the matters and facts set out in said motion he believes to be true, and that said motion is not filed for the purpose of delay only, but that justice may be done the defendant in said cause."

The following proceedings thereupon took place:

"Said motion coming on to be heard on the 29th day of April, 1916, during term time, the following evidence was introduced for the same (which said evidence was and is attached to the foregoing motion and affidavit of continuance, marked Exhibit 1):

"Dr. Edward R. Liell, 140 West Monroe Street,

"Jacksonville, Florida. April 28/16.

"To the Honorable Justice H. P. Branning, Ft. Lauderdale, Fla.—Dear Sir: This is to certify that Mr. R. J. Bolles has been a patient of mine for the past six years. That he is at

present under my professional care for a cardiac-renal trouble with arterial hypertension; his blood-pressure is 154, being above the maximum normal. This condition is associated with frequent attacks of vertigo, palpitation, extreme flatulent distension of the stomach, distress in breathing, etc.

"In my opinion, Mr. Bolles is in no condition to attend at court or to stand trial at this time; he is in need of both mental and physical rest, for a month or so at least; at the end of which time I have it in hope he will be in condition to fulfill the duty required of him.

"[Signed] Edward R. Liell.

"Sworn to and subscribed before me this 28th day of April, 1916.

"[N. P. Seal.]

A. F. Wilson,

"Notary Public, State at Large.

"My commission expires May 15, 1918."

"Exhibit 2.

"(Attached to motion for continuance and submitted in evidence.)

"P. A. Vans Agnew, Attorney at Law, Heard National Bank Building,

"Jacksonville, Florida. 26 April, 1916.

"Mr. Thomas B. Norfleet, Ft. Lauderdale, Fla. In re Carson v. Bolles. Dear Sir: Referring to your telegram of yesterday. Mr. Bolles and I will leave Jacksonville to-morrow, Thursday night, and arrive at Ft. Lauderdale Friday morning, and we will go on straight to the courthouse from the train.

"Will you kindly advise the court of this fact so that in case the train should be late he may kindly excuse us for any delay.

"Your assistance in the trial of the case will be greatly appreciated.

"Yours very truly, P. A. Vans Agnew.

"Pava/ba."

"Exhibit 3.

"(Attached to motion for continuance and submitted in evidence.)

"Western Union Telegram.

"Received at Ft. Lauderdale, Fla. 128 JJ 48 Blue.

"St. Augustine, Florida, 425 PM Apr. 27th.

"T. B. Norfleet.

"Just received telegram from clerk circuit court that Bolles case postponed till Saturday also telephone message that Mr. Bolles is sick and unable to leave Jacksonville for several days. Please explain his condition to Judge Branning. I will send you doctor's certificate Tomorrow. Please wire me Jacksonville to-night. P. A. Vans Agnew. 504 PM."

"Exhibit 4.

"(Attached to motion for continuance and submitted in evidence.)

"Received at Ft. Lauderdale 56 JJ 13M.

"Jacksonville, Florida, 1145 am Apr 28th.

"Thomas B. Norfleet

"Motion for continuance with doctors certificate attached mailed you one thirty train to-day. P. A. Vans Agnew. 1149 AM."

"Upon consideration of said motion by the court, the same was overruled; and the order of the court on said motion is in the words and figures following, to wit:

"In the Circuit Court of the Eleventh Judicial Circuit in and for Broward County, Florida.

"James M. Carson, Plaintiff, versus R. J. Bolles, Defendant.

"This cause coming on to be heard on motion of defendant for a continuance as filed herein, and the court having heard the argument of counsel, and being fully advised in the premises, and Thomas B. Norfleet, Esq., affiant in said motion for continuance having been sworn and

testified that the said affidavit was made from the information and belief, from the letters and telegrams attached to said affidavit, and from the doctor's certificate thereto attached and from the files of the said cause, and not from personal knowledge, and the court being fully advised in the premises:

"It is thereupon ordered that the said motion for continuance be and it is hereby denied, to which ruling the defendant excepts.

"Done and ordered at Ft. Lauderdale, Florida, this 29th day of April, A. D. 1916."

The denial of this motion forms the basis for the first assignment of error. After such denial, the cause came on for trial before a jury, when James M. Carson was introduced as a witness in his own behalf and was examined and cross-examined. No further testimony being offered by either party, at the request of the plaintiff, the court directed a verdict in favor of the plaintiff, upon which a final judgment was entered. The defendant filed a motion for a new trial, which was overruled, and which ruling forms the basis for the second and third assignments; the only remaining assignment being that the court erred in entering judgment.

[1] This is another of the many cases in this court in which the defendant in error has not seen fit to favor us with a brief, but has left us to make an independent investigation for authorities in support of the judgment rendered. As we have several times held:

"It is the duty of counsel for appellee or defendant in error to file in this court a brief, maintaining the correctness of the proceedings and judgment of the trial court." Chamberlain v. Lesley, 39 Fla. 452, 22 South. 736; Pinney v. Pinney, 46 Fla. 559, text 570, 35 South. 95; First National Bank of Pensacola v. Hirsch-kowitz, 46 Fla. 588, text 594, 35 South. 22; Mizell Live Stock Co. v. J. J. McCaskill Co., 59 Fla. 322, 51 South. 547; Morgan v. Eaton, 59 Fla. 557, text 560, 51 South. 814.

[2, 3] Again and again we have ruled that:

"An application for the continuance of a cause is always addressed to the sound discretion of the court, and must be left to the tribunal which has the parties before it, and who must determine from a variety of circumstances occurring in its presence whether such applications are made in good faith." Livingston v. Cooper, 22 Fla. 292, citing other decisions of this court.

Also see the discussion in Reynolds v. Smith, 49 Fla. 217, 38 South. 903, wherein we held that:

"In deciding upon the sufficiency of an affidavit for continuance, no presumption favorable to the applicant is to be indulged."

[4] We call attention to the fact that the plea in the instant case upon which issue was joined is a plea in abatement, not a plea to the merits. As to whether or not the defendant had a meritorious defense to the action does not appear. Be that as it may, we are of the opinion that it is not clearly and affirmatively shown by the record that there was a palpable abuse of discretion by the trial court, in denying the motion for a continuance, to the detriment of the defendant; therefore we must hold that this assignment has not been sustained.

An examination of the testimony given by the plaintiff, who was the only witness introduced in the case, which it would be profitless to set out, discloses that it is amply sufficient to sustain the verdict rendered. This being true and there being no testimony upon which a verdict could have been returned for the defendant, the trial court properly directed a verdict for the plaintiff, under the provisions of section 1496 of the General Statutes of 1906. See *Investment Co. v. Trueman*, 63 Fla. 184, 57 South. 663.

The judgment is affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and WHITFIELD, JJ., concur. ELLIS, J., took no part.

(73 Fla. 513)

CREVELING v. CHAMBERS et al.

(Supreme Court of Florida. Feb. 24, 1917.)

(Syllabus by the Court.)

INJUNCTION §118(1)—PLEADING §8(1), 18  
—ALLEGATIONS OF BILL—FACTS ENTITLING  
COMPLAINANT TO RELIEF.

It is incumbent upon a complainant to allege in his bill every fact, clearly and definitely, that is necessary to entitle him to relief; and if he omits essential facts therefrom, or states such facts therein as show that he is not entitled to relief in a court of equity, he must suffer the consequences of his so doing. This principle applies to all bills in equity, but is especially applicable to bills seeking an injunction, the rule being that the title or interest of the complainant and the facts upon which he predicates his prayer for such relief must be stated positively, with clearness and certainty. The bill must state facts, and not opinions or legal conclusions.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223-232, 234; Pleading, Cent. Dig. §§ 12, 25, 28, 39, 64.]

Appeal from Circuit Court, Broward County; H. Pierre Branning, Judge.

Bill in chancery by T. N. Creveling against E. C. Chambers and others. General demurrer to bill sustained, and bill dismissed, and complainant appeals. Decree affirmed.

James T. Sanders, of Miami, for appellant.

PER CURIAM. This is still another case in which the appellees have failed to file any brief. See *Bolles v. Carson*, 74 South. 509, decided here at the present term.

Creveling filed his bill in chancery against E. C. Chambers and Chambers Land Company, a corporation, seeking to require the defendants to comply with the terms of an alleged contract with the complainant to build certain rock roads, found a town site, and build the town, and also other specific relief, including an injunction, as well as general relief. A general demurrer was sustained to the bill, and subsequently, the complainant declining to amend, a decree was rendered dismissing the bill. The complainant has entered his appeal from such final decree.

As we held in *McClinton v. Chapin*, 54 Fla. 510, 45 South. 35, 14 Ann. Cas. 365:

"It is incumbent upon a complainant to allege in his bill every fact, clearly and definitely, that is necessary to entitle him to relief; and if he omits essential facts therefrom, or states such facts therein as show that he is not entitled to relief in a court of equity, he must suffer the consequences of his so doing.

"A bill in equity must state facts, and not opinions or legal conclusions, and where fraud is relied upon the allegations or charges must be specific. In passing upon a demurrer to a bill every presumption is against the bill."

In *Godwin v. Phifer*, 51 Fla. 441, 41 South. 597, we held that these principles were especially applicable to bills seeking an injunction. We have examined the bill and exhibits attached thereto in the light of these principles, and are of the opinion that the decree should be affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

(73 Fla. 451)

HERNDON v. STATE.

(Supreme Court of Florida. Feb. 24, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1160—APPEAL—SUFFICIENCY OF EVIDENCE.

In passing upon an assignment questioning the correctness of the ruling of the trial court in denying a motion for new trial which is based upon the sufficiency of the evidence to sustain the verdict, the guiding principle for an appellate court is not what it may think the jury ought to have done or what such court may think it would have done had it been sitting as a jury in the case, but whether as reasonable men the jury could have found such verdict. If this question can be answered in the affirmative, the action of the trial court upon such motion should not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084.]

2. CRIMINAL LAW §1159(3)—TRIAL—QUESTION FOR JURY.

While the legal effect of evidence is a question of law to be passed upon by the court when properly presented, the credibility and probative force of conflicting testimony are for the determination of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076.]

3. WITNESSES §383, 405(1)—CROSS-EXAMINATION—IMPEACHMENT.

The answer of a witness on cross-examination respecting any fact irrelevant to the issue will be conclusive, and no question relating to facts irrelevant to the issue can be put on cross-examination merely for the purpose of impeaching the credit of the witness by contradicting him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1224, 1273, 1275.]

4. WITNESSES §37(2) — ADMISSIBILITY OF EVIDENCE—DISTANCE BETWEEN DEFENDANT AND DECEASED.

In a prosecution for murder, objections interposed to questions propounded on the direct examination of a witness are properly sustain-

ed, when such questions seek to elicit information from the witness as to the distance between the defendant and the deceased when the fatal encounter took place and as to how far from the deceased a certain designated track was, and it has been made to appear from the examination of such witness that he was not present at the tragedy, but had visited the place thereof after it had occurred and saw tracks there, and that all the information which the witness possessed as to the distance between the defendant and the deceased at the time of the shooting and as to the identity of the tracks which the witness saw was derived from statements made to the witness by the defendant and others.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 81.]

**5. CRIMINAL LAW**  $\S$  938(1), 939(1)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISFAVOR—DILIGENCE—MATERIALITY.

Applications for new trial upon the ground of newly discovered evidence are looked upon by the courts with distrust and disfavor, and are granted only under the following restrictions: (1) The evidence must have been discovered since the former trial; (2) the party must have used due diligence to procure it on the former trial; (3) it must be material to the issue; (4) it must go to the merits of the cause, and not merely to impeach the character of a witness; (5) it must not be merely cumulative; (6) it must be such as ought to produce on another trial an opposite result on the merits. The party applying must make his vigilance apparent, for if it is left even doubtful that he knew of the evidence, or that he might, but for the negligence, have known of and produced it, he will not succeed in his application.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306, 2312.]

**6. CRIMINAL LAW**  $\S$  938(1)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—APPLICATION.

In passing upon a motion for a new trial upon the ground of newly discovered evidence, even if it can be properly assumed that the affidavits of the defendant and his attorneys show that they had used due diligence to procure the newly discovered evidence on the former trial, that it is material to the issue, and that it can be said to go to the merits of the cause, if it is not of such a nature that it ought to produce on another trial an opposite result on the merits, and if it is merely cumulative, such motion is properly denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306, 2312, 2313, 2315, 2317.]

**7. CRIMINAL LAW**  $\S$  941(1)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.

Where newly discovered testimony runs simply to the matter of threats, and only tends to make more emphatic and clear what is already plain by the testimony, that the parties at the time of meeting were enraged against each other, *held*, that the court did not err in refusing a new trial on this ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2323, 2330.]

**8. CRIMINAL LAW**  $\S$  824(1)—APPEAL—FAILURE TO CHARGE.

Error cannot be assigned of the judge's failure to charge upon any question of law, unless the party desiring it shall have requested charges thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996, 2004.]

**9. HOMICIDE**  $\S$  250—MANSLAUGHTER—SUFFICIENCY OF EVIDENCE.

Evidence examined, and found sufficient to support the verdict.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517.]

Browne, C. J., dissenting, and Taylor, J., dissenting in part.

Error to Circuit Court, Madison County; D. J. Jones, Judge.

D. B. Herndon was convicted of manslaughter, and he brings error. Affirmed.

Chas. E. Davis, of Madison, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

SHACKLEFORD, J. D. B. Herndon was indicted for the crime of murder in the first degree, tried before a jury, convicted of the crime of manslaughter, and sentenced to confinement at hard labor in the state prison for the period of seven years, from which judgment and sentence he seeks relief here by writ of error.

Seven errors are assigned, of which the first, third, and sixth are expressly abandoned. The first assignment argued is the seventh, which is based upon the overruling of the motion for a new trial, the grounds of which motion are as follows:

"(1) The verdict is contrary to the evidence.  
"(2) The verdict is contrary to the law and the evidence.

"(3) The court erred in refusing to permit A. D. Stanton to testify as to the whole conversation had between him and A. H. Touchstone.

"(4) The court erred in refusing to permit A. D. Stanton to testify as to the distance, as pointed out by D. B. Herndon, between said Herndon and Henry Griffin at the time of the shooting of said Griffin.

"(5) The court erred in refusing to permit A. D. Stanton to answer the following question: 'How far from that place (the track indicating that a person had turned) was the last track toward Pinetta that seemed to be turned north?'

"(6) The court erred in refusing to permit A. D. Stanton to answer the following question: 'How far from the dead man was the last track toward Pinetta that seemed to be coming backward?'

"(7) The court erred in failing to instruct the jury as to what was justifiable homicide.

"(8) The court erred in giving the following instruction to the jury: 'If the evidence in this case should convince the jury beyond a reasonable doubt as to a moral certainty that the defendant, in Madison county, Florida, at any time within the two years immediately preceding the finding of this indictment, unlawfully killed Henry Griffin in the manner and by the means charged in this indictment, and the jury should not find from the evidence beyond a reasonable doubt that such killing was perpetrated from and with a premeditated design on the defendant's part to effect the death of the said Henry Griffin, and the jury should not find from the evidence beyond a reasonable doubt that such killing was perpetrated by an act imminently dangerous to another and evincing a depraved mind regardless of human life, then you should find the defendant guilty of manslaughter.'

"(9) Because of newly discovered evidence as set forth in the affidavit of Emery Welch hereto attached."

The affidavit of Emery Welch, attached thereto, is as follows:

"Before me personally appeared Emery Welch, who being by me first duly sworn, deposes and says: That about a mile and a half from the town of Pinetta, Florida, near Taylor & Brady's mill, about a week before Henry Griffin was killed, he had a conversation with said Henry Griffin; that in said conversation affiant said that they are having some trouble around Pinetta over the blind tigers, and Henry Griffin replied that there was only one man giving them any trouble, and that was that low down Bert Herndon; that he was going to put a stop to it; that if he ever caught Bert Herndon in the right place he was going to kill him, and that would put a stop to it all; and affiant said that if he were Griffin he would not have any trouble about it, and Henry Griffin replied that he did not care anything for the trouble, and that he was going to get rid of Bert Herndon; that Griffin repeated this threat several times in different words."

Then follows this affidavit of the defendant, D. B. Herndon:

"Before me personally appeared D. B. Herndon, who being by me first duly sworn, deposes and says: That he has read the affidavit of Emery Welch this day made, regarding a threat made about a week before Henry Griffin was killed, by said Henry Griffin to kill affiant; that affiant did not know of the facts set forth in said affidavit or any portion thereof or have any intimation thereof or have reason to believe that such facts existed, until since the trial and conviction of affiant for the killing of said Henry Griffin; that since said homicide, affiant has used due diligence to procure said testimony for the trial of said cause, and has inquired of, and has endeavored to procure from every person whom he had reason to believe knew of any fact material to the case, and has also had other persons to endeavor to secure all testimony material to the case; that he did not suppose or have reason to believe that said Emery Welch knew the facts set forth in his affidavit or any fact material to defendant's case, and that only since said trial and conviction said Emery Welch voluntarily came to said affiant and told him of the contents of said affidavit, and that immediately thereafter affiant informed his attorneys of said facts."

Then follows this affidavit of Chas. E. Davis and R. H. Rowe, the attorneys for the defendant:

"Before me personally appeared C. E. Davis and R. H. Rowe, each of whom, being duly sworn, deposes and says each for himself that he did not know, or have reason to know, anything whatever of the existence of the facts set forth in the affidavit of Emery Welch hereto attached, prior to the trial of D. B. Herndon for the killing of Henry Griffin, and only knew of said fact since said trial when told of same by D. B. Herndon."

[1] We shall follow our established practice and consider only such grounds of this motion as are argued before us. *Smith v. State*, 65 Fla. 56, 61 South. 120, and *Thomas v. State*, 74 South. 1, decided here at the present term. It is strenuously contended that the evidence adduced is not sufficient to support the verdict. As we have repeatedly held:

"An appellate court should not grant a new trial upon the ground of the insufficiency of the evidence to sustain a verdict of guilty affirmed by the trial court if there is some substantial evidence of all the facts legally essential to support the verdict, and the whole evidence is such

that the verdict may fairly have been found on it.

"Where there is evidence from which all the elements of the crime may legally have been found or inferred, and it does not appear that the jury were not governed by the evidence, the verdict will not be disturbed by the appellate court on the ground of the insufficiency of the evidence.

"A verdict will not be set aside by an appellate court where the propriety of the verdict depends not upon the lack of evidence, but upon the credibility or weight of conflicting competent testimony." *Smith v. State*, 66 Fla. 135, 63 South. 138, and *Thomas v. State*, supra.

In *Barrentine v. State*, 72 Fla. —, 72 South. 280, we held that:

"The refusal of the trial court to grant a new trial for insufficiency of the evidence to sustain the verdict, or because the verdict is contrary to the evidence, will not be reversed, unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the appellate court that it is wrong and unjust."

In *Young v. State*, 70 Fla. 211, 70 South. 19, following prior decisions of this court, we held that:

"When the trial court concurs in the verdict rendered by a jury by denying the motion for a new trial, and there is evidence to support it, an appellate court should refuse to disturb it, in the absence of any showing that the jurors must have been improperly influenced by considerations outside the evidence."

[2] We have likewise held several times:

"In passing upon an assignment questioning the correctness of the ruling of the trial court in denying a motion for new trial which is based upon the sufficiency of the evidence to sustain the verdict, the guiding principle for an appellate court is not what it may think the jury ought to have done or what such court may think it would have done had it been sitting as a jury in the case, but whether as reasonable men the jury could have found such verdict. If this question can be answered in the affirmative, the action of the trial court upon such motion should not be disturbed." *Tully v. State*, 69 Fla. 662, 68 South. 934.

As we have also held:

"While the legal effect of evidence is a question of law to be passed upon by the court when properly presented, the credibility and probative force of conflicting testimony are for the determination of the jury." *Tampa & Jacksonville Ry. Co. v. Crawford*, 67 Fla. 77, 64 South. 437.

These well-established principles of law must guide us in determining whether the evidence in the instant case is sufficient to support the verdict rendered. It is also incumbent upon us to consider and pass upon the contention of the defendant that certain errors of law and procedure were committed during the trial which were so material and harmful to him as to compel a reversal of the judgment. We think that it is advisable to consider these alleged errors before we express an opinion as to the sufficiency of the evidence, even though such grounds of the motion for a new trial are argued first before us.

It is urged that the court erred in sustaining the objection interposed by the state to

the following question propounded by the defendant to Tom Corbett, a witness introduced by the defendant in his behalf:

"Did Mr. W. T. Mann while riding with you and your brother on that occasion tell you, in your brother's presence, that on Thursday before the killing he had a conversation with the defendant near the back end of Pinetta Supply Company's store, in which conversation he (Mann) stated that Mr. Griffin would kill Herndon the first time he crossed his path, and also said, 'Whatever you do, Bert, you keep your eye on Mr. Griffin; you are going to have trouble with that man.'"

This forms the basis for the second assignment.

The bill of exceptions discloses that Tom Corbett was the first witness introduced by the defendant in his behalf, after the state had rested, and had testified as follows:

"I have been sworn. I know W. T. Mann, a witness in this case. I remember the occasion when Mr. Griffin was killed. On Thursday before the killing, I rode with Mr. Mann and my brother all of the way to my father's house. I cannot state that on that trip he detailed to me and my brother any conversation that he had had with Bert Herndon. I recall what was said. The question of Mr. Herndon and Mr. Griffin was brought up."

Then the question was propounded to him which we have just copied above and to which the objection was sustained. The only possible basis for this question was that W. T. Mann had been introduced as a witness on behalf of the state, and on his direct examination testified as follows:

"My name is W. T. Mann. I live about five miles east of Pinetta. I lived there on July 5, 1915. I know D. B. Herndon, and knew Henry Griffin in his lifetime. I remember the occasion of the death of Mr. Griffin. I had a conversation with Mr. Herndon on Thursday before the killing. In that conversation he spoke of Mr. Griffin. He called me out of the northwest door of the Pinetta Supply Company. He stated that he had heard it rumored around in my settlement that he had been selling liquor. I told him that there were such rumors. Then he told me to tell anybody down there that said he had been selling liquor that they were G—d—l— sons of bitches. I asked him if he thought they would turn him up. He said, 'No, damn them, they won't.' He said that there were no people down there against him but Henry Griffin and old Rabb."

On cross-examination, the witness gave the following testimony:

"I have had a difference with Mr. Herndon, but this was years ago. I have also had difference with Henry Griffin. Q. Did you not on Thursday before the killing while riding with Tom Corbett and his brother out toward your home state in their presence that you had a conversation with the defendant that day near the back end of Pinetta Supply Company's store, and in that conversation you said that Mr. Griffin would kill Herndon the first time he crossed his path, and also said, 'Whatever you do, Bert, you keep your eye on Mr. Griffin; you are going to have trouble with that man,' or words to that effect?"

[3] The question propounded to W. T. Mann on his cross-examination and which he was permitted to answer without any objection being interposed thereto not only was not in cross of anything to which he had testified on his direct-examination, but also call-

ed for matter irrelevant to the issue, therefore the negative answer given by the witness was conclusive. See *Stewart v. State*, 42 Fla. 591, 28 South. 815, wherein we held:

"The answer of a witness on cross-examination respecting any fact irrelevant to the issue will be conclusive, and no question relating to facts irrelevant to the issue can be put on cross-examination merely for the purpose of impeaching the credit of the witness by contradicting him."

Also see *Livingston v. Roberts*, 18 Fla. 70, text 76; *Eldridge v. State*, 27 Fla. 162, 9 South. 448; *Myers v. State*, 43 Fla. 500, 31 South. 275; *Fields v. State*, 46 Fla. 84, 35 South. 185; *Starke v. State*, 49 Fla. 41, 37 South. 850; *Johnson v. State*, 68 Fla. 523, 67 South. 100. The witness, Mann, had testified to a conversation which had taken place between him and the defendant. It was not sought either on the cross-examination of Mann or on the direct examination of Tom Corbett to elicit other portions of that conversation, but a statement made by Mann to another person when the defendant was not present, consequently the authorities cited by the defendant (*Thalheim v. State*, 38 Fla. 169, 20 South. 938; *Fields v. State*, supra; *Presly v. State*, 61 Fla. 46, 54 South. 367) are not in point, and do not support him in this contention. We must hold that the second assignment has not been sustained.

[4] We now reach the fourth and fifth assignments, which are as follows:

"4. The court erred in sustaining the state's objection to the following question propounded to A. D. Stanton: How far apart were they?"

"5. The court erred in sustaining the state's objection to the following question propounded to A. D. Stanton: How far from the dead man was that last track towards Pinetta that seemed to be coming backward?"

These assignments are not separately argued, it being stated in the brief that they are discussed under the seventh assignment, which is based upon the overruling of the motion for a new trial, and which we have partially treated above. A. D. Stanton was introduced as a witness in behalf of the defendant, and the following proceedings took place.

"I am sheriff of Madison county. I know Bert Herndon. I saw him on or about July 5th this year. I remember the occasion of the death of Henry Griffin. I saw the defendant in Pinetta that day. I had an engagement with him in Pinetta on that day. I phoned him to meet me in Pinetta. I went to Pinetta, and got there, perhaps, a quarter to 10 in the morning. I know Mr. Touchstone, and I have seen him a few times. I saw him in Pinetta that morning first with Bert Herndon. When I first saw them they were coming down the Georgia & Florida Railroad track just beyond Pinetta within the city limits. I was up at Pinetta, and the car stopped in front of the drug store, and I got to the car just a few minutes before they walked up, and I spoke to them. At that time Mr. Herndon made a statement with reference to the killing of Mr. Touchstone. My car was standing here. Mr. Herndon walked to the front of it. I was standing near the rear wheel of the car, and Mr. Touchstone was sort of back of the car, and Mr. Herndon was up at the front of the car. Q. Please state whether or not Mr. Touchstone made a

statement to you that the statement made by the defendant, Mr. Herndon, with reference to the killing, was true or false, such statement being in words as follows: 'Mr. Griffin cursed me for everything he could think of, all kinds of sons of bitches; I begged Mr. Griffin to go on and let me alone. I told him I didn't want him to hurt me, and I didn't want to hurt him. Mr. Griffin was coming towards me. I kept backing back, and when he was in five or six feet of me, he put his hand in his pocket, and then I pulled my gun and shot him,' or words to that effect? A. He did. Q. Did he or not, about two hours after the killing, near the rear of the drug store, in Pinetta, in response to a question asked him by you to tell you in his own way about the killing, then and there tell you that Mr. Herndon kept backing down the railroad telling Mr. Griffin to go on, that he did not want to hurt him, and didn't want Mr. Griffin to hurt him; that Mr. Griffin kept cursing him for a son of a bitch and calling him a coward; 'that I said to Mr. Griffin, "Now stop this; there is no use to have any trouble;" that when I said this it seemed to make Mr. Griffin worse and he run his hand in his right pocket and Mr. Herndon pulled his gun and shot; and that I would have done it before Mr. Herndon did; and that at the time of the shooting they were five cross-ties apart—or words to that effect? A. Yes, sir; that is true; he did, sir. He was six cross-ties, if I remember right. After the homicide was reported to me I went to the scene of the killing, and after Mr. Herndon reported it to me I arrested him. I saw the dead man. Some one pointed out to me where Mr. Herndon was standing when he shot, and where the dead man was. I didn't measure the distance. I counted the spaces, the ties between where the two men were standing, as the places pointed out to me. Bert Herndon pointed out the places to me. A track was there to show where they were standing. The heel where Mr. Herndon was standing was next to the cross-tie, and I could not see but one, and the heel was back this way towards Pinetta, traced north. And the other man's track showed me where the other man was standing; he was facing this way where the track kind of turned; looked like he kind of stepped that way. Q. How far apart were they? The state attorney objected to the question, upon the ground that it is self-serving. Whereupon the court sustained said objection, to which ruling the defendant excepted. Q. I will ask you this: Was there any sign there on the track as to where the two parties were standing? A. I saw tracks. One track pointing north and one south. There was an indication in the track on the north, facing south, like it turned, like a person kind of turned making a track on the ground and sand. I did not, on that occasion, see but one set of tracks that indicated that they were pointing north and stopped at a certain place. I could tell that they had been coming backwards, because the heel would strike, that way, making a different track from what it would in walking forward. Q. How far from the dead man was that last track towards Pinetta that seemed to be coming backwards? The state attorney objected to the question upon the ground that it had not been identified as the track of the defendant. By the Court: The witness says that was the only track. Witness: I didn't see but one track. The state attorney renewed his objection. By the Court: I think, myself, it is too indefinite. The objection is sustained, to which ruling of the court the defendant excepted."

It will be observed from the foregoing testimony that this witness was not present when the fatal difficulty occurred and had no personal knowledge of what took place between the defendant and the deceased. All the information which the witness possessed as to the distance between the defendant and

the deceased at the time of the shooting was derived from statements made to the witness by A. H. Touchstone, the defendant and possibly some one else. It is true that the witness testified that he went to the place of the tragedy after it had occurred and saw tracks there, but he did not identify such tracks, basing his information concerning them on what the defendant told him. Clearly the testimony sought to be elicited by these two questions was not admissible, and there is no occasion for further discussion.

[5-7] It is insisted that the motion for a new trial should have been granted on the ground of newly discovered evidence, and it is claimed that the showing made meets the requirements of the rule laid down in *Howard v. State*, 36 Fla. 21, 17 South. 84, wherein we held:

"Applications for new trial upon the ground of newly discovered evidence are looked upon by the courts with distrust and disfavor, and are granted only under the following restrictions: (1) The evidence must have been discovered since the former trial; (2) the party must have used due diligence to procure it on the former trial; (3) it must be material to the issue; (4) it must go to the merits of the cause, and not merely to impeach the character of a witness; (5) it must not be merely cumulative; (6) it must be such as ought to produce on another trial an opposite result on the merits. The party applying must make his vigilance apparent, for if it is left even doubtful that he knew of the evidence, or that he might, but for the negligence, have known of and produced it, he will not succeed in his application."

In addition to the prior decisions of this court which are cited in the opinion, also see the following subsequent opinions: *Driggers v. State*, 38 Fla. 7, text 18, 20 South. 758; *Browning v. State*, 41 Fla. 271, text 273, 26 South. 639; *Long v. State*, 42 Fla. 612, 28 South. 855; *Mitchell v. State*, 43 Fla. 584, 31 South. 242; *Williams v. State*, 53 Fla. 89, 43 South. 428; *Enson v. State*, 58 Fla. 37, 50 South. 948, 138 Am. St. Rep. 92, 18 Ann. Cas. 940; *Gilbert v. State*, 61 Fla. 25, 55 South. 464; *Williams v. State*, 68 Fla. 88, 66 South. 424; *Florida East Coast Ry. Co. v. Knowles*, 68 Fla. 400, 67 South. 122; *Kirkland v. State*, 70 Fla. 584, 70 South. 592; *Ryals v. State*, 72 Fla. —, 72 South. 369. In these cases will be found a discussion of the rule which we announced in *Howard v. State*, supra, which we have copied above, and the application thereof to the variant facts and circumstances as shown in such cases. We would also refer to instructive notes on page 609 of 14 L. R. A. and page 903 of 46 L. R. A. (N. S.), wherein many cases are collected from other jurisdictions bearing upon cumulative evidence as ground for new trial, and the point is well discussed. We do not think that this newly discovered evidence as set forth in the affidavit of Emery Welch, which we have copied above, measures up to all the requirements which we have laid down. As we stated in the rule which we have adopted, "Applications for new trial upon the ground of newly discovered evidence are looked upon



by the courts with distrust and disfavor," and are only granted under the restrictions which we there announced. Even if we assume that the affidavits of the defendant and his attorneys show that they had used due diligence to procure this newly discovered evidence on the former trial, and that it is material to the issue, and that it can be said to go to the merits of the cause, the evidence is not of such a nature that it ought to produce on another trial an opposite result on the merits. It would also seem to be merely cumulative. We find that the defendant testified in his own behalf as follows:

"My name is Bert Herndon. I am the defendant in this case. I know W. T. Mann. I heard Mr. Mann's statement on the stand. I will go over it and tell you just the conversation me and Mr. Mann had on Thursday, some time between 11 and 12 o'clock, close to noon, in Pinetta Supply Company, and I had heard of this rumor that I had been accused of selling liquor in his settlement, and I called Mr. Mann, said, 'Step here, I want to talk with you.' We walked out the northwest door of the building and stepped around the corner just the least bit, and I said, 'I understand there is a little rumor in your settlement that I have been selling liquor.' He said, 'There is, Bert.' Called me Bert. I said, 'I want to get you to tell any one down there that you hear say that I sold liquor down there that they are a damn liar and a son of a bitch.' And we talked on, and he said, 'I will do it; deliver the message to any one that I hear.' May not have said 'any one,' but said, 'I will deliver the message.' I said, 'Have you any idea who started that rumor?' And he said, 'I have not.' I said, 'I don't think there is any one mad with me down there, except Mr. Griffin.' He said, 'Yes, there is, too; Mr. Will Hammock is, too.' And I said, 'I didn't know that.' And he said, 'Well, he is.' And that was the conversation about the whisky. And he made a step or two, like to that table, and stopped with his left hand and said, 'Whatever you do, Bert, you keep your eye on Mr. Griffin; you are going to have trouble with that man. That was all the conversation.'"

Mr. Downing, a witness introduced by the defendant, testified as follows:

"I know Bert Herndon and knew Mr. Henry Griffin in his lifetime. A short time prior to the death of Henry Griffin I was in the presence of Mr. Henry Griffin near Lamont in the south corner of Madison county, working with him down there. There was a conversation had with me at the time regarding Bert Herndon. He made a threat against Mr. Herndon at that time. Mr. Griffin said he could take a ten-cent barlow, not only himself, but any negro boy, and run Bert Herndon out of Pinetta, 'and as for Bert Herndon,' said, 'Bert Herndon ain't no man; he has been going to the express office taking packages of whisky away from other people that didn't belong to him.' I said, 'He has, eh?' He said, 'Yes.' He said if he ever fooled with him with that big pistol he had in his pocket, he would take it away from him and stamp him in the ground."

Cross-examination:

"He said if Bert Herndon ever fooled with him with that big pistol on him, he would stamp him in the ground. He didn't say he would kill him, or cut him or hurt him, just said he would take his pistol from and stamp him in the ground."

We see from the testimony of the defendant himself that he had been directly warned by Mann to keep his eye on Griffin; that he was going to have trouble with him, and

from the testimony of Downing that Griffin had made threats against the defendant. The newly discovered testimony would simply have shown that other threats against the defendant had been made by the deceased. As we said by Mr. Justice Brewer in *State v. Kearley*, 28 Kan. 77, text 89:

"So far as the other matter disclosed by the affidavit is concerned, that of threats or ill feeling of deceased toward defendant, it is not sufficient to justify a setting aside of the verdict. The fact of a pre-existent ill feeling was obvious on the trial; neither party was free from this ill feeling. The new testimony would only make clearer that which was sufficiently disclosed upon the trial. Strictly, it was only cumulative, and cumulative testimony seldom, if ever, justifies any interference with a verdict. We cannot think that with this testimony the verdict would have been other than it was, and hence the verdict as returned ought not to be disturbed."

Also see *Malone v. State*, 176 Ind. 338, 96 N. E. 1, and *Williams v. Territory*, 13 Ariz. 306, 114 Pac. 556.

[8] It is suggested, rather than argued, that the court erred in giving a portion of the charge to the jury which forms the eighth ground of the motion for a new trial, which we have copied above. Suffice it to say that no error is made to appear here. If the defendant desired that the jury should have been further instructed as to what constituted justifiable homicide, he should have specifically requested such instruction. As we held in *Carr v. State*, 45 Fla. 11, 34 South. 892:

"Error cannot be assigned of the judge's failure to charge upon any question of law unless the party desiring it shall have requested charges thereon."

Also see *McDonald v. State*, 55 Fla. 134, 46 South. 176; *Padgett v. State*, 64 Fla. 389, 59 South. 946, Ann. Cas. 1914B, 897; *Sykes v. State*, 68 Fla. 348, 67 South. 121.

[9] We have carefully examined the evidence, and are of the opinion that it is amply sufficient to support the verdict rendered. Having found no reversible errors of law or procedure, it follows that the judgment must be affirmed.

WHITFIELD and ELLIS, JJ., concur.

BROWNE, C. J. (dissenting). The view which I take of this case prevents me from concurring in the decision of the majority of the court.

In my opinion, the case should be reversed upon two grounds: First, because the court refused to permit Sheriff Stanton to testify as to the distance between the tracks of the deceased and the defendant, made at the time the fatal shot was fired, and, second, because the court refused to grant a new trial on the ground of newly discovered evidence. These are presented in the fourth and fifth, and the seventh assignments of error.

A. D. Stanton was the sheriff of Madison county, and went with several others to the scene of the killing shortly after it occurred.



He testified that some one pointed out to him where Herndon was standing when he shot, and where the dead man was; that a track was there to show where they were standing. The heel where Herndon was standing was next to the cross-tie, \* \* \* and the heel was back this way towards Pinetta, traced north. The other man's track showed where the other man was standing. He was then asked: "How far apart were they?" and on objection by the state attorney, the court refused to permit the question to be asked, when the following occurred:

"Q. I will ask you this: Was there any sign there on the track as to where the two parties were standing? A. I saw tracks. One track was pointing north and one south. There was an indication in the track on the north, facing south, like it turned, like a person kind of turned making a track on the ground and sand. I did not, on that occasion, see but one set of tracks that indicated that they were pointing north and stopped at a certain place. I could tell that they had been coming backwards, because the heel would strike, that way, making a different track from what it would in walking forward. Q. How far from the dead man was that last track towards Pinetta that seemed to be coming backwards? The state attorney objected to the question upon the ground that it had not been identified as the track of the defendant. By the Court: The witness says that was the only track. Witness: I didn't see but one track. The state attorney renewed his objection. By the Court: I think, myself, it is too indefinite. The objection is sustained, to which ruling of the court the defendant excepted."

The distance between the parties when the shooting took place was material. As long as they were so far apart that Griffin could not by a sudden rush clinch with Herndon and prevent him from drawing his pistol in self-defense, Herndon did not shoot. It cannot be contended that Herndon shot because of vile epithets which Griffin applied to him immediately before the shooting, or for any other reason than in self-defense, because Griffin had several times before this applied similar epithets to him, and Herndon could have shot him before Touchstone appeared on the scene, and there would have been no witness to the killing. Herndon testified in part as follows:

"After I passed Mr. Griffin about as far as from the chair to the corner there I heard him say something, and I am a little hard of hearing, and had my left ear next to him, and I kind of stepped around, and he was standing facing me. And I said, 'What did you say, Mr. Griffin?' He said, 'I want to know if you sold my boy any more liquor.' I said, 'Mr. Griffin, I told you before I never sold your boy any liquor, and it is strange you keep this matter up, and I have only this much to tell you about that, your boy or any other boy that says I sold them liquor, they are damn liars.' And he said, 'He said it, and if you say you didn't you are a God damn liar and a son of a bitch, and threw his hand back to his pocket, and I pulled my pistol on him, like that, and kept my eye on him, and it came slowly out of his pocket, and I saw his fingers was that way, and I dropped the pistol back in my pocket; I took my hand out of my pocket after I put the pistol back into my pocket. I was backing back

down the railroad, and he was coming on to me. He was cursing me for everything that a man could lay his tongue to, when he cursed me for a damn son of a bitch I told him he was another. And he kept coming on, and every once in a while I told him, 'Go on, Mr. Griffin, I don't want any trouble with you; let me alone; I don't want to hurt you or be hurt by you.' And he kept coming, cursing me, and kept on that way until Mr. Touchstone came up."

The purpose of the testimony sought to be elicited by the question to which objection by the state was sustained was to corroborate the testimony of defendant that he was backing away from the deceased, who was advancing on him, and was within six or eight feet of him when he shot, and to overcome the effect of the testimony of N. M. Thompson, a witness for the state, that the tracks showed that Griffin was at least 15 feet away when Herndon shot him. Thompson's testimony on this point is as follows:

"I remember the occasion of the killing of Mr. Henry Griffin on the railroad. I was up there a short time after the killing where the killing occurred. I walked up to the sheriff, Stanton, who was making an examination of the dead man's body, and Mr. Herndon was in the middle of a conversation how the killing was done. Q. At that time and place did you hear and see Mr. Herndon point out to the sheriff where him and Mr. Griffin were standing at the time of the shooting? A. He was pointing out. As to whom he was pointing out to, I am unable to say, whether he was pointing out to me or the sheriff. He pointed out where he was standing. I did not measure the distance from where he pointed out as to where he was standing to where the dead man lay. Mr. Herndon pointed out where he was and Mr. Griffin was, and it was ten spaces. Q. What was the distance? A. Eighteen inches, by standard railroad rules. I won't say that was the exact measurement; I only know the standard railroad rule. I counted ten of those spaces. That would make fifteen feet between the two points if the ties were laid to standard. I did not estimate the number of feet at the time, only by counting. On a standard railroad it would have been fifteen feet."

The distance between Griffin and Herndon when the latter fired the fatal shot was very material, and that the state so regarded it on the trial is shown by the fact that the entire testimony of the witness Thompson was on that point, and his knowledge thereof was derived from the identical sources from which the sheriff was asked to testify. Thompson, Sheriff Stanton, and Touchstone were at the scene of the killing a short time after it occurred, and from what was then said, and from the tracks which were pointed out as the tracks of Griffin and Herndon, Thompson derived his knowledge of the distance between them, and testified that they were about 15 feet apart when the shot was fired. The sheriff was asked to testify as to this distance, from the same source of information upon which Thompson formed his opinion, and he was not permitted to do so. Permitting Thompson to testify on this point, and refusing to permit the sheriff to testify on the same point, was error, harmful to the defendant.

The seventh assignment of error is based

on the denial of the defendant's motion for a new trial. One of the grounds of the motion was that of newly discovered evidence. The defendant in support of this ground submitted the affidavit of one Emery Welch, as follows:

"Before me personally appeared Emery Welch, who being by me first duly sworn, deposes and says: That about a mile and a half from the town of Pinetta, Florida, near Taylor & Brady's mill, about a week before Henry Griffin was killed, he had a conversation with said Henry Griffin; that in said conversation affiant said that they are having some trouble around Pinetta over the blind tigers, and Henry Griffin replied that there was only one man giving them any trouble, and that was that low down Bert Herndon; that he was going to put a stop to it; that if he ever caught Bert Herndon in the right place he was going to kill him, and that would put a stop to it all; and affiant said that if he were Griffin he would not have any trouble about it, and Henry Griffin replied that he did not care anything for the trouble, and that he was going to get rid of Bert Herndon; that Griffin repeated this threat several times in different words."

In the case of *Howard v. State*, 36 Fla. 21, 17 South. 84, Mr. Justice Taylor, who rendered the opinion, thus lays down the rule governing applications for new trial upon the ground of newly discovered evidence:

"(1) The evidence must have been discovered since the former trial; (2) the party must have used due diligence to procure it on the former trial; (3) it must be material to the issue; (4) it must go to the merits of the cause, and not merely to impeach the character of a witness; (5) it must not be merely cumulative; (6) it must be such as ought to produce on another trial an opposite result on the merits."

It seems to be conceded by the opinion of the majority of the court that the application for a new trial on the grounds of newly discovered evidence comes within the rule governing the same in all but the fifth ground, in that the newly discovered evidence set forth in the affidavit of Emery Welch was merely cumulative. I cannot accept that view. There is no testimony of any threats by Griffin to kill Herndon, or to do him great bodily harm. Herndon testified that G. W. Mann told him, "Whatever you do, Bert, you keep your eye on Mr. Griffin; you are going to have trouble with that man." This was merely the opinion of the witness, and if the threat contained in the affidavit in support of the motion is cumulative, it becomes the doctrine of this court that the opinion of a witness as to the probability of an encounter between two persons is admissible to prove a threat. Only upon this theory could the testimony offered be regarded as "cumulative" of what Herndon said Mann told him.

Mr. Downing's testimony, which is set out in the opinion, can in no wise be regarded as a threat to kill or do great bodily harm. It is true, this witness says, "He made a threat against Mr. Herndon at that time," but when he states what constituted the so-called

threat, it proves to be the mere bombast of a bully, and instead of being a threat in the eye of the law, is a mere expression of Griffin's contempt for Herndon. Thus, "Mr. Griffin said he could take a ten-cent barlow, not only himself, but any negro boy, and run Bert Herndon out of Pinetta." Only by that expediency of reasoning by which courts sometimes construe "may" to mean "must," and "shall" to mean "may," can Griffin's boasting of what he or "any negro boy" could do, be construed into "would" so as to make it a threat.

The only other statement credited to Griffin is that he said, "If he ever fooled with him with that big pistol he had in his pocket, he would take it away from him and stamp him in the ground." But he states most positively that Griffin "didn't say he would kill him, or cut him, or hurt him; just said he would take his pistol away and stamp him in the ground."

In the affidavit in support of the motion for a new trial, the threats were, "if he ever caught Bert Herndon in the right place he was going to kill him," and "that he was going to get rid of Bert Herndon," which he repeated several times. For this to be cumulative there would have to be some testimony of threats by Griffin to kill Herndon, or do him great bodily harm; but instead there is only the statement by Herndon that Mann told him to "look out for Mr. Griffin," and Mann's opinion that he was going to have trouble with him, and Downing's testimony about taking that big pistol away from him, and stamping him in the ground, and this witness was very careful to remove any impression that Griffin intended any bodily harm to Herndon by his highly figurative language, and added, "he didn't say he would kill him, or cut him or hurt him, just said he would take his pistol away and stamp him in the ground."

The testimony presented in the affidavit of Emery Welch cannot in the slightest degree be considered cumulative, unless we hold that the opinion of a witness, that one person is going to have trouble with another, is competent testimony to prove a threat, and that a contemptuous boasting of superior prowess and courage, even though coupled with positive testimony that he didn't say he would kill him, or cut him or hurt him, is a threat to kill or do great bodily harm. I cannot accept that view.

For the reasons set forth herein, I think the judgment should be reversed, and a new trial granted.

TAYLOR, J., concurs in the dissent of Chief Justice BROWNE, on the point of the rejection of the evidence of the sheriff.

(73 Fla. 514)

## FORRESTER et al. v. WATTS.

(Supreme Court of Florida. Feb. 28, 1917.)

*(Syllabus by the Court.)*1. TRUSTS ~~§ 85~~ — CONSTRUCTIVE TRUST — FRAUD.

The law will ingraft a trust upon an absolute and unconditional deed where there is fraud, actual or constructive, in the transaction.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 145-147.]

2. TRUSTS ~~§ 89(5)~~ — CONSTRUCTIVE TRUST — FRAUD.

In order to ingraft a trust upon an absolute and unconditional deed, the proof must be so clear, strong, and unequivocal as to remove every reasonable doubt as to the existence of the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 137.]

3. TRUSTS ~~§ 89(4)~~ — CONSTRUCTIVE TRUST — AGREEMENT TO HOLD—EVIDENCE.

Where it is claimed that a widow who buys real estate and takes an absolute and unconditional deed in her own name holds the lands in trust for her deceased husband's heirs by reason of a prior contract between him and her grantor for the purchase of the property conveyed to her, the proof of the existence of such contract and its terms and conditions must be as strict as is required by the rule in this state to establish a resulting or constructive trust, and the statement of a witness of his conclusion that there was such a contract, without stating all the facts which are essential to create a valid contract, is not sufficient to defeat the deed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 136.]

4. PARTITION ~~§ 81~~—INTEREST OF PARTIES—DETERMINATION.

The quantity and proportionate interest of the parties in a partition suit is not determined by what they claim, but by what the testimony proves they are legally entitled to. The question of the interests of all the parties must be adjudicated by the court, and a mistake on the part of a party to the suit as to what his interest is will not bar his being decreed what he is entitled to, even if he remains passive and abstains from making any answer.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 228.]

Appeal from Circuit Court, Jackson County; A. G. Campbell, Judge.

Bill for partition by John D. Watts against Mary L. Forrester and another. Decree for complainant, and defendants appeal. Decree reversed, and cause remanded, with directions.

Appellee, the complainant below, brought a bill for partition of real estate in Jackson county against Mary L. Forrester and Cary W. Forrester, her son. The bill, in substance, states that in 1902, when B. M. Forrester, the husband of Mary L. Forrester, died, he owned all the land described in the bill; that in 1897 he and his father, T. R. Forrester, bought it together, but thereafter T. R. Forrester sold his half interest to B. M. Forrester, and the latter then owned the entire tract, but before he finished paying T. R. Forrester for his half interest B. M. Forrester died, leaving surviving him his wife, Mary L. For-

rester, their son, Cary W. Forrester, and D. T. Forrester, a son by a former marriage; that T. R. Forrester made a deed for his half interest to Mary L. Forrester; that B. M. Forrester had paid part of the purchase money for this half interest before his death, and that Mary L. Forrester finished paying for said half interest out of funds belonging to the estate of B. M. Forrester, and that the deed to her from T. R. Forrester did not convey the title in said half interest to her in fee simple, but only as trustee for the estate of B. M. Forrester, and that this title was the same that B. M. Forrester had purchased in his lifetime, but had not finished paying for at the time of his death; that in February, 1912, D. T. Forrester sold his interest to John D. Watts and gave him a deed for one-third interest in the lands; that John D. Watts owns one-third and Mary L. Forrester owns one-third. The interest of C. W. Forrester is not stated in the body of the bill, but the prayer is that, if Mary L. Forrester elects to take a child's part, and the property is sold, the money arising from such sale be divided equally among Mary L. Forrester, Cary W. Forrester, and John D. Watts. No fraud is charged in the bill.

Separate answers were filed by Mary L. Forrester and Cary W. Forrester. Mary L. Forrester in her answer denied that B. M. Forrester owned the lands at the time of his death; that he had paid any part of the purchase price therefor, or that he had received any deed conveying to him T. R. Forrester's interest therein; that Mary L. Forrester bought from T. R. Forrester, her father-in-law, his half interest in the lands after the death of her husband, D. M. Forrester, and paid therefor \$600, and assumed the debt of T. R. Forrester and B. M. Forrester for the unpaid balance on the original purchase price, and that she paid the same partly with money which she borrowed, and partly by proceeds of crops which she and her son Cary W. Forrester made on the lands; that she paid off a large indebtedness of her husband which he owed at the time of his death; and that she paid all the taxes on the property.

The answer of Cary W. Forrester denies the material allegations of the bill, but does not state what is his interest in the lands.

Paul Carter, of Marianna, for appellants. James H. Finch, of Marianna, for appellee.

BROWNE, C. J. (after stating the facts as above). In the consideration of this case we are confronted at the outset by the allegation in the bill:

"That the deed made to her did not convey the title in the said half interest to her in fee simple, but only as trustee for the estate of B. M. Forrester."

This is a declaration of an express trust which the evidence not only failed to sustain, but conclusively disproved, as the deed

from T. R. Forrester to M. L. Forrester, which was introduced in evidence, is an absolute and unconditional one in fee simple. We may consider the case, however, as predicated upon a constructive trust arising out of fraudulent acts of Mary L. Forrester; for, although fraud is not charged in the bill, it is strongly contended for in appellee's brief.

In discussing the subject of constructive trusts, Perry says:

"If a person obtains the legal title to property by such acts or circumstances of circumvention, imposition, or fraud, or if he obtains it by virtue of a confidential relation and influence under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interest of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust by construction out of such circumstances or relations; and this trust they will fasten upon the conscience of the offending party, and will convert him into a trustee of the legal title, and order him to hold it, or to execute the trust in such a manner as to protect the rights of the defrauded party and promote the safety and interests of society." Perry on Trusts, § 166.

[1] The law will ingraft a trust upon an unconditional and absolute deed where there is fraud in the transaction, actual or constructive, as where it may be contrary to some rule established by public policy for the protection of society, and it is upon this theory that parol evidence is admissible to show that the title of the grantee under the deed is held in trust for the proper beneficiaries.

"Parol evidence, however, is not favorably received by courts in any case, and they will not act upon it against written instruments, unless it is exceedingly clear and certain, and contradicted by other evidence." Perry on Trusts (6th Ed.) § 227.

[2] The rule as to the character of parol testimony necessary to ingraft a trust upon an absolute and unconditional deed, although expressed in varying phraseology, is in effect that there must be no room for doubt.

In *Lingenfelter v. Richey*, 62 Pa. 123, it is said:

"As they claimed title to the land against the express language of the deed, they were bound to show by clear and satisfactory evidence that there was a resulting trust in favor of Sparks."

In *Collier v. Collier*, 30 Ind. 32, the doctrine is thus laid down:

"Parol evidence to establish a resulting trust in land held by an absolute conveyance, \* \* \* must be strong and clearly relevant."

In Illinois the proof must be "full, clear and convincing." *Francis v. Rhoades*, 146 Ill. 535, 35 N. E. 232; *Koster v. Miller*, 149 Ill. 195, 37 N. E. 46; *Hogue v. Steel*, 207 Ill. 340, 69 N. E. 931.

In Virginia the proof is required to be "unequivocal and explicit, and established by clear and convincing testimony." *Jesser v. Armentrout's Ex'r*, 100 Va. 666, 42 S. E. 681.

In Iowa it is held that there must be "more than a bare preponderance of the evidence." *Cunningham v. Cunningham*, 125 Iowa, 681, 101 N. W. 470.

The rule is thus laid down in Utah:

"To establish a resulting trust by parol evidence, in favor of one who furnished purchase money, public policy and the safety and security of titles to real estate demand that the proof be scrutinized with great caution, and that it be clear, definite, unequivocal, and conclusive. A bare preponderance of parol evidence is not sufficient. It must show the existence of the trust beyond reasonable controversy." *Chambers v. Emery*, 13 Utah, 374, 45 Pac. 192.

The Missouri rule is similar to ours, that the "evidence to establish a resulting trust must be so clear and convincing as to exclude every reasonable doubt of the existence of such trust." *Reed v. Painter*, 129 Mo. 674, 31 S. W. 919. The rule in this state is very strong, and properly so; for the relaxation or modification of the strict rules of the statute of frauds tends to restore those practices which because of their prevalence the statute was enacted. In order to ingraft a resulting or constructive trust on an absolute and unconditional deed by parol testimony, the evidence "must be so clear, strong, and unequivocal as to remove from the mind of the chancellor every reasonable doubt as to the existence of the trust." *Geter v. Simmons*, 57 Fla. 423, 49 South. 131; *Rogero v. Rogero*, 66 Fla. 6, 62 South. 899.

[3] The theory of the complainant's case is that there was a valid existing contract of sale between T. R. Forrester and B. M. Forrester upon which part of the consideration had been paid by the latter prior to his death, and that Mary L. Forrester finished paying for the same with money belonging to the estate of B. M. Forrester.

There is no testimony to support this contention. There is some reference to an "arrangement" between them, but there was no attempt to prove what that arrangement was. The only effort to prove the contract relied on to establish the trust was by the testimony of the witness Owens as to conversations between himself and Mary L. Forrester. He was asked if he heard "Mary L. Forrester say at the time of her husband's death that her husband has arranged and contracted to buy the other half interest in the lands," and his reply was, "Yes, sir; I heard her say that they owned it together, the old man and her husband." A witness replying "Yes" to a leading question about a conversation cannot be taken as proving the statements in the question when he follows it with a recital of what he heard, which is contrary to the implication in the question propounded. He was next asked, "Did you hear her say after the death of B. M. Forrester that he had an arrangement to buy the half interest of Thomas Forrester?" to which the witness replied, "At that time she talked about it, but afterwards she didn't." He further testified:

That she told him "her husband had bought it, or contracted for it, and when she bought the old man's part he went with her; that he was the one who told her to buy it, have the deed made in her name and it would all be

hers; that T. R. Forrester said the papers had been made, and there was not any use to change them, but before they left he agreed to make the deeds to her if she would pay it pretty soon—in a month or a short time; that nothing was said about whom the papers had previously been made to or what price was to have been paid by B. M. Forrester."

Mary L. Forrester testified that her husband had agreed to buy his father's interest for \$700. There is no testimony of any memorandum in writing between T. R. Forrester and B. M. Forrester, and none that any part of an agreed purchase price had been paid. The testimony of these witnesses about a contract is without weight. Neither of them saw the contract if it were in writing, and neither heard it expressed if it were a parol contract, and neither was able to testify as to the terms and conditions of the same. It is apparent that what they refer to as a contract was, at best, a desire on the part of B. M. Forrester to buy his father's interest, and that perhaps there was some sort of an understanding between them that the son's desire might some day be consummated. This testimony is wholly inadequate to prove that a valid contract of sale existed between T. R. Forrester and B. M. Forrester at the time of the death of the latter.

It is contended, however, by the appellee that Mary L. Forrester paid for the undivided half interest which she bought from T. R. Forrester with funds belonging to the estate of B. M. Forrester, and that she held the title to the same as trustee for the heirs of B. M. Forrester. Tested by the rule in this state as to the amount of evidence necessary to ingraft a trust on an absolute and unconditional deed, the testimony in this case falls utterly to come within the rule.

The testimony shows that on the death of B. M. Forrester his wife and the son, Cary W. Forrester, remained on the farm and together they cultivated and improved it. Her stepson ran away before his father's death, and, with the exception of one day, he remained away the rest of his life. About ten months after her husband's death, and after a crop had been made on the farm, she bought from her husband's father his undivided half interest in the property. According to her testimony, she and her son, Cary, cultivated part of the farm, and part was rented to tenants. Of the \$600 she paid to T. R. Forrester for his half interest, \$200 was made by herself and her son on the farm, and \$400 she borrowed from Dr. Willis.

Much testimony was introduced by complainant about the horses, mules, and produce sold by Mary L. Forrester which were on the place when B. M. Forrester died, the purpose of which was to raise a presumption that the money she paid to T. R. Forrester for his half interest was derived from this source, and that, having paid for the land by funds derived from the sale of property own-

ed jointly by herself and the two sons of, B. M. Forrester, her title was as trustee for the benefit of herself and these two sons. A trust cannot be ingrafted on an absolute and unconditional deed by presumption, but the evidence "must be so clear, strong, and unequivocal as to remove from the mind of the chancellor every reasonable doubt as to the existence of the trust." The testimony for the complainant was so vague and indefinite as to what became of the proceeds of the sale of stock and produce mentioned as hardly to have raised even a mere presumption that it was used to pay for the half interest she purchased from T. R. Forrester, and, taken in connection with the testimony of Mary L. Forrester that she used these proceeds to pay the debts of the estate created prior to her husband's death, and her explanation of how she and her son worked to earn the \$200 with which she made the first payment, and that the subsequent payments were made "with her hard-earned money that she dug out of the ground" with the help of her son, and her positive statement that she did not pay for any of the land with money from the estate of B. M. Forrester, the testimony certainly was not so clear, strong, and convincing as to remove even reasonable doubt, which is essential before a trust can be ingrafted on an absolute and unconditional deed. To sustain the contention of appellee that a resulting trust was shown by the vague, indefinite, and hazy parol testimony introduced in support of the bill in this case, would tend to make paper titles most uncertain, if not worthless.

The decree of the circuit judge was also erroneous in that he decreed that Watts, the grantee from D. T. Forrester, owned an undivided one-third interest, and Cary W. Forrester owned but a one-sixth interest in the property sought to be partitioned. No aspect of the case warrants this finding. The interests of D. T. Forrester and C. W. Forrester are identical. The circuit judge gave as the reason for making this discrimination that Cary W. Forrester, "having claimed only a one-sixth interest therein, is entitled to only a one-sixth interest."

[4] The quantity and proportionate interest of the parties will not be determined by what they claim, but by what the testimony proves they are legally entitled to. In suits of the character of partition and accounting, the question of the interests of all the parties concerned is to be adjudicated by the court, and a mistake on the part of a claimant as to what his interest is will not bar him from being decreed what he is legally entitled to, not even if he remain passive and abstain from making any answer.

In the case of *Anderson v. Northrop*, 30 Fla. 612, 12 South. 318, this court said:

"It is further contended for the appellants that the Crafts and their trustee, De Saussure, who did not join as complainants, but were made parties defendant in this cause, are not entitled to any share in the relief to be granted, because

they complained of nothing, and asked for nothing, and that the decree as to them is erroneous because thereof. There is nothing in this contention. The Crafts are entitled, in their proper proportion, to the same relief, and in virtue of the same right, as are the active complainants herein, and were necessary and proper parties to the suit, in order to a complete determination of all interests involved; and because they remain passive, and are consequently made parties defendant, does not operate as a waiver or surrender of their rights in the premises. The defendant, Andrew Anderson, is himself entitled to a one-fourth share in all the properties involved in this litigation, under the will of the elder Andrew Anderson, as a devisee under said will; because he does not claim it herein in the same right as do the other reversioners, but, on the contrary, is a defendant actively opposing and denying their claims, furnishes no reason why he should be deprived of his interests acquired through the same source as the others."

The complainant, Watts, does not come before this court in good faith demanding what he claims he is equitably entitled to, but rather as a speculator in the result of the suit. His deed was executed in the District of Columbia on February 27, 1912. On December 6, 1911, he wrote to Mary L. Forrester offering to buy her and her son's interests, and said:

"So I will make you an offer of \$5 per acre for yours and his which if I understand it right would be five-sixths of the plantation."

He testified that Mr. Wilson told him that:

Talmage, his grantor, "was entitled to one-third and he would sell me one-third and get a deed for it and would guarantee that I get one-third without any further costs to me."

It follows, therefore, that the circuit judge erred in decreeing that Mary L. Forrester owned an undivided one-half, that J. D. Watts owned an undivided one-third, and that Cary W. Forrester owned an undivided one-sixth interest in the lands sought to be partitioned, and the decree is reversed, and the cause remanded, with directions to the circuit judge to enter a decree awarding to Mary L. Forrester an undivided four-sixths, and to Cary W. Forrester and John D. Watts an undivided one-sixth each in the property, and that the costs of this appeal be paid by the appellee, John D. Watts.

Decree reversed.

**TAYLOR, SHACKLEFORD, WHITFIELD.**  
and **ELLIS, JJ.**, concur.

(73 Fla. 476)

#### MACK v. STATE.

(Supreme Court of Florida. Feb. 24, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW §1186(4) — APPEAL — TECHNICAL ERROR — REVERSAL.

Where, in a criminal prosecution for rape, there is ample evidence to sustain the verdict, and the rulings in admitting and rejecting testimony could not have been harmful in view of the entire proceedings, technical errors, if any,

will not warrant a reversal of the judgment of conviction.

Browne, C. J., dissenting.

Error to Circuit Court, Duval County;  
George Couper Gibbs, Judge.

James Mack was convicted of rape, and he brings error. Affirmed.

L. S. Gaulden, of Jacksonville, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

WHITFIELD, J. Mack was sentenced to life imprisonment on a conviction of rape with a recommendation to mercy. On writ of error it is contended that errors were committed in various rulings in admitting and rejecting testimony. As there is ample evidence to sustain the verdict, and as the rulings complained of could not have been harmful in view of the entire proceedings, the technical errors if any will not warrant a reversal. *Stone v. State*, 71 Fla. 514, 71 South. 634.

The accused testified that he did not commit rape, but there was testimony of a confession by him that he did rob the victim, taking money from her stocking. The confession was extrajudicial, and a preponderance of the evidence shows it was voluntary. There is positive testimony of the victim identifying the accused, and that—

"he knocked me down and dragged me in the bushes." "He just choked me until I lost consciousness. I don't know what happened after that." He was "on top of me choking me. That's all I remember." "Q. Did he have intercourse with you?" "A. I don't know. I was unconscious. I don't know anything about it." "I am sure that [accused] is the man because I had a good view of his face when he had me on the ground. He was on top of me." "It was not dark." "Q. You can't say that he committed rape upon you then because you were unconscious?" "A. Yes, I was unconscious." "My clothes were up when the people found me." "I was down on my back." "Q. If he had intercourse with you, did you consent to it?" "A. Why certainly not." "Q. If he did it, did he do it by force and against your will?" "A. He certainly did."

The jury were warranted in finding from the testimony of the victim and the corroborative evidence which was adduced as to her physical condition just after the alleged assault that rape was committed. A careful consideration of the entire record discloses that the defendant's rights were dutifully guarded at the trial by his counsel, and that no errors were committed that prejudice the rights of the accused. *Mack v. State*, 54 Fla. 55, 44 South. 706, 13 L. R. A. (N. S.) 373, 14 Ann. Cas. 78. The conviction was had in due course of law, and the judgment is affirmed.

**TAYLOR, SHACKLEFORD, and ELLIS, JJ.**, concur. **BROWNE, C. J.**, dissents.

(73 Fla. 554)

SEABOARD AIR LINE RY. CO. v. KAY.  
(Supreme Court of Florida. March 2, 1917.)

(Syllabus by the Court.)

1. TRIAL ~~§~~ 202—INSTRUCTIONS—ISSUES AND EVIDENCE.

Each party to a trial at law has a right to have the court instruct the jury as to the law applicable to the facts in evidence introduced under the issues as made by the pleadings.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 474, 477, 482.]

2. TRIAL ~~§~~ 233(3) — INSTRUCTIONS — ISSUES — REFERENCE TO PLEADINGS.

In charging the jury the court should state to them the issues made by the pleadings, and it is error simply to refer the jury to the pleadings to ascertain the issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 529.]

Error to Circuit Court, Duval County: George Couper Gibbs, Judge.

Action by Samuel Kay against the Seaboard Air Line Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Fleming & Fleming, of Jacksonville, for plaintiff in error. C. B. Peeler and M. M. Scarborough, both of Jacksonville, for defendant in error.

PER CURIAM. The defendant in error recovered a judgment in the circuit court for Duval county against the plaintiff in error in the sum of \$5,000 as damages for personal injuries. The defendant below took a writ of error, and seeks here to reverse the judgment entered upon the verdict so obtained.

While there are many errors assigned, it is unnecessary to discuss but two or three. We think the demurrer to the second count of the amended declaration was properly overruled; that the court's order allowing the plaintiff leave to amend the second count of the amended declaration, so as to show that the injury was committed in the year 1913 instead of 1914, was within the court's discretion, and not in the least harmful to the defendant, and that the defendant's motion for an instructed verdict in its favor was properly overruled.

The case was tried upon the second count of the declaration, the first count having been held to be bad on demurrer. The second count of the declaration alleged, in substance, that the plaintiff and several others, while riding in an automobile, ran into a train of cars of the defendant which was then extending across a public highway; that the plaintiff was thrown out of the automobile upon the ground "under one of the defendant's cars then and there being upon said railroad track"; that he was unable to extricate himself from the position because he was "jammed and fastened" by the automobile; that while in that situation, the defendant knowing that the plain-

tiff was in that perilous situation, and "that to move such train of cars while plaintiff was in such position would injure him," "did negligently, carelessly, and improperly run, operate, and manage its train of cars by moving it from the position in which it was then standing, thereby running the same over the hand" of the plaintiff, cutting several of his fingers and otherwise bruising, wounding, and injuring him in his limbs and body, whereby he suffered pain and was forced to lay out money in endeavoring to be healed, and that he is permanently disabled by such injury.

The testimony of the plaintiff and one or two other witnesses tended to support the allegations of the declaration, the testimony of several witnesses for the defense, in fact all the evidence offered by the defense, and much of it offered by the plaintiff, tended to support the defendant's contention that the train of cars was in motion when it was struck by the automobile and the plaintiff was thrown out upon the ground with his hand upon the railroad track, and that his hand was run over and the fingers cut off before the train could possibly be stopped; that the train passed over the crossing and came to a stop for the first time several car lengths beyond the crossing. If these facts were true, the plaintiff should not have recovered upon the declaration. The defendant had pleaded not guilty, and that the plaintiff's negligence contributed directly to his own injury in the manner above stated, and that his negligence was the sole cause of the injury he sustained.

Now the basis of the ninth and tenth assignments of error was the refusal of the court to give the following instructions requested by the defendant, viz.:

"(2) The court charges you that under the pleadings in this case the defendant cannot be held liable for the collision between the automobile which plaintiff was driving and defendant's train, and if you believe from a preponderance of the evidence that plaintiff was injured solely as a result of that collision, then you will find the defendant not guilty."

"(5) The court charges you that if you find from a preponderance of the evidence that the employees of defendant in charge of defendant's train stopped said train as soon as it was reasonably possible to do after the discovery of the collision between said automobile, which plaintiff was driving, and said train, and that the employees in charge of said train did not start said train again until after plaintiff had been removed from the position in which he was then in when said train was brought to a stop, then you will find the defendant not guilty."

[1, 2] It is true that the court charged the jury in general terms that if they believed from the evidence the facts alleged in any one of the pleas in bar they should find for the defendant, but no part of the charge given can be said to have covered substantially the ideas embraced in the two charges above quoted. There was ample evidence to which the charges were applicable, the issue was clear-

ly raised by the plea of not guilty, and the special pleas mentioned. The defendant had a right to have the jury instructed specifically upon those issues, and the law applied to the state of facts. This the court refused to do, although requested by the defendant in proper manner. We think this refusal was error, for which the judgment should be reversed. See *Hood v. French*, 37 Fla. 117, 19 South. 165. It is the duty of the court to state to the jury the issues made by the pleadings; and, while this duty involves a large discretion as to the form and style in which the instructions shall be given, it is generally held to be erroneous to read the pleadings to the jury or refer them to the pleadings for the issues by way of instructing them in the law of the case. The issues should be stated by the court fully to the jury as those issues have been made by the pleadings, and each party to the cause had a right to have the law given to the jury upon the issues raised if there is evidence to which such charge is applicable.

The error was harmful in view of the character of evidence, and because of it the judgment is reversed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

(73 Fla. 541)

ALTHA GIN & MFG. CO. v. LIDDON et al.  
(Supreme Court of Florida, March 1, 1917.)

(Syllabus by the Court.)

EJECTMENT — DEFENSES — PURCHASE AT PUBLIC SALE.

In an action of ejectment, a showing that the defendant in possession purchased the property at a public sale and has paid the purchase price is a good defense, even though a deed of conveyance had not been made to the purchaser.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 81-93.]

Error to Circuit Court, Calhoun County; W. B. Farley, Judge ad litem.

Ejectment by the Altha Gin & Manufacturing Company against C. C. Liddon and others, copartners under the firm name and style of Liddon & Turvaville. Verdict and judgment for defendants, and plaintiff brings error. Affirmed.

J. H. Finch, of Marianna, for plaintiff in error. Paul Carter, of Marianna, for defendants in error.

PER CURIAM. The corporation brought ejectment against the partnership. Trial was had before Honorable W. B. Farley, as Judge ad litem, upon a plea of not guilty, and the following special pleas:

"3. That the defendants rented the premises described in plaintiff's declaration from the plaintiff during the years 1912 and 1913, for an agreed rental, and were in possession of said premises under such agreement on the 4th day of March, 1914, when the said defendants

bought the said premises from the plaintiff for the sum of \$2,010 and paid on the purchase price the sum of \$500 in cash, but the plaintiff has never tendered these defendants a deed for the said premises, and has never offered to return the said \$500 paid on the purchase price, and has never demanded possession of the said premises from these defendants before the institution of this suit.

"4. And for a fourth plea to plaintiff's declaration on equitable grounds, these defendants say:

"That defendants entered into possession of the property described in plaintiff's declaration during the year 1912 under a lease or renting of said property by defendants. That about the 9th day of March, 1914, the said property was sold to the defendants by the plaintiff for the sum of \$2,010, under an agreement of the directors of said corporation, at a public sale in the town of Altha, Fla. That it was a part of the said agreement that the property of the corporation be sold for the purpose of paying off its indebtedness. That the said indebtedness was a mortgage, executed by plaintiff to Citizens' State Bank, for the sum of \$1,562.50, due and payable January 1, 1914, with interest at 10 per cent. from maturity; an indebtedness due defendants for the sum of \$244.53, for goods, wares and merchandise, sold and delivered plaintiff and interest on account; an indebtedness due and owing the defendants, C. C. Liddon and T. B. Liddon, copartners under firm name and style of C. C. Liddon & Co., amounting to \$43.40, with interest for two years.

"That the defendant, C. C. Liddon, was, during all of said time, treasurer of the plaintiff corporation. That it was agreed as a term and part of said sale that the indebtedness of the corporation should be paid from the proceeds of said sale. That there was no other outstanding indebtedness against the plaintiff corporation. That these defendants duly delivered the amount due upon the said mortgage to the holder thereof, to wit, Citizens' State Bank, amounting to the sum of \$32.15 interest and \$1,090.60 principal, and caused said mortgage to be transferred to these defendants and released the indorsers on the note secured thereby.

"That the defendants, at the time of said purchase, paid to J. D. Smith, president of the plaintiff, \$500 on said purchase price, and offered to allow all of the above indebtedness on the balance of said purchase price and offered and agreed to pay the balance of said purchase price upon delivery of a deed to these defendants, but the plaintiff failed and refused to deliver said deed and instituted suit. That said balance was the sum of \$103.53, which defendants bring into court and tender."

Verdict and judgment were rendered for the defendants.

On writ of error the plaintiff contends that the court erred in overruling demurrers to the third and fourth pleas; in admitting testimony; and in charges given to the jury. As all the evidence adduced was admissible under the general issue of not guilty, it is not necessary to determine whether error was committed in overruling demurrers to the special pleas.

It appears that the corporation having title to the property authorized its sale to the highest bidder for cash to be applied to the payment of the indebtedness of the corporation. A sale was made to the defendant partnership for \$2,010; \$500 being paid in cash at the sale. There is evidence that the remainder of the purchase price was sat-



isfied by the payment of a mortgage and open accounts owed by the plaintiff corporation, except a small balance which was paid into the court registry. This payment of the purchase price as testified to, having been found to have been made, showed an equitable defense available to the defendant, and technical errors, if any, in the admission of evidence or in the charges given could not have been harmful to the plaintiff, no errors of substantive law appearing.

Affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

(73 Fla. 535)

LOWRY et al. v. DOWNING MFG. CO. et al.  
(Supreme Court of Florida. March 1, 1917.)

(*Syllabus by the Court.*)

1. INTERPLEADER ¶6—REMEDY—REQUISITES—“BILL OF INTERPLEADER.”

A bill of interpleader lies in cases where the complainant alleges that he has funds in his hands in which he claims and has no interest, and to which the defendants set up conflicting claims, and the complainant brings the fund into court and prays that the defendants contest it between themselves; the complainant not being in collusion with either of the defendants and unable to decide between them.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 6.]

For other definitions, see Words and Phrases, First and Second Series, Bill of Interpleader.]

2. INTERPLEADER ¶26 — ANSWER — MATTERS OF DEFENSE.

If any facts exist which are not shown by the bill of interpleader, but which constitute a valid reason why the bill should not lie, they are matters of defense, and may be set up by answer.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 50, 53, 54.]

3. INTERPLEADER ¶6 — RIGHT TO REMEDY — AMOUNT DUE CONTRACTOR.

A married woman, upon whose property a house was built under a contract whereby the builder agreed to furnish all material and labor, may, on default of the contractor, bring into court the amount due him under the contract, and maintain a bill of interpleader against conflicting claimants of the fund.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 6.]

Appeal from Circuit Court, Hillsborough County; F. M. Robles, Judge.

Bill of interpleader by Willie M. Lowry and her husband, S. L. Lowry, against the Downing Manufacturing Company and others. From an order sustaining a demurrer to the bill, complainants appeal. Order reversed.

H. S. Hampton and F. J. Hampton, both of Tampa, for appellants. McKay, Withers & Phipps, of Tampa, for appellees.

ELLIS, J. The appellants filed their bill of interpleader in the circuit court for Hillsborough county against D. C. Walker, the

Downing Manufacturing Company, Alexander Lumber Company, Orville Rigby, Holmes & Binkley, Gulf City Painting & Decoration Company, W. E. McAndrews, Knight & Wall, Pierce Electric Company, O. F. Bender, and Nathan Bryan.

The bill alleges in substance that Mrs. Willie M. Lowry is the owner of certain lots in Hillsborough county; that she is the wife of S. L. Lowry, and the lots are her separate statutory property; that she and her husband entered into a contract with D. C. Walker for the erection of a dwelling house on the property to cost \$3,600, in which Walker agreed to furnish all the labor and material in its construction; that the contract contained a clause providing that, if at any time the contractor should refuse or neglect to supply a sufficiency of workmen or material, or refuse to comply with any of the articles of agreement, the owners should have the right to enter upon and take possession of the premises and provide the necessary materials and workmen to finish the construction of the house, after giving notice in writing; and that the expense of such notice and finishing of the work should be deducted from the amount agreed to be paid under the contract. It is alleged that Walker neglected to complete the work, and went away, and complainants, after giving him notice, entered upon the premises and completed the work, after doing which there remains due by the complainants to the defendant Walker under the contract the sum of \$449; that the complainants have received notices from the other named defendants of claims for material and labor furnished in the construction of the building; that complainants knew nothing of the rights nor priorities of such claimants, and do not know how the sum remaining in the complainants' hands should be apportioned between the claimants; that two of the defendants have commenced “a suit” against the complainants in which the property is sought to be subjected to their claims.

The bill prays that the defendants may interplead, that complainants may be permitted to pay the said sum of money into court, that the demands of the defendants may be adjusted between themselves and settled out of the fund so paid into court by the complainants, and that the defendants be restrained from proceeding against the complainants for the recovery of their claims alleged to be due by the contractor.

The record shows that all the defendants answered except Pierce Electric Company, Nathan Bryan, and Knight & Wall. Decrees pro confesso were taken against Holmes & Binkley, Pierce Electric Company, and Nathan Bryan. Knight & Wall interposed a demurrer to the bill, which was sustained, from which order this appeal is taken.

The demurrer attacks the bill upon six grounds, which are as follows:

"First. There is no equity in the bill.

"Second. It appears by the bill that the complainant Willie M. Lowry is the owner of the land in controversy and is a married woman, and that said property constitutes her separate statutory estate, and therefore is not subject to the operation of the lien of the state of Florida.

"Third. From the facts stated in the bill as a matter of law, the said complainant could pay the sum of money mentioned in the bill to whomsoever she pleases, and be legally discharged of any and all obligations to any of the defendants.

"Fourth. That it appears from the averments of the bill that the said complainants are not mere stakeholders of the fund therein mentioned, but that there are controverted questions of fact pending, and that, in order for the court to rule upon the rights of the respective parties to this suit, it will have to first determine a controversy as to whether or not the complainants are indebted in one sum or another, and such a controversy cannot be properly determined in a proceeding of this kind.

"Fifth. That it is not averred in the bill that the said complainants do not collude with the defendants or either of them.

"Sixth. And for many other good and sufficient reasons apparent upon the face of said bill."

By this demurrer Knight & Wall question the right of the complainants to file a bill of interpleader.

[1] In the case of *Wainright v. Connecticut Fire Insurance Company*, decided at the present term, 74 South. 8, Mr. Justice Shackelford, speaking for the court, said:

"Where a bill of interpleader is filed the better practice is first to determine whether such bill will lie."

A bill of interpleader is not a proceeding in rem. It is where the complainant alleges that he has a fund in his hands in which he claims and has no interest, and to which the defendants set up conflicting claims. The complainant brings the fund into court and prays that the defendants contest it between themselves. See *Hoggrat v. Cutts*, 1 Cr. & Ph. (18 Eng. Ch.) 197; *Byers v. Sansom-Thayer Comm. Co.*, 111 Ill. App. 575; *Wing v. Saulding*, 64 Vt. 83, 23 Atl. 615; *Pfister v. Wade*, 56 Cal. 43; *Glasner v. Welsberg*, 43 Mo. App. 214; *Williams v. Matthews*, 47 N. J. Eq. 196, 20 Atl. 261; *Patterson v. Perry*, 14 How. Prac. (N. Y.) 505; *Bridsburg Mfg. Co.'s Appeal*, 106 Pa. 275. In *Sherman v. Partridge*, 11 N. Y. Super. Ct. (4 Duer) 646, it was said that an interpleader can justly be allowed only where no other question than the right of the property is meant to be litigated. Fletcher, in his work on Equity Pleading and Practice, says that:

"A bill of interpleader lies where the complainant claims no relief against either of the defendants, but where the defendants claiming of him the same debt or duty by different or separate interests he is uncertain with which of the claims he ought to comply." Fletcher's Eq. Pl. & Pr. §§ 772, 773-775.

See, also, *Shaw v. Coster*, 8 Paige's Ch. (N. Y.) 339, 35 Am. Dec. 690, and note; 5 Pomeroy's Eq. Jur. § 43.

The bill in this case presents a situation in which the complainants can be said to be merely stakeholders, having no interest in

the fund claimed, seeking no relief against the defendants, and having no interest in the subject-matter and not in collusion with the defendants or either of them. The essential allegations are contained in the bill, which is sworn to by one of the complainants.

[2] If any facts exist, not shown by the bill, whose allegations are admitted by the demurrer, which constitute a valid reason why the bill of interpleader should not lie, they are matters of defense, and can be set up in the answer.

[3] It is no ground for demurrer that one of the complainants is a married woman, upon whose property the house was built, and no liability therefore attaches to her, nor to the property, for improvements thereon, until certain proceedings are taken by the materialmen holding such claims. If she chooses to acknowledge that she has the sum in her hands to be paid for materials furnished to her contractors, but cannot determine to whom she should pay it, the claimants surely should not be heard to complain. There is nothing to prevent a disclaimer being filed by any one of the defendants, who may have no interest in the fund.

We can perceive no merit in the contention that the complainants are merely seeking to force the defendants to litigate over a small sum of money which the complainants arbitrarily assert is the entire amount due. If the allegations of the bill are true, then the sum alleged in the bill is all the defendants may claim of her. If the allegations are not true, they may be denied. It is true that the allegations of the bill could have been more definite and much clearer as to the claims of the defendants in their nature or character and amounts, also as to the time of presentation to the complainants; but we think there is enough in the allegations contained in the bill to show a conflict of interest between the defendants. If it is true that the amount named in the bill is the only sum to be shared between the numerous materialmen who were made defendants, some conflicts between them doubtless exist as to priority of lien. If the allegations of the bill are true, the defendants have no lien upon the complainants' property greater than the amount due by her to the contractor, when notices of such claims were served upon her, and that lien may be discharged by payment. In the last analysis, therefore, there is necessarily a conflict of interest between the defendants over the amount due by complainants to the contractor. To whom should it be paid, so that the various liens may be discharged? That question the bill of interpleader seeks to have determined, so that the complainants may not be annoyed by many suits.

The order sustaining the demurrer is reversed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and WHITFIELD, JJ., concur.

(140 La. 985)

No. 21639.

## NABORS et al. v. PRODUCERS' OIL CO.

(Supreme Court of Louisiana. Feb. 12, 1917.  
Rehearing Denied March 12, 1917.)

(Syllabus by the Court.)

1. CONTRACTS  $\S$  182(1), 184—JOINT CONTRACT—JOINT AND SEVERABLE CONTRACT.

A contract by which several persons obligate themselves to do the same thing creates a joint obligation on their part; and a contract whereby something is to be done for the common benefit of several persons creates an obligation that is joint and inseverable as to the obligees.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 780-786, 789.]

2. CONTRACTS  $\S$  184—JOINT AND SEVERABLE CONTRACTS—INJUNCTION.

Whether a contract is joint or severable depends upon the intention of the contracting parties, as revealed by the language of their contract, and the subject-matter to which it refers.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 789.]

3. MINES AND MINERALS  $\S$  73, 78(1)—MINING LEASE—CONSTRUCTION—JOINT OBLIGATION.

A mining lease whereby several lessors or grantors dispose of the mineral rights on several tracts of land, for a gross price, without stating the amount paid to each grantor and without stating or designating the area of land belonging to each grantor, creates a joint obligation on the part of the lessors or grantors, because it is impossible to affirm that the lessee would have paid a proportionate consideration for the lease or mineral rights on only a portion of the land. In such a contract, a stipulation that operations for the drilling of a well for oil or gas shall be commenced by the lessee within one year, cannot be construed to mean that operations for the drilling of a well shall be commenced on each tract of land belonging to the different lessors or grantors.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 201, 205, 210.]

4. MINES AND MINERALS  $\S$  78(1) — LEASE — CONSTRUCTION—DRILLING WELLS.

In a lease of land for the production of oil and gas, in which the lessee expressly obligates himself to commence the drilling of a well within one year or forfeit the contract, there is no implied obligation on his part to drill as many wells as may be reasonably necessary to secure the oil or gas for the common advantage of the lessor and lessee within the year, when oil or gas has not been found in paying quantities.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 205.]

5. MINES AND MINERALS  $\S$  78(2) — LEASE — CANCELLATION—GROUNDS.

When the lessee of a tract of land for the production of oil and gas has paid an adequate consideration in cash, and has complied with the only obligation expressly required of him during the first year after the signing of the contract, by the drilling of one test well, and has not found oil or gas in paying quantities, the grantor is not entitled to a cancellation of the lease on the ground that the lessee failed to perform an implied obligation to drill more than one well for the common advantage of the lessor and lessee.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 205.]

6. MINES AND MINERALS  $\S$  78(1, 2)—OIL AND GAS LEASE—INTEREST OF LESSEE—CANCELLATION.

A lease of land for the production of oil and gas, for which the lessee has paid an adequate consideration in cash, and in which he obligates himself to pay a stipulated royalty for all the oil or gas that may be produced, and containing the provision that, under penalty of forfeiture, the lessee shall commence the drilling of a well within one year from the signing of the contract or pay a stipulated consideration each year for an extension of the time, not exceeding a period of three years in all, and containing the provision that, if the lessee discovers oil or gas within the time limit or within the extension of the time limit provided in the contract, the conveyance shall be in full force and effect for 20 years from the discovery of oil or gas and as much longer as such minerals are produced in paying quantities, is a conveyance of a real right, and cannot be construed as the sale of a mere hope of producing oil or gas within one year from the signing of the contract. If the lessee, in such case, has complied with his obligation by commencing the drilling of a well within one year from the signing of the contract and is prosecuting the work with due diligence, the lessor is not entitled to a cancellation of the lease at the expiration of the year on the ground that he has discharged his obligation by permitting the lessee to attempt to realize his hope within the year.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 205, 206.]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Suit by W. A. Nabors and others against the Producers' Oil Company, for the annulment of an oil and gas lease. Judgment for plaintiffs, and defendant appeals, and plaintiffs, answering the appeal, ask that judgment be amended by allowing their demand for damages for the alleged violation of the contract on which demand the district court had rendered a nonsuit. Judgment annulled and ordered that plaintiffs' demand be rejected and their suit dismissed.

Hampden Story, of Shreveport, for appellant. Blanchard & Smith, of Shreveport, for appellees.

O'NIELL, J. The defendant appeals from a judgment annulling a contract purporting to be a mining lease of certain lands to the defendant. The plaintiffs, who were the grantors, have answered the appeal and pray that the judgment be amended by allowing their demand for damages for the alleged violation of the contract, on which demand for damages the district court rendered a judgment of nonsuit.

The following is a copy of the contract, viz.:

"This oil and mineral lease and contract, between J. M. Nabors (a married man, whose wife is Mary Lee), W. A. Nabors (a married man, whose wife is Robena Fugua), J. B. Nabors, a single man, Mrs. Sallie Mag Nabors, widow of E. A. Nabors, individually and as tutrix for the minors, Sarah, Susan, Eugene, Louise, Margaret and Wilfred A., heirs of E. A. Nabors, deceased, all residents of De Soto parish, Louisiana, and Grand Bayou Planting Company, a corporation organized under the laws of Louis-

iana, with its domicile at Mansfield, La., herein represented by its president, J. M. Nabors, duly authorized by its board of directors (hereinafter styled grantor, whether one or more), and Producers' Oil Company, a corporation organized under the laws of Texas, and domiciled at Houston, Harris county, Texas (hereinafter styled grantee),

"Witnesseth: That said grantor does hereby grant, bargain, sell and convey unto the said grantee all of the oil, gas, coal and other minerals in and under the lands herein described, together with the exclusive right of ingress and egress at all times for the purpose of drilling, mining, and operating for oil, gas, coal and other minerals, and for conducting all operations and the erection of appliances and structures in regard thereto, and for laying all pipe lines necessary for the production, mining, storing and transportation of oil, gas and other minerals, with privilege of renewing and removing all such structures at will, reserving and securing to the grantor, however, the royalties, payments and other benefits and advantages hereinafter provided for.

"It is agreed that the grantee shall have free use of oil, gas, water and wood from said lands for all developments and operations thereon; said lands being described as follows:

"In De Soto and Red River parishes, state of Louisiana, and being Frac. S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ ; Frac. S. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ ; Frac. N. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ ; Frac. N. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ ; Frac. S.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$ ; Frac. E.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$  and Frac. N. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ ; Frac. N. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  and Frac. S. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  of Sec. 29, Frac. N. E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  of Sec. 30, containing 231.33 acres of land, more or less, and being land patented from the state of Louisiana, and lying east of Bayou Pierre, all in T. 13 R. 11, Red River parish, Louisiana. Also Lots 1, 2, 3, and 4 in section 25, T. 13 R. 12 containing 416.5 acres of land more or less and being patented from the state of Louisiana, being in De Soto parish. Also west half of S. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , Sec. 11 and S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$ , Sec. 15, and N. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  of Sec. 26, and the S. E.  $\frac{1}{4}$  of Sec. 26, being 260 acres of land all in T. 12 R. 12 De Soto parish, Louisiana. Making a grand total of 907.83 acres of land, more or less in De Soto and Red River parish, state of Louisiana."

"Grantor here warrants and defends the title to the above-described lands unto the said grantee and the successors and assigns of such, and obligate themselves to hold said grantee harmless from all damages by reason of any defect in title.

"To have and to hold all and singular the above-described premises, rights, properties and privileges, and all such as are hereinafter specified, unto the said grantee, and the heirs, successors and assigns of such, forever, upon the following terms:

"1. The considerations of this contract are as follows: (a) The sum of twenty-two thousand six hundred and ninety-four and 75/100 dollars, payment whereof by the grantor is hereby acknowledged; (b) such other payments by the grantee, if any, as may be hereinafter provided for; (c) the royalties hereinafter specified; and (d) the expenditure by the grantee of such sums of money as may have been or may hereafter be made upon the above premises or upon neighboring lands, for the development of mineral resources in such locality; and the payment and expenditures made or that may be made by grantor are considerations, not only for the minerals in the lands aforesaid, but for all the other privileges granted herein.

"2. The royalty above mentioned as to oil shall be a quantity equal to one-eighth ( $\frac{1}{8}$ ) of all produced and saved upon the premises, the same to be delivered at the well, free of charge to the grantor, or to his credit, in the pipe line to which such wells may be connected.

"3. The royalty for coal shall be four cents for every ton of same that is mined and marketed, payable monthly.

"4. The royalty for gas shall be \$300 per annum for each well from which gas is used off the premises, the grantor to have the privilege at his own risk and cost to make connections and use gas free of charge for one dwelling on the premises.

"5. The royalty for any other minerals discovered shall be one-tenth of the net proceeds arising therefrom while the same are being used off the premises.

"6. Under penalty of forfeiture of the rights and estate hereby granted, operations for the drilling of a well for oil or gas shall be begun within one year from the time of final execution and delivery of this contract, and if so forfeited the rights and liabilities of both parties shall thereupon be ended. Forfeiture may, however, be saved by the grantee, and the vitality hereof be continued and maintained, notwithstanding operations be not begun within the proper time limit, provided only that, for the privilege of delay in such beginning, from time to time, the grantee may pay, as hereinafter provided, \$22,694.75 per year for a period not exceeding three years from delivery hereof.

"Operations upon a well begun shall be prosecuted with diligence, unavoidable accidents and contingencies only excepted, and, when a well is begun, it shall be sunk to a depth of — feet, unless oil or gas be sooner developed in paying quantities, but a well which may be lost or spoiled may be continued at another location, and to be considered the same as the original.

"After a well is begun, no further payments in respect to delivery shall be due, and, for every well drilled, there shall in all events be secure from forfeiture an area of 200 feet square, with the well in the center, together with 40 acres of land adjoining, said acreage to be precisely designated by the grantee, if grantor so demands.

"7. Any payments due or to become due hereunder shall be deemed complete if made or tendered to the grantor or if deposited or tendered for deposit to the credit of the grantor in the People's Bank at Mansfield, La.

"8. In case the grantee or its successors or assigns should sink a well or shaft and discover either oil, gas or other minerals, within the limits of time, or the extension of such as hereinafter provided for, then this conveyance shall be in full force and effect for twenty years from the discovery of said product, and as much longer as such minerals are produced in paying quantities.

"9. No well shall be drilled nearer than — feet of the house or barn on said premises, unless by consent of both parties. It is agreed that the grantor is to have the exclusive use of the premises hereinabove described for all purposes other than above mentioned. When requested, grantee agrees to bury all pipe lines below plow depth and pay all damages to crops and fences, when injured by grantee or by employees of such.

"10. This lease is not intended as a mere franchise, but is intended as a conveyance of the property and privilege above described for the purposes herein mentioned, and it is so understood by all parties hereto.

"11. It is agreed that this contract and all the terms hereof shall extend to and be binding upon the succession, legal representatives and assigns and successive assigns of such parties, respectively.

"Executed this 16th day of May, 1913."

The grantee selected the location for boring the first well on the 8th of May, 1914, and commenced drilling on the 16th of that month. The well was located on the land of Mrs. Sallie Mag Nabors and W. A. Nabors, described in the lease as the S. E.  $\frac{1}{4}$  of S.

E.  $\frac{1}{4}$  of section 25, township 13, range 12, and was known as Grand Bayou Planting Company well No. 1. It was completed on the 6th of August, 1914, at a depth of 2,910 feet. At 2,760 feet oil and gas were found in small quantities. At 2,800 feet the well blew out. At that depth the liner was set, and oil and gas were found in small quantities. It appears from the log that the well blew out again at a depth of 2,836 to 2,855 feet, and again at a depth of 2,888 to 2,900 feet, with oil showing, and again at 2,910 feet, spraying oil. At that depth, a small volume of gas was developed, with very high rock pressure, and the liner was blown in two, on or about the 8th of August, 1914. From that date, the lessee made continued efforts to get the broken liner out of the hole, to put a new one in, until the 23d of October, 1914, when it was found to be impossible to remove the broken liner, and the grantee abandoned work on the well.

On the 24th of December, 1914, that is, two months after having abandoned work on the first well, the grantee selected the location for a second well, known as Grand Bayou No. 2, on the tract of land belonging to Mrs. Sallie Mag Nabors, included in the lease.

This suit, for the annulment of the lease, was filed by the grantors in the Twelfth judicial district court, in the parish of De Soto, on the 17th of December, 1914; but citation did not issue until the 23d day of that month. It was served on the agent of the defendant company, in the parish of Caddo, at the domicile of the corporation, on the 24th of December, 1914. The defendant thereafter filed a plea to the jurisdiction of the district court in De Soto parish; and by consent of counsel, the case was transferred and the original pleadings filed in the First judicial district court, in the parish of Caddo.

The plaintiffs are the five grantors named in the contract of lease, and the Nabors Oil & Gas Company. The titles to the different portions of the land described in the contract of lease are set forth in the petition and admitted in the answer. It appears that W. A. Nabors owns individually a portion of the area of the land described in the lease and the undivided half interest in another portion of it; that he and J. M. Nabors own jointly another portion of the land; that Mrs. Sallie Mag Nabors owns an undivided half interest in another portion of the land, of which her minor children of whom she is tutrix own the other half interest; that J. B. Nabors individually owns a tract of 40 acres of the land described in the lease, and that the Grand Bayou Planting Company owns the balance of it. It is also alleged in the petition and admitted in the answer that the Nabors Oil & Gas Company owns the mineral rights in and under the S. E.  $\frac{1}{4}$  of section 26, in township 12, range 12. There is no explanation in the pleadings, nor in

the evidence, as to how the Nabors Oil & Gas Company acquired title to the mineral rights in or under that tract of land. Nor did the plaintiffs allege who owns the land. As it is described in the contract of lease in which all of the plaintiffs except the Nabors Oil & Gas Company were named as the grantors and warranted the title conveyed to the defendant company, it may be that whatever title the Nabors Oil & Gas Company has to the mineral rights in or under the S. E.  $\frac{1}{4}$  of section 26, in township 12, range 12, was acquired from the defendant company.

For the sole purpose of showing the pretended title under which the defendants claim the minerals and mineral rights in the land described in their petition, the plaintiffs annexed to their petition the contract of lease dated the 16th of May, 1913. They alleged that the defendant company did not begin the drilling of a well on any of the tracts of land described in the lease within the year ending on the 16th of May, 1914, and did not pay to the plaintiffs the sum of \$22,694.75 to prevent a forfeiture of the lease, according to its terms and stipulations; and that, in consequence of the failure to begin drilling a well within the year, or to pay the aforesaid sum of money to prevent a forfeiture of the lease, the defendants thereby forfeited all rights under the contract of lease and thus rendered it null and void and of no effect.

The plaintiffs alleged that, after the expiration of the year from the date of the contract, the defendant company made an effort to develop the tract of land owned by W. A. Nabors and Mrs. Sallie Mag Nabors, described in the contract of lease as the S. E.  $\frac{1}{4}$  of section 25, township 13, range 12; but that the effort at development proved abortive, no production having been obtained, and that the well was abandoned. They alleged that they had not acquiesced in the drilling of the well, and that, as it was commenced after the expiration of the year from the date of the contract, the defendant was acting on its own responsibility.

They alleged that the defendant company had not made any attempt to develop any of the other tracts of land described in the contract of lease, belonging to the other grantors or lessors except that of W. A. Nabors and Mrs. Sallie Mag Nabors; and that the defendant company had not paid the sum of \$25 per acre to any other of the grantors to prevent a forfeiture of the lease, as provided in the contract; hence they alleged that, as each of the grantors owned separate portions of the land described in the lease, the contract was forfeited as to all of the land except that of W. A. Nabors and Mrs. Sallie Mag Nabors, for the further and additional reason that the defendant company had made no attempt whatever to develop any of the land except that of W. A. Nabors and Mrs. Sallie Mag Nabors.

As to the tract of land belonging to W. A. Nabors and Mrs. Sallie Mag Nabors, on which the well was drilled, the plaintiffs alleged that, as the well was only a dry hole or nonproducing well, the defendant company could not, in any event, claim that more than 200 feet square, together with 40 acres adjoining it, was secure from forfeiture, under the terms and stipulations of the contract of lease.

The plaintiffs alleged that, as the lands described in the contract are of vast area, widely separated, the boring of a well on the land of one of the grantors was not a testing of the mineral value of the lands of the other grantors; and that, under a reasonable and correct interpretation of the contract of lease, the drilling of a well on one of the tracts, even if it had been drilled within the year from the date of the contract, could not have prevented a forfeiture of the lease on the lands belonging to the other grantors or lessors.

The plaintiffs alleged that the region in which the land described in the lease is situated, in the parishes of Red River and De Soto, was rich in oil and natural gas, as shown by development in that vicinity within the 18 months preceding the filing of this suit. They alleged that the contract of lease was forfeited and became null and void by the failure of the lessee to comply with its terms and conditions, and especially by the failure of the lessee to drill wells for oil or gas or to explore the lands for its minerals, which, they alleged, was the principal motive and object of the contract of lease.

Referring to and quoting the paragraph No. 8 of the lease, the plaintiffs alleged that the parties to the contract contemplated that the grantee or lessee should drill a well on the land of each of the separate owners, within a year from the date of the contract, or pay each separate owner at the rate of \$25 per acre to prevent a forfeiture of the lease of the land belonging to each separate owner. In the alternative, the plaintiffs alleged that, if the court should hold that the drilling of one well was the only obligation on the part of the grantee expressly provided to prevent a forfeiture of the lease, it was nevertheless contemplated by the parties, and was an implied obligation on the part of the lessee in all such contracts, that the lessee should drill more than one well on such a vast area of land, containing 907.83 acres, situated in two parishes, to properly explore and develop the land for oil and gas.

The plaintiffs alleged that, if the court should hold that the parties to the contract contemplated the drilling of only one well within the year from the date of the contract, the lessee or grantee only acquired the right to enter upon the land and bore for oil and gas and other minerals within the year from the date of the contract, together with

the hope of finding oil and gas and other minerals; and that, under that construction, the grantors had discharged their obligation by permitting the lessee to attempt to realize its hope.

The plaintiffs alleged that, if the court should hold that the contract only required the drilling of one well within the year to prevent its forfeiture, then, inasmuch as the contract contained no provision as to what should be the consequence if the test well should prove a failure, there was an implied obligation on the part of the lessee to proceed further with the exploration and development of the land with reasonable diligence, and its failure so to do should be considered an abandonment of its rights, or, in law, that such conduct amounted to an abandonment of the lease.

The plaintiffs alleged that the existence of oil and gas in paying quantities had been made known by the development of other lands in the immediate vicinity of the leased premises; that there was therefore an implied obligation on the part of the lessee to drill a sufficient number of wells on the leased premises to secure the oil and gas under it, for the mutual advantage and protection of the lessors and the lessee; and that the defendant had not complied with that implied obligation.

They alleged that the claim of the defendant to the mineral rights in the plaintiffs' lands was a cloud upon their title and prevented their leasing or operating the lands for their mineral products, and had thereby damaged the plaintiffs in the sum of \$10,000, and would continue to damage them at the rate of \$1,000 per month. They prayed for a judgment decreeing the lease null and for damages as alleged.

In its answer, the defendant company denied that it had violated the lease or permitted the same to be forfeited; and alleged, on the contrary, that it had begun drilling a well on the leased premises within the year following the date of the contract, and was therefore not required to pay to the plaintiffs or to any of them the sum of \$22,694.75 to prevent a forfeiture of the lease, because of the express provision that, if the drilling of a well was commenced within the year, no further payments were required to prevent a forfeiture of the lease.

The defendant admitted, in its answer, that it had only commenced drilling the one well during the year after the date of the contract, and that it had not paid \$25 per acre to prevent the forfeiture of the lease on any of the lands, and alleged that there was no obligation on its part to begin the drilling of more than one well within the year, or to pay \$25 an acre to prevent the forfeiture of the lease, when it had commenced the drilling of one well within the year following the date of the lease.

The defendant denied that the lands in

the vicinity of the leased premises were rich in mineral oil or gas; denied that there had been any development of the mineral properties of the lands surrounding or in the vicinity of the leased premises; and alleged that the lands described in the contract of lease were in wild cat territory, remote from any developed mineral lands. The defendant denied that it had acquired only the hope of discovering oil or gas within the year from the date of the lease, and denied that the grantors had discharged their obligation by permitting the lessee to attempt to realize that hope within one year.

The defendant denied that it had violated any implied obligation, and averred that, on the contrary, it had diligently and reasonably prosecuted the development of the leased premises for oil and gas. The defendant alleged that, under the contract of lease, the lessors or grantors were bound in solido to warrant and defend and maintain the lessee in the possession of the lands for the purposes expressed in the contract.

It appears from the written reasons for judgment assigned by the district judge that he based his decree of nullity of the lease on two grounds: (1) That, as the first well drilled failed to produce oil or gas in paying quantities, the lessee had no right to drill another test well; and (2) if the plaintiff had the right to drill another test well, under the clause of the contract providing that "a well which may be lost or spoiled may be continued at another location and be considered the same as the original," the drilling of the second well was not commenced in good faith within a proper or reasonable time after the first well was lost or spoiled.

In passing upon the application for a new trial, the district judge admitted that the question of good or bad faith on the part of the defendant in commencing the drilling of the second well was not an issue under the pleadings or the evidence in the case, except in so far as it had application to the question of the defendant's having prosecuted the drilling of a well with due diligence. He then held that the defendant's right to continue its mining operations after the first well was lost or spoiled depended upon the construction of paragraph No. 8 of the contract, providing that, if oil or gas should be found within the limit of time or within the extension of such limit as provided in the contract, then that the contract should remain in force 20 years from the discovery of the oil or gas and as much longer as minerals should be produced in paying quantities. The district judge held that the finding of oil and gas, not in paying quantities, did not operate to keep the contract in force 20 years, or give the lessee the right to continue operations after the failure of the first well to produce oil or gas in paying quantities. The judge then rested his decree upon his conclu-

sion that the lessee had the right to drill only one test well, holding that:

"If it had desired the right to make successive attempts to find oil, without paying an additional sum for that right, such should have been stated plainly in the contract and not left to construction."

The court based the decision upon the doctrine quoted from the case of *Cooke v. Gulf Refining Co.*, 127 La. 593, 53 South. 874, viz.:

"If one has a lease on land to bore for oil, he cannot extend the lease beyond its terms on the ground that he has failed to find oil, for by his contract he acquired merely a hope, and the lessor has discharged his obligation by permitting the lessee to attempt to realize his hope."

#### Opinion.

Our opinion is that the defendant's right to drill the second well, or to make successive attempts to find oil or gas in paying quantities, did not depend upon the contract being continued in force for 20 years under paragraph No. 8 of the contract; but depended upon whether the contract was in force when the second well was begun, within the period of 3 years mentioned in paragraph No. 6 of the contract.

The contract is not susceptible of the construction that the grantee acquired nothing more than the hope of finding oil or gas in paying quantities within a year from its date. The rights and obligations of the parties to this contract, during the first 3 years after its date, are stated plainly and leave no room for construction. What the grantee acquired for the cash payment of \$22,694.75 was the right to enter upon the lands and drill for oil and gas and other minerals, within one year from the date of the contract, with the following alternative consequences, viz.: If the grantee should fail to begin operations for the drilling of a well for oil or gas within one year, all of the grantee's rights were to be thereby forfeited, unless, however, the grantee paid, within the year, an additional sum of \$22,694.75, for an extension of its right to commence operations for the drilling of a well within another year. In that event, that is, if the grantee failed to begin operations for the drilling of the well during the first year after the date of the contract, but paid \$22,694.75 for the right to begin operations during the second year, then, if the grantee failed to begin operations for the drilling of a well during the second year, its rights under the contract were to be forfeited, unless, however, before the expiration of the second year the grantee paid an additional sum of \$22,694.75 for the right to begin operations for the drilling of a well during the third year; and if the grantee then failed to begin operations for the drilling of a well during the third year from the date of the contract, all of its rights under the contract were to be at an end.

It is not necessary to determine whether the finding of oil and gas, not in paying



quantities, within the two years from the date of the contract, would have kept it in force 20 years, under paragraph No. 8 of the contract. The only question to be determined is whether the defendant had complied with all the obligations required of it, to prevent a forfeiture of the contract, at the time this suit was filed, that is, in December, 1914, within 2 years from and after the signing of the contract.

The grounds on which the plaintiffs sued for a decree of forfeiture of the lease, as set forth in their petition, may be summarized as follows, viz.:

First. That the defendant did not begin operations for the drilling of a well within a year from and after the signing of the contract.

Second. That the contract was not joint, but severable, and that therefore, even if the drilling of the well on the land of E. A. Nabors and Mrs. Sallie Mag Nabors prevented a forfeiture of the lease as to their land, it did not prevent a forfeiture of the lease of the lands belonging to the other lessors.

Third. That it was contemplated by the parties to the contract, and was an implied obligation on the part of the lessee or grantee, that the latter should drill a sufficient number of wells on such a vast area of land to secure the oil and gas under it for the mutual advantage and protection of the lessors and the lessee; and that the drilling of one well was not a compliance with that implied obligation on the part of the lessee or grantee.

Fourth. That, if the court should hold that the lessee was only required to commence operations for the drilling of one well during the first year after the signing of the contract, then that the grantee acquired only the hope of finding oil or gas or other minerals during the first year of the contract, and that the grantors discharged their obligation by permitting the lessee to attempt to realize its hope.

At the beginning of the trial of this case, the plaintiffs' counsel announced that they were mistaken in their allegation that the grantee had not commenced operations for the drilling of the well on the land of W. A. Nabors and Mrs. Sallie Mag Nabors within the year from the signing of the contract; and they abandoned that complaint as a cause for the annulment of the lease.

[1-3] The second complaint is that the beginning of operations for the drilling of a well on the land of W. A. Nabors and Mrs. Sallie Mag Nabors did not prevent a forfeiture of the lease of the lands of the other grantors. The force of that contention depends upon the contract being severable, not joint or entire. We agree with the finding of the district judge that the contract is not severable, but joint or entire. Article 2080, R. C. C., provides that, when several persons join in the same contract to do the same thing, it produces a joint ob-

ligation on the part of the obligors; and article 2081 provides that, when one or more persons make an obligation to several persons for the performance of something for the common benefit of all the obligees, it creates an obligation that is joint in favor of the obligees. Article 2084, R. C. C., declares that several obligations, although created by one act, have no other effect than the same obligations would have, if made by separate contracts, and that they are governed by the rules which apply to all contracts in general. But the Code does not lay down a rule for determining what contracts are joint and what are severable, except that, when several persons join in the same contract to do the same thing it produces a joint obligation on their part, and that, when an obligation is incurred in favor of several persons for the performance of something for their common benefit, it creates a joint obligation in their favor. Whether a contract is severable or joint depends upon the intention of the contracting parties as revealed by the language of their contract and the subject-matter to which it refers. With regard to the subject-matter, the authorities agree that the contract is entire and not severable, although it embodies a conveyance or delivery of several things, if the consideration is paid in a gross sum and it is impossible to affirm that the party making the payment would have done so unless the rights he acquired should apply to all of the things mentioned. See 6 R. C. L. p. 859, § 246, and the decisions there cited. That test is particularly applicable to a mineral lease or option, where the lessee or grantee has paid a gross sum of money for the privilege he acquired on all of the lands described in the contract and it is impossible to affirm that he would have paid a proportionate consideration for the lease or option on only a portion of the land. It was admitted in this case that the cash consideration paid was at the rate of \$25 per acre; but it was nevertheless a gross sum paid to all of the grantors. The contract did not state the amount paid to each of the grantors, nor state the area of land owned by each of them. They joined in one contract to do the same thing, in consideration for advantages to be derived for the common benefit of all of them. The language of the instrument leaves no doubt that their contract was joint and not severable. For example, the contract declares that the lessees are to be "hereinafter styled grantor, whether one or more."

In the case of *Murray et al. v. Barnhart*, 117 La. 1027, 42 South. 489, being a suit to annul a mining lease, this court held that, the obligation to complete one well being indivisible in its nature, the corresponding obligation to deliver the land was also indivisible; because, if the whole of one side of the contract was to be fulfilled, the whole of the other side should likewise be fulfilled. The



court cited Pothier on Obligations, 215, and R. C. C. 2109. That article of the Code provides that an obligation is indivisible, even though the thing or the fact which is the object of it is in its nature divisible, if the light in which it is considered in the obligation does not admit of its being partially executed. But article 2111, R. C. C., declares that the question of divisibility of an obligation is applicable only to the heirs of the contracting parties.

In the case of *Cochran v. Gulf Refining Co.*, 139 La. 1010, 72 South. 721, it was said to be well settled that a party to an indivisible contract, such as a mineral lease, who had, by disposing of a part of the property subject to the lease, rendered it impossible to dissolve the contract as to all of the property and restore matters to the same situation as though the contract had not been made, could not maintain an action against the other party to the contract to dissolve it. See the authorities there cited. See, also, *South Penn. Oil Co. v. Snodgrass*, 71 W. Va. 438, 76 S. E. 961, 43 L. R. A. (N. S.) 848; *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 72 C. C. A. 213; *Harness v. Eastern Oil Co.*, 49 W. Va. 232, 138 S. E. 662; *Thornton on Oil and Gas* (2d Ed.) § 246, and authorities there cited.

Our conclusion is that the provision in the sixth paragraph of the contract, "operations for the drilling of a well for oil or gas shall be begun within one year," cannot be construed to mean that operations for the drilling of a well should be begun on the lands of each of the grantors. Hence our conclusion is that the beginning of operations for the drilling of a well on the tract of land belonging to W. A. Nabors and Mrs. Sallie Mag Nabors within the year from the date of the contract prevented a forfeiture of the lease on all of the lands described in the contract.

[4] In support of the third ground urged by the plaintiffs for demanding an annulment of the lease, that there was an implied obligation on the part of the lessee to drill more than one well within the time that had elapsed when this suit was filed, their counsel rely upon the decision of this court in the case of *Caddo Oil & Mining Co. v. Producers' Oil Co.*, 134 La. 701, 64 South. 684, quoting from *Thornton on Oil and Gas*, § 111, that it is an implied condition of every lease of land for the production of oil that, when the existence of oil in paying quantities is made apparent, the lessee shall put down as many wells as may be reasonably necessary to secure the oil for the common advantage of both lessor and lessee. That doctrine can have no application to the case before us, because the existence of oil or gas in paying quantities in the land of the plaintiffs in this suit had not been discovered or made apparent when the suit was filed.

The plaintiff's counsel, in their brief, call attention to the fact that the superintendent of the oil fields of the defendant com-

pany, testifying on behalf of the defendant, admitted that the boring of one well on the vast area of land described in the contract before us was not a sufficient development of the land. What the witness said was that the boring of one well on that vast area of land would not be a sufficient test to determine whether any of the land contained oil or gas in paying quantities, and that the drilling of one well would not be a sufficient development of that vast area of land if it did produce oil in paying quantities. But it does not follow, from that admission, that the defendant company was obliged to drill more than one test well within the year after the signing of the contract.

[5] In the case of *McClendon v. Busch-Everett Co.*, 138 La. 722, 70 South. 781, and again in *Cochran v. Gulf Refining Co.*, 139 La. 1010, 72 South. 718, it was held that, when the grantee of a mining lease for a limited term had paid an adequate consideration in cash and had complied with all of the obligations expressly imposed upon him, the grantor was not entitled to a cancellation of the lease for the failure of the grantee to drill more wells than he was expressly required to drill within the time stipulated.

The only obligation on the part of the lessee, with regard to the drilling of the well that was begun within the year after the signing of the contract, was that operations upon that well were to be prosecuted with diligence, unless unavoidable accidents or contingencies prevented it; and that, when that well was lost or spoiled, the plaintiff had the right to select another location for a well to be considered the same as the first. It is not denied, but is virtually admitted, that the breaking of the liner in the first well drilled by the defendant company was an unavoidable accident. Nor is it denied that the defendant endeavored faithfully to remove the broken liner in order to put in a new one. The fact that the plaintiff did not select another location on which to continue the drilling until two months after it was found to be impossible to remove the broken liner from the first well is not of itself sufficient evidence on which to hold that the defendant violated its obligation to prosecute its operations with diligence. In fact, the plaintiff's demand is not founded upon any contention that the defendant did not prosecute with diligence the drilling of the well that was commenced within the year after the signing of the contract, either at its original or subsequent location.

[6] The fourth ground urged in the plaintiff's petition for demanding that the contract be decreed null is the one for which the district court declared it null; that is, that the grantee acquired only the hope of discovering oil or gas or other minerals in paying quantities within a year from the date of the contract, and had no right to make successive attempts to find oil or gas or other minerals without paying an addi-

tional sum for that right. Our opinion is that the contract is not susceptible of that interpretation or construction. The fact that the lessee was only required to begin operations for the drilling of a well within one year from the signing of the contract precludes the idea that the lessee acquired only the hope of discovering oil or gas or other minerals in paying quantities within one year. We have no fault to find with the doctrine announced in the case of *Cooke v. Gulf Refining Co.*, 127 La. 592, 53 South. 874, as a legal proposition that, if one has a lease on land to bore for oil, he cannot extend the lease beyond its terms on the ground that he has failed to find oil, for, by his contract, he acquired merely a hope, and the lessor has discharged his obligation by permitting the lessee to attempt to realize his hope. Nor have we any criticism to make of the other legal proposition announced in that case, that a lease which stipulates that it is to continue during the time that gas or oil is found in paying quantities is at an end when the time during which the lessee has a right to exploit the land has expired and no gas or oil has been found. But those principles have no application to the contract before us. The defendant in this case is not attempting to extend the lease beyond its terms on the ground that the lessee has failed to find oil or gas; nor had the time during which the lessee had the right to exploit the land for oil and gas and other minerals expired when this suit was filed. It is contended by the learned counsel for the plaintiff that the contract of lease involved in this case is identically like that to which the principles announced in *Cooke v. Gulf Refining Co.* were applied, and that they are therefore applicable also to this case. The presumption is that the facts found in the case cited justified the application of the legal propositions stated, and we are not called upon now to review the facts of that case. It is sufficient to say that the legal principles announced in that case, whether applied rightfully or wrongfully to the contract there in contest, are not applicable to the contract before us in this case, although a copy of the contract referred to in *Cooke's Case* was introduced in evidence in this suit. In the case cited, the court found, as a matter of fact, that the contract provided for the drilling of three wells, one to be drilled in 30 days, another in 12 months, and a third in 24 months, from the signing of the contract; and that the grantee failed in its obligation to drill the first well within 30 days, and also in its obligation to drill the second well within 12 months. On those findings of fact—which we are not called upon to review—the decision was correct.

Our conclusion is that the contract of lease sought to be annulled by this suit was not violated or forfeited for any of the rea-

sons or causes alleged in the plaintiff's petition.

The judgment appealed from is annulled, and it is now ordered, adjudged, and decreed that the plaintiff's demands be rejected, and their suit dismissed, at their cost in both courts.

(140 La. 1007)

No. 20760.

**GUIDRY v. MORGAN'S LOUISIANA & T. R. & S. S. CO.**

(Supreme Court of Louisiana. Jan. 15, 1917.  
Rehearing Denied March 12, 1917.)

(*Syllabus by the Court.*)

**1. CARRIERS — 303(4)—SETTING DOWN PASSENGERS—LIABILITY.**

It is the duty of the employés of a railroad company in charge of its train to stop the train long enough at a station to allow passengers to get off safely. If a neglect of that duty results in injury to a passenger, the railroad company is responsible in damages.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1228, 1229.]

**2. CARRIERS — 338 — PERSONAL INJURY — CONTRIBUTORY NEGLIGENCE.**

Where the negligence of the employés of a railroad company causes such excitement to a passenger as to force him or her to an immediate selection of one or another situation of danger, the passenger will not be held guilty of contributory negligence for suddenly taking the most dangerous course.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1352.]

**3. CARRIERS — 333(7)—SETTING DOWN PASSENGERS—CONTRIBUTORY NEGLIGENCE.**

A woman passenger on a railroad train, whose station was announced by a member of the train crew, went with her child to the platform of the car while the train was slowing down. The train stopped only a few seconds, at a dark, desolate station, late in the night. No member of the train crew offered to assist the woman or saw her leave the train. The child stepped off without being injured, but before the woman could step down the train started and she fell and was injured. Held that, if it be assumed that the woman had not made her last or irretrievable step when the train started, her jumping from the train immediately after it had started, under the circumstances of necessity and excitement brought on by the negligence of the employés of the defendant company, was not contributory negligence on her part.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1893.]

(*Additional Syllabus by Editorial Staff.*)

**4. DAMAGES — 132(6)—EXCESSIVE DAMAGES — PERSONAL INJURY.**

A verdict of \$5,000 awarded a woman passenger 32 years of age, one of whose legs was badly and permanently flexed or bent at the knee and ankle, and whose kneecap was broken, and who before the accident was of sound physique was not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 877.]

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Thomas M. Milling, Judge.

Action by Mrs. Amella Tyler Guidry

against the Morgan's Louisiana & Texas Railroad & Steamship Company. Judgment for plaintiff, and defendant appeals, and plaintiff prays that judgment be increased from \$5,000 to \$10,000. Affirmed.

Caffery, Quintero & Brumby, of Franklin, for appellant. A. C. Allen, Percy Saint, and Emmet Alpha, all of Franklin, for appellee.

O'NIELL, J. The plaintiff sued for \$10,000 damages for personal injuries which she alleges she sustained by being thrown from the step of the defendant's railroad car, on which she was a passenger. The jury rendered a verdict in her favor for \$5,000. Judgment was rendered accordingly, and the defendant has appealed. In answer to the appeal, the plaintiff prays that the judgment be increased to \$10,000.

The plaintiff purchased at Adeline station an excursion ticket for transportation to and from New Orleans. On the return trip, her 13 year old daughter accompanied her. The conductor did not demand railroad fare for the child, and it was not paid.

When the train approached Adeline station, at 1:40 a. m., a member of the train crew entered the car in which the plaintiff was seated and called the name of the station. As the train slowed down the plaintiff and her daughter arose, and a gentleman who had been in conversation with her carried her valise to the platform. They were all on the platform before the train stopped. The station, in a somewhat desolate place, was closed, and there were no lights there or in the neighborhood. The plaintiff and her daughter were the only passengers going to Adeline. There was no one at or near the station, and no member of the train crew approached or offered to assist them. The moment the train stopped, the child stepped off, but before the plaintiff could alight, the train started, and she was thrown to the ground and severely injured.

It is admitted that the train stopped only a few seconds. The members of the train crew, as witnesses for the defendant, testified that the stop lasted five to seven seconds. The plaintiff and her daughter testified that the stop was not longer than two seconds. One of the passengers testified that the stop was no longer than a second; that he felt the jar of the train stopping and instantly it pulled out. The gentleman who carried the plaintiff's valise to the platform testified that the train did not come to a full stop; but the defendant's counsel admit that he is mistaken in that; that the train did stop for a few seconds.

The members of the train crew, as witnesses for the plaintiff, testified that none of them saw the plaintiff or her child get off of the train, notwithstanding the conductor admitted that, when the train approached Adeline, he remembered that he had a lady pas-

senger for that station and knew what coach she was in.

The members of the train crew testified that when the train stopped at Adeline, they got down on the ground on the side towards the station, the conductor standing near the front end of the train, the porter near the center, and the brakeman near the rear end, during the few seconds the train was stopped. As they were on the side of the train from which the plaintiff and her daughter got off, and as the conductor knew they were to get off at that station, we cannot understand why no member of the train crew took care to see that they had got off safely before the train pulled out.

When the child got off, she tripped on an umbrella which she was carrying and fell, but was not injured. The plaintiff, who was on the platform of the car behind the child, then attempted to alight, but the train immediately started, and she fell, four or five feet from where the child had fallen.

The defense to this suit is that the few seconds the train stopped gave the plaintiff ample time to get off safely, and that she was negligent in not getting off sooner than she did. In support of that contention, the defendant relies upon the testimony of the passenger who carried the plaintiff's valise to the platform. He testified that he and the plaintiff and her child went to the platform of the car while the train was slowing down for the station. In fact, it is proven conclusively, and is not disputed, that the plaintiff and her daughter lost no time in going to the platform of the car as soon as the station was called and before the train had stopped. Therefore, when the train stopped (and defendant admits that it did stop), the plaintiff and her daughter and the gentleman carrying their valise were already on the platform of the car, ready to step off. The child was on the lower step, and got down immediately after the train stopped. The passenger who carried their valise testified that he was standing behind the child and in front of the plaintiff, and stepped aside to permit her to descend the steps of the train. He admits that his being in her way delayed her getting off the train a few seconds. His failure to observe that the train had stopped when the child got off is, perhaps, due to the fact that it was very dark and he was not on the steps but on the platform of the car, engaged in a conversation with the plaintiff, when the train stopped. At any rate, it is evident, from his statement that he moved aside to permit her to pass down the steps of the car, that he did not consider it dangerous or imprudent for her to get off. He testified, and it is admitted by the defendant, that the train did not stop after the plaintiff got off, but increased its speed and continued on to the next station. Hence the only theory on which we could conclude that the

plaintiff deliberately stepped off of the train while it was in motion would be that the train did not stop at all. Six of the seven witnesses who testified on that subject swore that the train did stop for a few seconds, and the defendant's counsel admit that it stopped. As the plaintiff's daughter was on the step of the car and the plaintiff was standing behind her on the platform before and at the moment the train stopped, and as they got off as soon as they could possibly do so after the train stopped, it follows that the only reason why the plaintiff did not get off safely is that the train did not stop long enough to allow her to get off safely.

[1-3] The defendant's counsel contend that, even if the employes in charge of the train were negligent in not allowing the plaintiff sufficient time to get off safely, she was guilty of contributory negligence in stepping off after the train had started, and that her negligence was the proximate cause of her being injured. That argument is founded upon the supposition, which is not borne out by the evidence, that the plaintiff had not made her last or irretrievable step when the train started, and that she might have remained on the step of the car and been carried beyond her station if she had used calm and deliberate judgment and prudence. But that argument also loses sight of the fact that the circumstances were such that the plaintiff could not deliberate or use her best judgment. She was getting off of the train at the implied invitation of those in charge of it, and had a right to believe that she would be given ample time to get off safely. Her child had got off the train at a dark, desolate way station, at 1:40 in the morning. If the plaintiff was not already in the act of stepping to the ground when the car started—if it was yet possible for her to remain on the step of the car when it started—it would have been very unnatural for her to remain there and incur the risk that her child might be injured by attempting to get back on the train. The fact that the plaintiff fell only four or five feet from where the child had got off shows that she did not lose any time in getting off after the child got off.

The defendant's plea of contributory negligence, under its most favorable theory of the facts of this case, is answered by the doctrine announced in the case of *Lehman v. Louisiana Western R. R. Co.*, 37 La. Ann. 705, cited with approval in *Holzab v. N. O. & Cr. Co.*, 38 La. Ann. 190, 58 Am. Rep. 177, in *Odom v. St. Louis Southwestern R. R. Co.*, 45 La. Ann. 1204, 14 South. 734, 23 L. R. A. 152, in *Brashear v. Houston Central A. & N. R. Co.*, 47 La. Ann. 738, 17 South. 260, 28 L. R. A. 811, 49 Am. St. Rep. 382, and in *Chretien v. N. O. Ry. Co.*, 113 La. 768, 37 South. 716, 104 Am. St. Rep. 519, viz.:

"It is the clear duty of a railway carrier to provide safe egress from their cars for their passengers, to give due notice of arrival at sta-

tions, to allow passengers proper and sufficient time to alight, and to take care not to start the train while passengers are in the act of getting off. For neglect of such duties, resulting in injury to passengers, the carrier is responsible."

In *Odom v. St. Louis Southwestern R. R. Co.*, 45 La. Ann. 1201, 14 South. 734, 23 L. R. A. 152, in which the case above quoted was cited with approval, the doctrine was stated thus:

"A passenger on a railroad train, when it stops at the station where he is to get off, and where he attempts to do so and is on the steps of the car, and the train moves ahead when he is in this situation, he is compelled to adopt a perilous alternative, to run the risk of being thrown from the train when its speed is accelerated, or to leave the train with less speed. In trying to escape imminent danger brought about by defendant's negligence, he is not guilty of contributory negligence, and the defendant corporation is responsible for its negligence."

In another case, in which both of the decisions quoted above were cited with approval (*Brashear v. Houston Cent. A. & N. R. R. Co.*, 47 La. Ann. 735, 17 South. 260, 28 L. R. A. 811, 49 Am. St. Rep. 382), a case like this was distinguished from the cases cited by the defendant's counsel, and the doctrine was stated thus:

"This case is distinguished from those in which it is held that the passenger on a railroad, carried beyond his station, cannot recover damages caused by jumping from a moving train. \* \* \*

"The passenger on a railroad train, with a ticket for a station at which it is customary for the train not to stop, but to slow its movement, so as to allow passengers to alight, will be entitled to damages if, called to the platform by the announcement of the station, he is thrown from the steps of the car and injured, his fall being caused by the sudden increase of the speed of the train, when it should have been slowed or stopped."

See, also, *Reynolds v. T. & P. Ry. Co.*, 37 La. Ann. 698; *Le Blanc v. Sweet*, 107 La. 368, 31 South. 766, 90 Am. St. Rep. 303; *Sharp v. New Orleans City R. Co.*, 111 La. 396, 35 South. 614, 100 Am. St. Rep. 488; 6 Cyc. 611-613; *Wharton's Law of Negligence* (2d Ed.) p. 324, § 378, citing *Toledo R. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71, and *Penn. R. R. Co. v. Kilgore*, 32 Pa. 292, 72 Am. Dec. 787. See, also, *Buswell on Personal Injuries*, p. 213, § 121. See, also, *Wood's Ry. Law*, vol. 2, p. 1126, § 305, on "Duty as to Stopping of Trains for Passengers to Alight," citing *Flier v. N. Y. C. R. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327, and *Loyd v. Hannibal R. R. Co.*, 53 Mo. 509; *I. C. R. R. Co. v. Able*, 59 Ill. 131.

The defendant relies upon the decisions of this court in *Damont v. N. O. & C. R. R. Co.*, 9 La. Ann. 441, 61 Am. Dec. 214, *Walker v. V. S. & P. R. R. Co.*, 41 La. Ann. 795, 6 South. 916, 7 L. R. A. 111, 17 Am. St. Rep. 417, *McMichael v. I. C. R. R. Co.*, 110 La. 18, 34 South. 110, and *Morris v. I. C. R. R. Co.*, 127 La. 445, 53 South. 698, 31 L. R. A. (N. S.) 629. Our opinion is that the decisions referred to are not at all appropriate to the facts of this case.

In *Damont v. N. O. & C. R. R. Co.*, 9 La. Ann. 441, 61 Am. Dec. 214, the passenger voluntarily jumped from the train that had failed to stop at the station where she had intended to get off; and it was held that she could not recover damages for the injury she sustained, because "the leap [was not] made to avoid an imminent impending peril, produced by the misconduct of defendants, but to avoid being carried beyond her destination."

In *Walker v. V., S. & P. R. R. Co.*, 41 La. Ann. 795, 6 South. 916, 7 L. R. A. 111, 17 Am. St. Rep. 417, also, the plaintiff had jumped from the moving train that had failed to stop at the station at which he had intended to get off. It was held that, although it was the duty of the railroad company to stop its train at the station to which it had contracted to carry the passenger and to land him there safely, the fact that the company neglected that duty by failing to stop did not justify the passenger in jumping from the moving train, because he was not invited to get off the train, expressly or impliedly, by any employé of the company, and because the plaintiff's jumping from the moving train was voluntary and was not influenced or excused by an impending danger or by necessity of any kind.

In *McMichael v. I. C. R. R. Co.*, 110 La. 18, 34 South. 110, the plaintiff's falling from the platform or step of the car was due to her persisting in going upon the platform or step and attempting to alight before the train stopped at the station to which she was going, after she had been warned not to attempt to alight while the train was in motion.

In *Morris v. I. C. R. R. Co.*, 127 La. 445, 53 South. 698, 31 L. R. A. (N. S.) 629, the plaintiff had boarded the train knowing that it was not scheduled to stop at the station to which he was going. At his request, the conductor consented to stop the train, and, while it was slowing down for the station, he stepped off and was injured. It was said, in the course of the opinion, that the only question at issue was whether the railroad company was liable for the failure of the flagman to warn the plaintiff of the danger of attempting to alight before the train had stopped. Quoting a decision of the Supreme Court of Pennsylvania, in *Penn. R. R. Co. v. Zebe*, 33 Pa. 318, to the effect that there was an implied obligation on the part of the passenger to observe the railroad company's rules and regulations for leaving the cars, and that, if injury befell him by reason of his disregard of the regulations necessary for conducting the business, the company was not liable, even though the negligence of its servants concurred with that of the passenger in causing the injury, this court said it would not go that far; that, if the court concluded that the flagman was negligent in failing to warn the passenger of the danger

of attempting to alight before the train stopped, the plaintiff would be entitled to damages. It is not necessary, in the case before us, to hold that it was the duty of any member of the train crew to warn the passenger of the danger of attempting to alight before the train stopped. The defendant, in this case, does not pretend that the plaintiff attempted to alight before the train stopped. On the contrary, the contention is that she did not get off soon enough. Our conclusion is that she got off as quickly as she could possibly have done so under the circumstances, and that the defendant was at fault for failing to allow her sufficient time to get down safely.

In one of the cases cited (*Lehman v. Louisiana Western R. R. Co.*, 37 La. Ann. 707) it was observed that the train had stopped a minute or a minute and a half, that is 15 times, or perhaps 40 times, as long as the train stopped in this instance; and it was held in the case cited:

"The stoppage was excessively brief. No diligence was used to learn whether passengers were in the act of getting off. Had there been, it would have been seen that the plaintiff and his party were on the platform and steps of the car for that purpose at the moment that the train was started. They had not been guilty of any unusual or unreasonable dilatoriness in getting off. They had a right to suppose that the train would not start until they were safely landed."

A number of bills of exception were reserved by the defendant's counsel to certain portions of the judge's charge to the jury and to the judge's refusal to give certain special charges requested by the defendant's counsel. It is contended that, on these bills of exception, the verdict and judgment appealed from should be set aside and the case remanded for a new trial. Having jurisdiction of the facts as well as the law, and having authority either to amend the judgment or to set it aside and render such judgment as may be deemed proper, in a civil case decided by a jury, this court will not grant a new trial on account of an error in the charge of the judge, if the verdict rendered is in accord with the law and the evidence. In this case, however, we have carefully examined the written charge delivered by the judge to the jury and find that it was a complete and correct exposition of the law applicable to the facts disclosed by the evidence.

In a motion for a new trial, the defendant's counsel complained that the judgment should be annulled and set aside and a new trial granted, on the ground that two verdicts were rendered. It appears that, after the case was submitted to the jury and they had retired to their room, they returned into court with this as their verdict, signed by the foreman, viz.:

"We, the jury, find the plaintiff, Mrs. Guidry, received her injuries through negligence of train crew, damages to be fixed by judge."

The judge refused to accept that finding as a verdict, and, having again instructed

the jury as to the manner of rendering either a special or a general verdict, sent them back to their room for further deliberation. Thereafter they returned with the following general verdict signed by the foreman, viz.:

"Verdict for plaintiff for five thousand (\$5,000) dollars."

The defendant's counsel contend that the first finding of the jury was a valid verdict, and that, in effect, it held that the injury to the plaintiff was caused by the negligence of the train crew, and not by the negligence of the defendant, and that judgment should have been rendered on that verdict dismissing the plaintiff's suit. In the alternative, the defendant's counsel contend that, if the first finding of the jury was a verdict to the effect that the plaintiff's injuries were caused by the negligence of the defendant company, the failure of the jury to fix the amount of the damages was in effect a finding that the plaintiff had not suffered any injury.

We find no merit in either of these contentions. The first verdict—if it was a valid special verdict—that the plaintiff received her injuries through the negligence of the train crew was a finding that the defendant was liable for whatever damages the judge might allow in his judgment. The verdict finally rendered removed all doubt as to the intention of the jury to hold that the defendant was liable in damages to the plaintiff. The defendant's counsel did not object to the judge's refusal to receive the first report of the jury as a special verdict, at the time he sent them back to their room for further deliberation. It was not illegal or improper for the judge to insist that the jury render either a general verdict or a special verdict on which he could base a judgment. When a trial by jury has been allowed in a civil case, neither party to the suit has a right to require that the jury shall render a special verdict, or to deprive the jury of the right to render a general verdict. C. P. 520.

[4] On account of her extraordinary weight, 220 pounds, the plaintiff was severely injured by her fall. One leg is badly and permanently flexed or bent at the knee and at the ankle, and the kneecap is dislocated and perhaps broken. She is very lame. The surgeon in charge of the defendant's sanitarium, testifying in behalf of the defendant, admitted that the plaintiff has less than one-twentieth, perhaps only one-fourtieth, of the normal functions or extent of motion of her injured knee, and that her condition can never improve. She was only 32 years old, and was of sound physique at the time of the accident. She is a widow with two children depending upon her for support, and has no other means of supporting them than her work as a seamstress. Under these circumstances, the amount of the judgment is surely not excessive. In deference to the verdict of the jury, who saw the plaintiff's injuries and were as capable as we are to judge the

extent of the damage, we will not increase the amount of the judgment.

The judgment appealed from is affirmed, at the cost of the appellant.

MONROE, C. J., takes no part.

(140 La. 1019)

No. 21317.

HAYNES v. LOUISIANA RY. & NAV. CO.  
(Supreme Court of Louisiana. Feb. 12, 1917.  
Rehearing Denied March 12, 1917.)

(Syllabus by the Court.)

1. CARRIERS  $\S$  290(1), 297 — PASSENGERS — PERSONAL INJURY—SPEED.

A railroad company is liable for an injury to a passenger occasioned by rapid traveling over slippery tracks, on a downgrade, over a bad roadbed; or by the breaking of an axle by reason of a defect therein, if the defect could have been discovered by the exercise of the utmost human skill and foresight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig.  $\S$  1177, 1204.]

(Additional Syllabus by Editorial Staff.)

2. DAMAGES  $\S$  132(4)—EXCESSIVE DAMAGES—PERSONAL INJURY.

A verdict of \$2,000 awarded plaintiff, a man of 50 years, of robust constitution, earning from \$2.50 to \$4 a day, for injury resulting in inguinal hernia incapacitating him for hard work and reducing his earning capacity, would not be reduced.

[Ed. Note.—For other cases, see Damages, Cent. Dig.  $\S$  375.]

Appeal from Thirteenth Judicial District Court, Parish of Grant; James Andrew, Judge.

Action by A. H. Haynes against the Louisiana Railway & Navigation Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wise, Randolph, Rendall & Freyer, of Shreveport, and White & Thornton & Holloman and Thornton & Thornton, all of Alexandria, for appellant. Richey & Harper, of Jena, for appellee.

SOMMERVILLE, J. The mixed train of the defendant company, on which plaintiff was a passenger, was wrecked; and he suffered an inguinal hernia, with some bruises; for which he asked \$11,000 in damages. The jury rendered a verdict in his favor for \$2,000. Defendant appealed. Plaintiff, on his brief, refers to an answer to the appeal filed by him, in which he asked for an amendment of the judgment, and an increase to \$5,000; but the answer is not found in the record.

Plaintiff charges fault and neglect on the part of defendant, and says that the wreck of the train and the injury to him were due to the bad and defective condition of the roadbed of defendant, which was known to the officers of defendant; and that the train was running at a high rate of speed.

In a supplemental petition, filed October 29, 1914, plaintiff alleged error in fixing the

date of the wreck on July 14, 1913, and corrected it so as to read August 14, 1913.

In a second supplemental petition, filed February 1, 1915, plaintiff alleged as an additional ground of fault and negligence the breaking of an axle on one of the freight cars of the train, which also caused the wreck.

Defendant moved to strike out the amended petitions for the reason that they contradicted, and conflict with, the allegations of the original petition, and change the issues there presented.

Defendant also pleaded the prescription of one year to the supplemental petitions.

The motion and plea were properly overruled. The amended and supplemental petitions presented the same cause of action as was contained in the original petition. The first amendment was of a mere clerical error in stating the date of the accident to have been July 14, instead of August 14, 1913. The second, merely stated an additional cause of the wreck, and repeated the causes named in the original. There was no inconsistency in these amendments, which were regularly allowed by the district court.

When an amendment to a petition is allowed, it relates back to the filing of the suit; and the cause of action, when it is the same, is not prescribed, unless it was prescribed at the time the suit was filed. *Roberts v. Leak*, 106 Ga. 806, 33 S. E. 995; *Southern Ry. Co. v. Horine*, 121 Ga. 386, 49 S. E. 285; *Belden v. Barker*, 124 Mich. 667, 83 N. W. 616; *Liebold v. Green*, 69 Ill. App. 527; *Illinois Central R. Co. v. Souders*, 178 Ill. 535, 53 N. E. 408; *Illinois Central R. Co. v. Souders* (1898) 79 Ill. App. 41, judgment affirmed *Chicago Ry. Co. v. McMeen* (1902) 102 Ill. App. 318; *Chicago City Ry. Co. v. McMeen*, 206 Ill. 108, 68 N. E. 1093; *Am. Dig. (Dec.)* *vo. Limitation of Actions*, No. 127.

Defendant answered admitting the derailment of its train and alleged that the train was going at the rate of only 15 miles an hour; that the wreck was caused by the breaking of a journal of a freight car belonging to the Missouri, Kansas & Texas Railway Company; that the arch bar of that car dropped, causing the derailment after moving a distance of several hundred yards; that the car had been well constructed, and had been properly inspected before it became a part of defendant's train; and that the accident was unavoidable. It further answered denying that plaintiff had suffered a hernia, and that, if he did, he had failed to minimize the damage by resorting to an operation.

The evidence is very conflicting as to the condition of the roadbed of defendant at the place of the wreck, which is a branch road between Winnfield, in Winn parish, and Verda, in Grant parish. Plaintiff's witnesses testify that it was in a very bad condition, while defendant's witnesses testify to the contrary.

On cross-examination, the superintendent of track of defendant testified, in part:

"No, sir; I would not call it a good road. Not a first-class road. They were not supposed to run over it as a first-class road. The road was about the same average track as a majority of the new roads that have been built in the state."

The section foreman of defendant, on cross-examination, testified, in part, as follows:

"Q. This road is nothing like the main line of the Louisiana Railroad & Navigation Company, is it? A. It is not supposed to be, as there is nothing to make it except dirt. I mean it has not been graveled. Q. It is not supposed to be kept in the same condition as the main line? A. I mean that a man cannot keep it up with nothing but dirt to build it with. Q. You do not mean to say that this road is smooth and level like the ordinary railroad? A. Yes, sir; it was fairly smooth, about as good as ordinary dirt roads. Q. What do you call an ordinary dirt road? A. A road where you depend upon the dirt for filling in the roadbed and tamping up the ties. You see there is some places where the dirt is better than others. Where you strike a gravel country, the road will build up fairly good, and then, where you strike a clay or gumbo streak, it is hard to make the track stand up. Taking it as a whole, this track was fairly good. Q. Is it not a fact that during the year of 1913 this road was in a rotten condition? A. There were places on it that were."

The engineer of the train said:

"There are always some few bad places on a road like this."

The testimony is also contradictory as to the speed of the train. Plaintiff's witnesses testify that it was moving very rapidly, while defendant's train crew say that it was gliding along at about 10 to 15 miles an hour.

The testimony of the latter would seem to be more reasonable in view of the fact that the stopping places of the train on either side of the wreck were only about 2 miles apart. But the road was on a down-grade, the tracks were slippery because of rain, and the train was a heavy one.

The preponderance of evidence supports the allegations of plaintiff that the roadbed was in bad condition, and the train was moving too rapidly over such a track for safety; that several cars became derailed because of these conditions; that the wreck ensued; and that plaintiff was injured through the fault of defendant.

The breaking of an axle and the falling of arch bars may have contributed to the wreck; but it does not appear to have been the originating cause, as alleged by defendant. The jolting of the cars over ties and a bad dirt roadbed doubtless caused the axle to break.

The section foreman testified that the cars left the track before the axle broke, and that the arch bars dropped and tore up the track, which caused one car to block the track and precipitate the wreck. He says, in part, in answer to questions on cross-examination:

"Q. As a matter of fact, was not the track, and the ties and everything in general there, torn up considerably by this wreck? A. There was a good deal of damage done. Q. About how many ties were injured? A. I hardly know. We put in several. The cars ran a considerable

distance on the ties before they began to damage them badly. It ran a little distance before it began to break the ties. When the journal dropped, it began breaking the ends of the ties off. Q. Then as a matter of fact, after this axle dropped down, the train ran for several feet knocking up things in general along there; did it not? A. Yes, sir; it must have run seven or eight rail lengths. Q. Was it not cutting off the ends of the ties all along there? A. Not as soon as they got off, but after the axle arch bars dropped down, then it began breaking off the ties. Q. About how far did it go before the car turned up and demolished the whole thing? A. It was about eleven rail lengths, as I remember, before it began to tear up the ties and track. Q. Then, after it did get to breaking up the ties, it tore up the track for three rail lengths; did it not? A. Yes, sir; that was about the amount of new rails we put in. Q. This wreck took on the magnitude of tearing up the track, breaking the ties off, and knocking down the dump in general; did it not? A. Tore up things pretty badly."

[1] The derailing of the cars and their going over cross-ties were sufficient to have caused the accident to plaintiff; or the subsequent wrecking of the train, because of the fallen arch bars, made it just as probable that plaintiff met with the accident to him because of a defective axle—both through the fault of defendant.

Defendant undertook to show that the defect in the axle was a latent one, that the car had been properly inspected, and that it was impracticable to have discovered the defect. The defect was shown to have always been in the axle, and that the crack was an old one. It was not shown that the original defect could not have been discovered by the car builder, and it was his duty to have discovered it, if that were possible, and to have rejected it at the time of the building of the car. The crack in the axle should have been discovered by a proper inspection.

In the case of *Mary J. Morgan v. Chesapeake & Ohio R. Co.*, 127 Ky. 433, 105 S. W. 961, 15 L. R. A. (N. S.) 790, 16 Ann. Cas. 608, it was held:

"A railroad company is liable for injury to a passenger caused by the breaking of an axle by reason of a sand hole, if the defect could have been discovered by the builder of the car by the exercise of the utmost human skill and foresight."

And this is true even though the car belonged to another company.

In the case of *Manser v. Eastern Counties R. Co.*, 3 L. R. (N. S.) 535, it was held that the defendant was liable for injuries sustained by the derailing of a passenger car in consequence of a latent defect in welding the tire of an engine wheel, which was not discovered by the application of a proper test when the wheel was new, but which might have been discovered by the carrier when the tire was reduced in thickness by being re-turned, by the application of the hammer test.

This court, in the case of *Jackson et al. v. Natchez & W. Ry. Co.*, reported in 114 La. 981, 38 South. 701, 70 L. R. A. 294, 108 Am. St. Rep. 366, adopted the views expressed in

the above-mentioned decisions, and hold that:

"A railroad company will be held responsible for the injury to a passenger resulting from the collapse of one of its bridges, unless it can show that the bridge was as safe as the highest degree of practical care and skill could make a bridge of that class, and that, to the fullest extent that the highest degree of care and foresight could suggest, such bridge was inspected for discovering and remedying any defects that might have developed in it from the operation of the road or other causes, and, in case the defect was latent in the materials, then that the materials were thoroughly tested before being put in position."

See, also, authorities cited on page 995 of 114 La. on page 701 of 38 South., 70 L. R. A. 294, 108 Am. St. Rep. 366.

The burden of proof is on the carrier to prove the absence of negligence, and not on the passenger to prove negligence, where it is shown that a contract of carriage has not been fulfilled. *Le Blanc v. Sweet*, 107 La. 355, 31 South. 766, 90 Am. St. Rep. 303; *Patton v. Pickles*, 50 La. Ann. 857, 24 South. 290; *Julien v. Wade Hampton*, 27 La. Ann. 377; *Moses v. Railroad Co.*, 39 La. Ann. 649, 2 South. 567, 4 Am. St. Rep. 231; *Spurlock et al. v. Shreveport Trac. Co.*, 118 La. 1, 42 South. 575; *L. Reems v. N. O. G. N. R.*, 126 La. 511, 52 South. 681; See *Carriers*, Cent. Dig. No. 1288, Dec. Dig. 316; C. C. art. 2232.

A carrier is bound to exercise the strictest diligence in receiving a passenger, conveying him to his destination and setting him down safely as the means of conveyance employed and the circumstances of the case will permit. See authorities cited above; also, 5 Am. Eng. Enc. (2d Ed.) 558; *Lehman v. L. W. R. R. Co.*, 37 La. Ann. 707; and *Turner v. V. S. & P. R. R. Co.*, 37 La. Ann. 649, 55 Am. Rep. 514; *Summers v. C. O. R. R. Co.*, 34 La. Ann. 145, 44 Am. Rep. 419; *Peniston v. C. S. L. & N. O. R. R. Co.*, 34 La. Ann. 777, 44 Am. Rep. 444.

A carrier is bound to exercise the highest degree of care to provide a safe roadbed, safe cars to transfer passengers, and to run at a reasonable rate of speed; and where negligent in either of these matters, and damages result to passengers, they are entitled to recover. *Carriers*, Dec. Dig. 280; *Reems v. N. O. G. N. R. Co.*, 126 La. 511, 52 South. 681.

Where a wreck is caused by defective appliances used by a railroad company and injury results, it must be shown that it was as safe as the highest degree of practical care could make it in order for defendant to avoid liability. *Jackson v. Natchez W. Ry. Co.*, 114 La. 981, 38 South. 701, 70 L. R. A. 294, 108 Am. St. Rep. 366; 4 R. C. L. § 268.

[2] Plaintiff was a man about 50 years of age, of a robust constitution, and followed the occupation of carpenter and builder. He earned from \$2.50 to \$4 per day, and was shown to be industrious. He sustained an inguinal hernia at the time of the acci-



dent, and he is compelled to wear a truss. He has been incapacitated for hard work, and his earning capacity has been much reduced. He suffered considerable pain at the time of the accident, and was confined for several days. He consulted two physicians; one of whom advised him to see a surgeon, and the other advised him not to have an operation performed, because of his advanced age.

He did not have an operation performed, when an operation might have minimized the damages. It is unnecessary to pass upon the question of whether an operation should have been submitted to or not to minimize the damages, in view of the amount of the verdict. In the case of *Donovan v. Railroad Co.*, 132 La. 239, 61 South. 216, 43 L. R. A. (N. S.) 109, where plaintiff suffered a hernia and refused to follow the advice of her physician and have an operation performed, the court held that she should have minimized the damages by submitting to an operation, and the judgment was reduced from \$6,000 to \$3,000. The judgment for \$2,000 in this case will not be reduced.

Affirmed.

O'NIELL, J., concurs in the decree.

(140 La. 1027)

No. 22182.

VINCENT et ux. v. MORGAN'S LOUISIANA & T. R. & S. S. CO.

(Supreme Court of Louisiana. Feb. 12, 1917.  
Rehearing Denied March 12, 1917.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §300—INJURY TO THIRD PERSON—SCOPE OF EMPLOYMENT.

The master is liable in damages for any negligent or wanton act of his servant whereby another sustains injury in his mind, body, or estate, and which is committed in connection with or furtherance of the purposes of the servant's employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1208.]

2. DEATH §31(1), 81, 93—RIGHT OF ACTION—DEVOLUTION—STATUTES.

Under our law as it now stands, the right of action for the recovery of damages for personal injury sustained through the fault of another is personal to the injured party so long as he survives, and, unless previously exercised by him, devolves at his death upon the persons specified in article 2315 of the Civil Code (as amended and re-enacted by Act No. 120 of 1908); and, should he die in consequence of his injury without having exercised his right, they acquire also a right of action in damages for injury they may sustain by reason of his death, and are entitled to full indemnity with respect thereto; but neither the person originally injured nor those who succeed to his rights with respect to the injury, and who acquire rights of their own with respect to the injury inflicted upon them by his death, are entitled to recover anything more in the way of damages than adequate indemnity for the injury and loss inflicted upon him and them in mind, body, or estate, there being no provision in our system of laws which authorizes the cumulation in such cases of a civil action for the redress of a private wrong with a quasi criminal prosecution for the assumed benefit of the public, but the sole pur-

pose and principal effect of which is to increase the adequate indemnity recovered by the plaintiff as actual and compensatory damages by the addition of a pecuniary penalty in the form of exemplary, punitive, or vindictive damages.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35, 46, 98, 103-105.]

3. APPEAL AND ERROR §1013—DISCRETION OF TRIAL COURT—DAMAGES—STATUTE.

An action in damages by both parents for the death of their son, aged 16 years, under circumstances which render a railroad company liable therefor, where the ground of action is the injury to their feelings and loss of their son's society and affection, belongs to a class with reference to which our law (Civ. Code, art. 1834) specifically declares that in the assessment of damages much discretion must be left to the judge or jury. Unless, therefore, this court is satisfied that the discretion so vested has been abused, the assessment of damages, as made by the judge or jury in such case, will be left undisturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3993-3995.]

4. DEATH §99(5)—DAMAGES—AMOUNT.

This court having established precedents for allowing \$5,000 to one parent for the loss of the society and affection of a child, the allowance in such case of \$10,000 to both parents is not an abuse of the discretion vested in the trial judge.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125, 126, 130.]

Appeal from Twenty-Eighth Judicial District Court, Parish of Jefferson; John E. Fleury, Judge.

Action by James H. Vincent and wife against the Morgan's Louisiana & Texas Railroad & Steamship Company. Judgment for plaintiffs, and defendant appeals and plaintiffs, answering the appeal, pray that the amount of the award be increased from \$10,000 to \$20,000. Affirmed.

Robert H. Marr, Alfred E. Billings, and Denegre, Leovy & Chaffe, all of New Orleans, for appellant. William H. Byrnes, Jr., and Prentice E. Edrington, Jr., both of New Orleans, for appellees.

Statement of the Case.

MONROE, C. J. This is an action by the parents of a boy for the recovery of damages for his alleged wanton killing by one of defendant's employés, while acting in the discharge of the functions for which he was employed. The case was tried without a jury, and resulted in a judgment for plaintiffs in the sum of \$10,000. Defendant has appealed, and plaintiff has answered praying that the amount of the award be increased to \$20,000. The facts, as we find them, disclosed by the evidence, are as follows:

On the evening of February 12, 1915, at about 8 o'clock, Edward Friloux, employed by defendant to watch its property and protect it from trespassers and thieves, was traveling on one of defendant's freight trains, and had in his custody three hoboes, who had been arrested and turned over to him and whom it was his purpose to lodge in the

parish jail at Avondale. The train was a long one, and he and his prisoners were seated on cross-ties constituting the load of a gondola which was about the seventeenth car from the locomotive, the prisoners with their faces towards the locomotive, and he, facing them, with his back to the locomotive, their elevation above the ground being eight or nine feet. At a certain point in Gretna where the railway crosses a public road there were gathered at that time some 15 or 18 boys, aged from 11 to 18 years, including plaintiff's son, aged 16 years, and as the gondola in question reached there and was passing there was some "hollering" and some missiles thrown by the boys, or some of them, at those who were on the gondola, and thereupon Friloux fired a shot from a pistol, which took effect upon plaintiff's son, and resulted in his death within a few minutes. There is some little conflict in the testimony, but the facts, nevertheless, stand out clearly enough. Ten of the boys were called as witnesses for plaintiffs, and eight of them testify that there was no "hollering," and all of them that they threw no missiles and saw none thrown. Two of them testify affirmatively to the "hollering" as follows:

Joe Russo:

"Well, I heard some boys 'holler,' there was four hoboes, and when the train was going a shot was fired into the boys, and I turned and run behind a tree. \* \* \* Q. Where did the shot come from? A. Come from that flat car (meaning the gondola), and he was on the flat car. Q. Had that flat car passed at the time that shot was fired? A. Yes, sir; passed about 70 feet, or something like that, when he fired."

Frank Allo:

"About 10 or 12 cars from the engine there were three or four fellows on a car, and we all hollered, 'Look at the hoboes on there,' and so soon as we hollered that a fellow fired; I couldn't tell who shot it, or what; I know it was a railroad detective, though. Q. Fired, and then what happened, Frank? A. Well then the boy fell, after he fired."

Friloux, after stating that he was on the car, with the three hoboes, and had reached the point to which we have referred, testifies further (quoting in part):

"Q. What happened there? A. I got hit on the head with a piece of cypress knot. \* \* \* A. What effect did it have when it hit you? A. It knocked me out a little bit, knocking me on my face, and, when I went to raise up, a brick caught me on the arm and another brick caught me in the back. Q. You know who threw those missiles 'at you'? A. No, sir; I don't know; I know there was a gang down there. \* \* \* Q. Did any of them say anything? A. Yes, sir; just as the knot hit me in the head and I fell down, one of them said, 'We've got the son of a b—; let's kill him.' I raised up, and one caught me on the arm and one in the back. I had my gun in my hand, watching those three hoboes I had arrested, and then I raised up and made a shot in the air to scare them. Q. Did you intend to hit anybody? A. No, sir; shot up in the air. \* \* \* Q. How fast was that train going, about? A. Well, I guess about eight or nine miles an hour. I know I could catch it, the way it was running. \* \* \* Q. Was it pretty dark? A. Very dark. \* \* \* Q. Was there any chance for you to get away from those missiles that were

being thrown? A. No, sir; the brick was coming too fast, and at the same time the three prisoners were struck, too. One of them was hit in the right side of the head and fell. \* \* \* He was hit with half a brick. \* \* \* Q. What did you say you did with that block that hit you on the head? A. Brought it here and turned it over to the sheriff. \* \* \* Mr. Friloux, how old are you? A. I am 42 years old. \* \* \* Q. How much do you weigh, Mr. Friloux? A. Two hundred and seventeen pounds. \* \* \* Q. You are pretty strong? A. Pretty strong. \* \* \* Q. Now, Mr. Friloux, how far had you passed the bridge, or the public road, where these boys were standing, when you shot? A. Of course, I couldn't tell while the train was going, but just about 25 or 50 feet, at most, just got past there. \* \* \* Q. When you say you shot up in the air, you mean you intended to shoot up in the air, but, as a matter of fact, you did not shoot up in the air? A. I couldn't shoot down. I had to shoot this way because I was about the middle of the car, and by sitting down I just shot over the heads. Q. As a matter of fact, it didn't go the way you intended it to go did it? A. That I don't know. Q. You do know that a boy was shot and that he was shot with your bullet? A. No, sir; I don't know that he was shot with my bullet. \* \* \* I don't think he was killed with my bullet. \* \* \* Q. What kind of a pistol did you have? A. Forty-one. Q. Would you know your bullet if you saw it? A. I know a 41 when I see it; yes, sir. (The witness is shown a bullet, marked 'XX,' being the bullet that was taken from the body of the boy.) The Witness: It is a 41. \* \* \* Q. How many shots were fired? A. I don't know; I fired one. Q. You fired one? A. Yes; and there were other people heard more. Q. How many did you hear? A. I heard one. \* \* \* Q. Those boys weren't right up against the crossing? A. They were right near. Q. Out near the crossing in the public road? A. About 10 or 15 feet from the train. \* \* \* Q. Now, if you had passed the crossing more than 25 or 50 feet, why did you fire at them? A. Because they said, 'Let's get the son of a b— and kill him.' Q. With the rumbling of a train of 55 or 60 cars, and after you had passed the crossing, you say you heard somebody in the crowd holler, and that is why you shot? A. Yes, sir. \* \* \* I didn't know if they were going to get on the train and pull me off the train. \* \* \* Q. And, according to your testimony, you shot up in the air, and you don't believe you hit the boy? A. I don't believe I did. \* \* \* I will swear I didn't kill the boy. \* \* \* Q. Now, did you think your life was in danger at the time you fired that shot? \* \* \* A. Yes; I thought my life was in danger; sure; that's why I fired. \* \* \* Q. You were being taken away from the danger, from the crowd, all the time? A. They could have got on the train, though. \* \* \* on the box cars. \* \* \* No; I made a shot just merely to stop them from climbing at me or getting on the train. \* \* \* Q. You say the hoboes couldn't have gotten off the train? You testified to that a few minutes ago. A. Unless they wanted to break their necks by jumping off. Q. That's the only way they could have gotten off, by jumping and breaking their necks? A. Breaking their necks or their legs. \* \* \* Q. Did the company approve of your shooting into a public highway? A. I don't think they approve of my shooting into a public highway, but they approved of me shooting to scare people away. Q. They thought you were justified in doing that? A. They thought I was justified in shooting to protect my life; yes. Q. You are still working for the company? A. Yes. Q. In the same capacity? A. Yes, sir."

There was one witness called for the defense who testified that he heard, or thought

he heard, two shots, neither of which he was able to locate, and he then admitted that one of them might have been an echo of the other. The testimony of the other witnesses, including that of Friloux, leaves no doubt that there was but one shot fired, that it was fired by Friloux, and that it killed the boy. Being asked how it happened that the cypress knot was the only missile that he preserved, Friloux replied that the bricks and half bricks by which he and the hoboes were struck passed on over the car after they had performed that function. He does not reconcile his statement, that they would have broken their necks or legs if they had attempted to get off, with his testimony to the effect that he feared that the boys would get on the train and another witness called by defendant testifies that, in view of the darkness and the surrounding conditions, the one attempt would have been about as dangerous as the other. Upon his arrival at Avondale witness exhibited the lump on his head and the cypress knot to several persons, but does not appear to have complained that he had been struck by any other missile. The coroner testifies concerning the injury as follows:

"There was some evidence of a little hickey over his eye or his forehead, I think; I don't remember which eye it was; might say just a slight bruise, a little hickey; \* \* \* just an elevation of the cutaneous part. Q. A swelling? A. Yes, sir. Q. Was not his eye blood-shot at that time? A. Not at that time."

Another witness compared the lump to a pigeon's egg; another to a hen's egg; another went so far as to say, in answer to a leading question, that it was as large as his fist. There is some testimony to the effect that one of the hoboes, perhaps two of them, exhibited red spots or bruises, but no suggestion that either Friloux or the hoboes made any attempt to escape the missiles by flattening themselves on the cross-ties, though they were elevated eight or nine feet above the boys, who were on the ground and near the track. Several of plaintiffs' witnesses testified that Friloux had been carried as much as 70 feet beyond the crossing, and, of course, was still moving away from the boys, when he fired the shot. Of the whole number of boys shown to have been in the crowd, at least five were not called by plaintiffs, and, whilst it may be that those who were called did not participate in the "hollering" and barely possible that, by reason of the darkness, some of them did not see the throwing, we are satisfied that "hollering" was done and missiles thrown by some of the party, though the throwers may have been those who were not called as witnesses. We are equally satisfied that Friloux was subjected to no such danger as justified his firing, as he did, into the crowd, and we are unable to believe that he really apprehended that the boys would get on the train and attack him, which he says was the danger that he feared and which induced him to fire. It does not appear that any of

the boys knew him, and it is evident, from the whole testimony, that they believed the persons on the car to be merely hoboes. It is shown that the boys were in the habit of congregating in the evenings and playing upon a "green" which happens to be opposite a barroom, and the fact that they mention the vicinity of the barroom as their rendezvous is placed to their discredit as though they met in the barroom, or chose the "green" because of its proximity to it. It is also placed to their discredit that they refer to themselves as "the gang," but boys of all classes do the same thing, even those of a larger growth and better opportunities. There is no doubt that they did at times get into mischief. They lived along the rights of way of two railroad companies, and they jumped on and off the passing trains. Defendant's counsel proposed to show, as they stated, in cross-examining one of the boys, that they had on previous occasions pelted defendant's trains with missiles, and that on November 14, 1914, Frank Vincent threw a rock or clinker through the window of the caboose of a train, knocking the hat off the head of the conductor. The court sustained an objection to the question on the ground that the throwing was alleged to have occurred six months before the killing of Vincent, and was irrelevant to the issues on trial. It was shown that Vincent and several others had been charged also in November, 1914, with throwing rocks and bricks and breaking the windows of the Texas & Pacific depot at Harvey; that they admitted their guilt, and were discharged with a severe reprimand and upon their promise that they would do better in the future. The justice of peace called as a witness for defendant and asked whether he knew the general reputation of young Vincent replied that he knew his parents to be nice people, but knew nothing about him save from the charge thus above mentioned. There are, however, a number of witnesses who testify that he was a boy of unusually good character. Thus Miss Hanley, principal of the Marrero Grammar School, says:

"That he was in the seventh grade, and that he was a 'very good boy; nothing to say against him; an excellent student; one of the best helps that a school-teacher could have in the school building. He did not only his duty in the school, but he did his work outside." [Had known him] "from September until his death. He had just left school one week before his death; left school to go to work."

#### Opinion.

We have found that plaintiffs' minor son was shot to death on a public highway by one of defendant's employes whilst the latter was engaged in the discharge of the functions for which he was employed, and, according to his uncontradicted testimony, his act has been approved by his superior officers, upon his representation that he shot in the air for the purpose of scaring away persons who were assaulting him and threaten-

ing him with death or great bodily harm. As part of the defense an effort was made to show that at various times prior to the killing the boy, or other boys with whom he associated, had thrown missiles at defendant's trains, though it is not suggested that any one had ever been injured in that way, and that they had committed other mischievous acts. The trial court ruled that the testimony offered was irrelevant, and it was, generally speaking, excluded, but in the cross-examination of one of the boys defendant's counsel elicited testimony to the effect that the witness had never seen the deceased boy throw any such missile. Conceding, however (for the purposes of the argument), that he or his friends had devoted years to that occupation, neither defendant nor its employé had the right thereafter to take his life on that account. The ruling of the trial judge in excluding the proffered testimony was therefore, correct.

We have found that the decedent and his associates had assembled on a public road, across which there passed at the rate of, say, 9 miles an hour, a train carrying the person who did the shooting, with three "hobo" prisoners in his custody, and that they were seated upon cross-ties, constituting the load of a gondola, and were thus elevated 8 or 9 feet above the ground upon which the boys were assembled, that there was some "holering" by the boys, and that some of them threw missiles at the party on the car, all of whom they supposed were hoboes. Defendant's employé testifies that they (referring to the boys) said, "Let's get the son of a bitch and kill him," or words to that effect, and (to quote his language), "I did not know if they were going to get on the train and pull me off the train"; and he says that he then, having passed the boys, according to his testimony, by 25 or 50 feet, and, according to other witnesses, 70 feet, and still moving away in his elevated position, fired up in the air, in order to scare the boys, but with no intention of hitting any one. No witness corroborates the testimony so given as to what was said by the boys, and neither the witness who gave that testimony nor any other testifies that the boy who was killed had said or had thrown anything, and the fact that he was standing on the ground eight or nine feet below the person who did the shooting, and was shot in the region of the epigastrium, is conclusive evidence that the shot was not fired up in the air. It is true that defendant's counsel, in some of their questions, suggested the idea that the bullet, fired up in the air, may have been deflected by a tree, but, from our understanding of the relative positions of the boy and the one or two trees that are shown upon a photograph offered in evidence, it would have been necessary for it to have been deflected downward and backward and then forward, in order to have passed, as it did, through the boy from front to rear. On

the other hand, the course taken by the bullet through the boy's body was the natural course for it to have taken if fired directly at the boy from the position occupied by the person who did the firing. The evidence utterly fails to satisfy us that there was any necessity for the firing of the pistol, or that Friloux, who fired it, had any reasonable or probable cause for believing, when he fired, that he was in any serious danger of life or limb. The car upon which he was traveling had passed the boys, as he admits, and was still moving, and he does not pretend that he apprehended any further danger from the missiles (which he might easily have avoided by flattening himself upon the cross-ties). He says that he "didn't know if they were going to get on the train" and take him off. He does not say that he observed any indication that they so intended; and he does say that the hoboes whom he had in charge could not have gotten off without breaking their necks or their legs, to which another of defendant's witnesses, who has been in the railroad service for many years, adds the following testimony (on cross-examination):

"Q. Then isn't it, as a matter of fact, easier to get off a train than it is to get on? A. Yes, sir. Q. And isn't it a fact that in the darkness of the night it is much more difficult to catch the handholds than it is in daylight? A. Yes; certainly."

If we assume that, when Friloux says he fired up in the air, with no intention of hitting any one, he is testifying to what he intended to do, and what he believes he did, the case is improved from a moral point of view, but is little or no better in its legal aspect; for he testifies that he has been accustomed to the use of firearms all of his life, and is a good shot, and his failure to miss (when firing with the intention to miss) a crowd of human beings standing within 25 or 50 or 70 feet, with nothing intervening, would be an exhibition of the grossest conceivable negligence.

[1] That defendant is liable for such damages as plaintiffs are entitled to recover we think there is no doubt. The master is liable in damages for any negligent or wanton act of his servant whereby another sustains injury in his mind, body, or estate, and that is committed in connection with or furtherance of the purposes of his employment. *Gann v. Great So. Lumber Co.*, 131 La. 400, 59 South. 830. Moreover, in this case, knowing what its servant had done, and that his act had resulted in the taking of a human life, the master ratified and approved that act.

[2, 3] The question then is as to the quantum of damages. The boy became unconscious almost immediately after he was shot, by reason of the great loss of blood consequent, as one of the physicians thought, upon the severance of a large artery, and we find nothing upon which to predicate the belief that he experienced any suffering that it would be possible for us to appreciate or measure in money. He is not shown to have

contributed anything to the support of his parents, and we have no assurance that he would ever have been able to do so.

In so far, therefore, as plaintiffs' claim for actual and compensatory damages is concerned, it is of the character thus described in the opinion in *Bourg v. Brownell-Drews Lumber-Co.*, 120 La. 1027, 45 South. 979, 124 Am. St. Rep. 448, in which the question of the right to recover damages for injury to feelings, loss of society, etc., is fully discussed, to wit:

"Plaintiff's right of recovery therefor rests upon the proposition that he is sorrowing, and will sorrow, for the untimely death of his son, and for the deprivation of his son's society and filial affection, and, exercising the discretion vested in the courts in such cases, we fix the amount to which he is entitled at \$5,000."

In the case thus cited the father alone sued, in the exercise of the right of action conferred upon him, and claimed nothing by virtue of the right inherited from his son, who was killed instantly, and nothing by way of punitive damages.

In the instant case, both parents are suing, and they claim punitive in addition to compensatory damages.

"Punitive damages," "vindictive damages," and "exemplary damages," say some of the authorities, "are in legal contemplation, synonymous terms. The kind of wrongs to which exemplary damages are applicable are those which, besides the violation of a right, or the actual damages sustained, import insult, fraud, or oppression, and are not merely injuries, but injuries inflicted in a spirit of wanton disregard. On the point of exemplary or vindictive damages, there has been some discussion between law writers, some contending that punitive damages are intended as a personal punishment to the offender; others that the object should rather be a lesson to the public. The better doctrine seems to be that they are usually given as a punishment to the offender, for the benefit of the community, and a restraint to the transgressor. Such damages are only given in cases where malice, fraud, or gross negligence enter into the cause of action; and, in order to warrant their recovery, there must enter into the injury some element of aggravation, some coloring of insult or malice that will take the case out of the ordinary rule of compensation." 31 Cyc. 106.

When, however, we consider that "punitive" damages, thus said to be given for the benefit of the community, are not given to the community, but are awarded to the individual who sues for them and shows some loss or injury resulting from the fault of another, it becomes evident that the award must be so made because the particular individual discloses a relation to the cause of action which entitles him, rather than some other member of the community, or the community itself, to recover it. The loss or injury resulting from fraud, insult, or slander may be difficult or impossible to prove, and, though the law may provide for the protection of the community in such cases by means of criminal prosecutions, the principal sufferer is the person who is defrauded, insulted, or slandered, and the civil action for the recovery of the damages that he can prove may be inadequate for his relief; and

so the common law recognizes punitive damages to be awarded, it is said, for the benefit of the community (already provided with a remedy), but which are given to the principal sufferer, on his petition for relief. For the loss of affection and society and the injury to her feelings which the tort-feasor inflicts upon the mother by the killing wantonly or negligently of her son the common law seems, as also did this court at one time, to have found no action in damages, and punitive damages have not unfrequently been awarded in addition to the damages allowed for pecuniary losses shown to have been sustained, or perhaps more frequently exaggerated damages, as for pecuniary losses, with but little in the way of proof to sustain the judgments. Under our law and present well-settled jurisprudence parents have an action for the recovery of compensatory damages against those by whose fault they lose their children, for the loss of the affection and society which they might otherwise enjoy, and for the grief with which they are thereby stricken, and the difficulty with regard to the proof in such cases is solved by a specific provision of the law to the effect that "much discretion must be left to the judge or jury." On the other hand, there is no provision which authorizes an individual bringing an action for damages to combine therewith a criminal prosecution for the punishment of the defendant in the interest of the community, and there is but little in our jurisprudence which sustains the view that such a combination is permissible; nor is there any good reason why there should be; for, if the law makes adequate provision, in the way of a civil action, for the indemnification of one who has been injured through the fault of another, and adequate provision, in the way of a criminal prosecution, for the protection of the community, there can be no reason why relief should not be sought in each case in the manner thus provided. The law to which we refer is found in C. C. art. 2315 (as re-enacted in Act No. 120 of 1908), and article 1934, and (so far as here applicable) reads as follows:

"Art. 2315. Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the children or widow of the deceased or either of them, and in default of these in favor of the surviving father and mother or either of them. \* \* \*

"Art. 2316. Every person is responsible for the damage he occasions, not merely by his act, but by his negligence, his imprudence, or his want of skill.

"Art. 2317. We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications. \* \* \*

"Art. 2320. Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed."

The remainder of this article is omitted, as eliminated by construction.

"Art. 1934. Where the object of the contract is anything but the payment of money, the damages due \* \* \* for its breach are the amount of the loss he has sustained, and the profit of which he has been deprived, under the following exceptions and modifications:

"1. Where the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. \* \* \*

"2. When the inexecution of the contract has proceeded from fraud or bad faith, the debtor shall not only be liable to such damages as were, or might have been foreseen at the time of making the contract, but also to such as are the immediate and direct consequence of the breach of that contract; *but even when there is fraud, the damages cannot exceed this.*

"3. Although the general rule is, that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived, yet there are cases in which damages may be assessed without calculating altogether on the pecuniary loss, or the privation of pecuniary gain to the party. Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality or taste, or some convenience or other gratification, although these are not appreciated in money by the parties, yet damages are due for their breach; a contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts are objects and examples of this rule.

"In the assessment of damages under this rule, *as well as in cases of offenses, quasi offenses, and quasi contracts, such discretion must be left to the judge or jury, while in other cases they have none, but are bound to give such damages \* \* \* as will fully indemnify the creditor whenever the contract has been broken by the fault, negligence, fraud or bad faith of the debtor.*" (Italics by the writer.)

It will be observed that article 2315 provides that a person through whose fault damage is caused shall "repair it," and that there is no suggestion of any other penalty to be imposed upon him; that article 1934, § 2, after providing for the actual damages to be recovered for the inexecution of a contract in fraud or bad faith, declares, "but, even when there is fraud, the damages cannot exceed this"; and that paragraph 3 of the same article deals, not with any penalty to be exacted for the benefit of the community, but with damages which become "due" to a party to a contract by reason of his being denied some gratification to which the contract entitled him, or because of some offense or quasi offense committed to his prejudice, which damages this court has held time and again to be compensatory, and not punitive. *Brown v. Crockett*, 8 La. Ann. 34; *Byrne & Co. v. Gardner*, 33 La. Ann. 6; *Van Amburg v. Railroad Co.*, 37 La. Ann. 650, 55 Am. Rep. 517; *Caspar v. Prosadame*, 46 La. Ann. 38, 14 South. 317; *Wimblish v. Hamilton*, 47 La. Ann. 254, 16 South. 856; *Fitzpatrick v. Publishing Co.*, 48 La. Ann. 1116, 20 South. 173; *Sundmaker v. Railroad Co.*, 106 La. 111, 30 South. 285; *Bourg v. Brownell-Drews Lumber Co.*, 120 La. 1000, 45 South. 972, 124

Am. St. Rep. 448. Nor is that doctrine confined to this jurisdiction. Judge Thompson, in his work on "Negligence," cites many cases decided by other courts in which it is sustained, and himself strongly supports it, saying, among other things:

"But damages on the ground of injury to the feelings are not given in these cases as exemplary damages, but as compensatory damages. \* \* \*." Thompson on Negligence, vol. 2, § 2479.

"A general reading of this chapter will make it clear beyond all question that damages are constantly awarded for the cause of outrage, indignity, and humiliation visited upon a passenger by expelling him from a vehicle of the carrier, although without violence, and although no substantial losses are subsequently entailed upon him as a proximate consequence of the expulsion. If this were not the rule, there would be no right to recover damages for insulting language, or for expelling a passenger in a rude and boisterous manner, or for subjecting a passenger to the nuisance of riding in a coach with drunken passengers. \* \* \* Damages given on the footing of humiliation, mortification, mental suffering, etc., are compensatory, and not exemplary damages." Id. p. 3288.

In *Caspar v. Prosadame*, 46 La. Ann. 38, 14 South. 317, it appeared that defendant charged plaintiff with having robbed him, called him a thief, etc., and plaintiff brought the suit for damages. It is said in the opinion:

"The plaintiff claims damages for injury to his feelings and for the humiliation to which he has been subjected. No claim is made for injury to his character or reputation."

And it was held that he was entitled to recover, and that, under C. C. art. 1934, much discretion was left the judge in the assessment of the damages.

Counsel who have from time to time appeared before this court, proceeding, apparently, upon the theory that, where no damages are susceptible of assessment by direct testimony, no actual or compensatory damages could be recovered, have prayed for punitive damages as the supposed and sole alternative, and, as the court in some instances has held that such damages might be awarded, and in others has awarded damages without designating their character, some confusion has arisen, so that in the later cases the right under our system to award such damages is not unfrequently referred to in the subjunctive. Thus, in *Rutherford v. Railroad Co.*, 41 La. Ann. 794, 6 South. 644, it was said:

"The question of the applicability of the doctrine of exemplary damages partaking of the nature of punishment to our system of laws has been the subject of many conflicting opinions in our own jurisprudence. And, while the doctrine, as applied to acts of willful and malicious torts on the part of natural persons is universally recognized in common-law jurisprudence, it has not received unanimous sanction in courts of that system in its application to suits in damages against corporations, and particularly as to railroad companies and other common carriers. The question is discussed at length and with ability by the district judge in this case, and it presents a subject of attractive study. Our own jurisprudence is not yet definitely settled on the question, and it is, perhaps, desirable that it should be, but under our appreciation

of the present case we conclude that the occasion has not yet arisen."

In *McFee v. Railroad Co.*, 42 La. Ann. 797, 7 South. 722, it is said:

"If such damages are allowable as such at all under our system, they are allowable only when an element of malice or evil intent, or oppression enters into and forms part of the act."

See, also, *Graham v. Street R. Co.*, 47 La. Ann. 1656, 18 South. 707, 49 Am. St. Rep. 436; *Patterson v. N. O. & C. Light & Power Co.*, 110 La. 797, 34 South. 782.

The earliest case to which our attention has been attracted, and which is sometimes cited as authority for the infliction of punitive damages, is that of *Carlin v. Stewart*, 2 La. 76, in which plaintiff was awarded \$1,000 for having been called a perjured villain. His counsel appear to have regarded the award as one for punitive damages, and defendant's counsel argued that, as no special damages were proved, none could be recovered. Martin, J., as the organ of the court, said that it appeared that plaintiff had sustained no real injury by the slander, but in affirming the judgment appealed from he did not intimate that the damages allowed were intended to be punitive; the language used by him in that connection being as follows:

"In such actions the jury or court must in many cases allow damages when no special damage is shown. If a professional man is maliciously and without cause charged with being absolutely ignorant of the first principles of the science he professes, he cannot administer positive or direct evidence of the injury he may have sustained. He must be in many cases without any adequate remedy at all if the jury or the court may not find a guide in the dictates of their own conscience. On the score of the quantum of damages the jury were the legitimate judges, and we are unable to say they erred."

The case therefore falls directly within the provisions of C. C. art. 1934, § 8, to the effect that:

"In actions for damages 'in cases of offenses \* \* \* much discretion must be left to the judge or jury.'"

In *Keene v. Lizardi et al.*, 8 La. 27, plaintiff sued for damages for injury to his wife and himself by reason of the conduct of the captain of one of defendant's vessels upon which they were passengers. A jury returned a verdict for \$100, and plaintiff appealed. It was said by this court in affirming the judgment:

"It is true juries sometimes very properly give what is called 'smart money.' They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct; but this is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent."

In *McGary v. City of Lafayette*, 12 Rob. 668, and 4 La. Ann. 440, it appeared that under the direction of certain of the city officers a portion of a building belonging to the plaintiff was illegally demolished, in violation of a pending injunction, and plaintiff brought the suit for damages, actual and pu-

nitive, and obtained a verdict for a large amount. On the first appeal (12 Rob. 668) it was held by this court

"that the acts of the president and council having been alleged to be willful and malicious, plaintiff cannot recover vindictive damages against the corporation, but only an indemnity for the loss actually sustained."

And the verdict and judgment were set aside and the case remanded for a new trial. On the second appeal it was found that the corporation had ratified the acts of its officers, but that the pecuniary damages sustained by plaintiff could not have exceeded \$300 or \$400, and the court, quoting C. C. art. 2294, as it then stood (now article 2315 as amended), said:

"Under that rule the reparation must be equal to the injury inflicted. But an exception is made by article 1928, C. C. [now 1934], in relation to damages resulting from offenses, quasi offenses, and quasi contracts. In those cases, says the Code, much discretion must be left to the judge or jury. \* \* \* This disposition of law, while it gives to the judge or jury a discretion which they have not in other actions of damages, clearly intimates that the discretion thus given is not unlimited. \* \* \* We admit that the actual loss sustained is not the measure of damages, and that the jury had a right to take into consideration the violent and illegal proceedings of the officers of the corporation. The facts of the case would, in our opinion, have authorized a verdict for \$1,500, and we will decree accordingly."

And the verdict of \$5,000 was reduced to \$1,500.

There is, no doubt, some ground for the contention that the court intended the difference between the \$300 or \$400 of proved damages and the \$1,500 awarded as punitive or vindictive damages, but we remain unconvinced that such was the intention, and prefer to believe that the difference in question was intended to represent the element of damage resulting from the illegal and arrogant disregard for and invasion of plaintiff's rights, since in our opinion, article 1934 contemplates the assessment only of compensatory, and not of punitive, damages. That question was considered in the case of *Black v. Carrollton R. R. Co.*, 10 La. Ann. 33, 63 Am. Dec. 586, in which the plaintiff sued for damages resulting to himself by reason of injuries sustained by his minor son in a railroad accident; nothing being claimed for the use and benefit of the son. The court, when the judgment was rendered, consisted of Chief Justice Slidell and Justices Voorhies, Buchanan, Ogden, and Spofford. Justice Spofford took no part in the case. The elements of loss and injury upon which the claim was based were the expense imposed on plaintiff for the care of his son, his own loss of time, and the injury to his feelings. In considering the element last mentioned, Mr. Justice Buchanan, as the organ of the court, said:

"The jury seems to have taken into view the shock to the parental feelings and the solicitude and anxiety of the parents of the sufferer, which must be supposed to have been the conse-



quences of the grave injuries and protracted convalescence of their child, and which are declared upon by plaintiff as elements of damage. But we are not disposed to admit the soundness of a doctrine which would extend vindictive damages to a case like the present. We carefully note the distinction between the immediate sufferer from a railroad accident and the relative of the sufferer, however near may be that relation. \* \* \* But we do not understand the object of the law to be the punishment of an offending party for having been the cause of unpleasant emotions in the family and acquaintances of the party offended; and this in the form of a pecuniary compensation to the relative or friend thus affected."

And there was judgment for \$5,000 in compensation for what the court concluded was the actual, and would be the future, loss of the plaintiff.

Mr. Justice Ogden in a separate opinion expressed the view that, under O. C. 1928 (now 1934), it was competent for the court to allow vindictive damages, and the inference would seem to be that he regarded the amount awarded to the plaintiff as having been, in part, so allowed, the prospective loss not being susceptible of proof, and the amount allowed therefor constituting rather a large proportion of the whole.

The Chief Justice dissented, and stated his reasons so clearly and forcibly that we are glad to strengthen this opinion by incorporating herein the following excerpt therefrom, interpreting the two articles of our Code which are particularly involved in this discussion, to wit:

"The civil actions for both causes [for damages caused by offenses and quasi offenses] are given by the same article of our Code. 'Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it' [being the whole of article 2294, now 2315, as it then stood, in 1855, prior to the amendment of that year]. This article, brief as it is, distinctly designates the purpose and limit of the action. It is simply reparation—a just and adequate compensation to the plaintiff for the injury received by him from the defendant. It suggests no idea of revenge or punishment. In this light it is viewed by the jurists of France, whose Code contains precisely the same provisions. [And there follow quotations of the article of the French Code, and from Merlin, Toullier, Duranton, and Domat, to the effect that, though the action for damages may be brought by the sufferer, the action for the enforcement of penalties belongs to the functionaries to whom the law intrusts that duty, after which the opinion proceeds:] My conclusion is that there is nothing in the provisions of our Code or settled principles of our law which sanctions what are called punitive, vindictive, or exemplary damages—in other words damages which blend together the interests of society and of the aggrieved individual. I think the damages in such actions should be referred to the extent of the wrong done to the sufferer. Where a person other than the immediate sufferer is plaintiff, there is a further necessary limitation already noticed. Where the immediate sufferer is plaintiff, as he is to be indemnified, every circumstance tending to his injury, whether in mind, body, or estate, may be taken into view; but considerations cannot be entertained which do not relate to the consequences of the injury to the sufferer. The true issue in the action is the guilt of the defendant and the damage it did to the plaintiff. Criminal punishment is not to be inflicted in a civil action.

"There may unquestionably be found in our reports dicta which countenance the idea of punitive, vindictive, or exemplary damages; but casual expressions ought not to be relied upon as deliberate expositions of the law. They were probably suggested by expressions found not unfrequently in the opinions of English jurists and commentators; and their force, even as exponents of the common law, will be greatly impaired in the apprehension of any one who will read the very able and learned review by Mr. Greenleaf of the English and American cases in the recent edition of his treatise on the Law of Evidence. That author, whose opinion is certainly entitled to great deference, lays down the rule in these emphatic words:

"Damages are given as a compensation, recompense, or satisfaction to the plaintiff for an injury actually received by him from the defendant. They should be precisely commensurate with the injury, neither more nor less, and this whether it be to his person or estate." In an elaborate note he defends this proposition, and takes occasion to express the opinion that the rule of damages, as limited by the extent of the injury to the plaintiff, was the same as in the Roman law.

"There is nothing in the article 1928 of our Code [now 1934] which, rightly considered, conflicts with the above conclusion."

The learned Chief Justice then recapitulates the provisions of the article mentioned, and quotes the last clause of the paragraph 3, and again proceeds:

"Applying the rule *noscitur a sociis*, and looking to the context for assistance, the intention of this clause is easily appreciated. The Code in the previous clause had treated of cases of damage where the feelings and taste are concerned; damages from their nature not susceptible of accurate and arithmetical computations, yet for which pecuniary compensation was admissible.

"Quasi offenses were very properly arranged in the same category, and their compensation submitted to the sound discretion of the judge or jury, since damages for mental anguish, or personal indignity or disgrace, etc., are incapable from their nature of any fixed rule. But the enumeration of this discretion by no means involves the idea that in the assessment of damages the court or jury can travel beyond the inquiry how far the sufferer himself is affected, or exaggerate the amount for the purpose of vindicating offended public justice, or punishing the offender as an example to others"—citing *McGary v. City of Lafayette*, 4 La. Ann. 440.

The same court, during the same month, decided the case of *Varillat v. N. O. & C. R. Co.*, 10 La. Ann. 88, in which it appeared that plaintiff had sustained an injury on the same road as in the preceding case, and that counsel for defendant requested the court to charge: "That under such circumstances the jury cannot give damages with the view to punish the defendant, \* \* \* but are only to consider and assess the damages sustained by the plaintiff," which request was refused, and the ruling was maintained on the appeal by the majority of this court, which held that vindictive damages were authorized by O. C. art. 1928 (now 1934), and that it had been so held in *Black's Case*, just previously decided. Mr. Justice Spofford, who had not participated in the decision of *Black's Case*, dissented, saying (*inter alia*):

"That in an action for a private injury damages may be given against a railroad company, with a view to punish the company or make



an example, is a position to which I cannot assent."

And the Chief Justice concurred in the dissent, and referred to the reasons which he had assigned in the case just previously decided.

In the case of *Hill v. N. O., O. & G. W. R. Co.*, 11 La. Ann. 292, being also an action in damages for an injury sustained on a railroad, Chief Justice Merrick, who had succeeded Chief Justice Sullard, speaking for the court, said:

"In actions of this kind it is not within the province of the jury, although the negligence is clearly proven, to give vindictive damages, as is sometimes allowed in cases of willful or malicious injuries. It is true that in estimating the damages, where a case is made out, the jury may consider the painful nature of the wound as well as the length of time the plaintiff has been kept from his employment and the permanent character of the injury; but in assessing the damages the jury should give such reasonable sum as will really compensate the plaintiff, and no more."

If, however, we go back to C. C. art. 1934, from which the authority to inflict vindictive damages is supposed to be derived, we find that the words "willful and malicious" are not mentioned, and that the authority referred to (such as it is) is vested, by the last clause of paragraph 3 of that article, in the judge and jury, in particular classes of cases, to estimate the damages, without reference to any question of willfulness or malice. In fact, as to one of the classes, the definition of the term applied to it absolutely precludes such an idea; for by "quasi offence" is understood an act by which one person, without malicious intention, but through imprudence, causes damage to another; and as to neither of the classes does the grant contain any limitation upon the discretion vested in the judge or jury in the matter of assessing damages, save such as may be found in the common understanding that the word as thus used will be taken to mean a regulated or judicial discretion. As so interpreted, it may be exercised by the trial judge, or jury, in assessing damages for failure to comply with a contract to paint a portrait, or execute any other work of art, to establish a charitable foundation, or to supply any gratification or enjoyment, whether of religion, morality, taste, or convenience, as well as for an injury resulting from an offense, a quasi offense, or a quasi contract, all without the slightest reference to willfulness, malice, or oppression. On the other hand, to confine the application of C. C. art. 2315, to the person upon whom the physical injury is inflicted would be to strike with nullity all that part of the article which has been added since 1855, and which puts the persons therein specified in the place of the original sufferer, in the event of his death, and also gives them a right of

action for the damages sustained by them by reason of his death.

Our conclusion therefore is that under our law as it now stands the right of action for the recovery of damages for personal injury, sustained through the fault of another, is personal to the injured party, so long as he survives, and, unless previously exercised by him, devolves at his death upon the persons specified in article 2315 of the Civil Code (as amended and re-enacted by Act No. 120 of 1908), who, should he die in consequence of his injury without having exercised his right, acquire also a right of action in damages for the injury they may sustain by reason of his death, and are entitled to full indemnity with respect thereto, but that neither the person originally injured nor those who succeed to his right with respect thereto, and who acquire rights of their own with respect to the injury inflicted upon them by his death, are entitled to recover anything more in the way of damages than adequate indemnity for the injury and loss inflicted upon him and them in mind, body, or estate; there being no provision in our system of laws which authorizes the cumulation in such cases of a civil action for the redress of a private wrong with a quasi criminal prosecution for the assumed benefit of the public, but the sole purpose and principal effect of which is to increase the adequate indemnity recovered by the plaintiff as actual and compensatory damages by the addition of the pecuniary penalties imposed as exemplary, punitive, or vindictive damages.

Our further conclusion is that this case belongs to a class with reference to which the law declares in specific terms that "in the assessment of damages \* \* \* much discretion must be left to the judge or jury," and hence that the assessment that has been herein made by the judge should not be disturbed by us unless we are satisfied that there has been an abuse of the discretion so vested in him, and, as we are not so satisfied, that it should remain undisturbed.

[4] In the case of *Parker v. Crowell & Spencer Lumber Co.*, 115 La. 463, 39 South. 445, a father was allowed \$5,000 for the loss of a minor son. In *Johnson v. Industrial Lumber Co.*, 131 La. 897, 60 South. 608, an award of \$2,326.50 in favor of a mother for the death of a minor son, of whom she had been given the custody by a judgment of separation a mensa et thoro, was increased by this court to \$5,000. In this case the father and mother have united in the suit, and the judgment of \$10,000 in their favor follows the precedents established in the two cases thus mentioned.

The judgment appealed from is therefore affirmed.

(140 La. 1052)

No. 21218.

**CULLIGAN v. DANZIGER & TESSIER.**

(Supreme Court of Louisiana. Feb. 12, 1917.

Rehearing Denied March 12, 1917.)

*(Syllabus by the Court.)***1. PARTNERSHIP  $\Leftrightarrow$  35—PARTNERSHIP TRANSACTIONS—ESTOPPEL.**

A firm of brokers, who have held themselves out to the plaintiff as dealers in bonds and stocks on margins, are estopped to urge that such transactions were contrary to the articles of partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 50.]

**2. APPEAL AND ERROR  $\Leftrightarrow$  173(3)—QUESTIONS BELOW—ESTOPPEL.**

A defendant member of a dissolved firm of brokers, who in his answer admitted that the firm was a "commercial partnership \* \* \* engaged in the stock, bond, and securities brokerage business and buying, selling, and dealing in stocks bonds and securities" is estopped to urge on appeal that the firm was an ordinary partnership.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1080, 1110, 1111.]

**3. APPEAL AND ERROR  $\Leftrightarrow$  173(6)—REVIEW—POINTS NOT RAISED BELOW.**

The contention that plaintiff's contract with the defendant brokers for the purchase of bonds on margin was a gambling transaction should have been pleaded below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1088.]

**4. PARTNERSHIP  $\Leftrightarrow$  153(1) — TRANSACTION WITH PARTNERSHIP—BOOK ENTRIES.**

Plaintiff's contract with the defendant firm, evidenced by the firm's written acknowledgment of the receipt of a certain margin, and the purchase of certain bonds for the account of the plaintiff, cannot be affected by the wrongful conversion of the margin by one of the partners, and by his change of book entries so as to show that the contract was made with himself, as an individual, and not as a member of the firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 274, 276, 277.]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by Albert F. Culligan against Danziger & Tessier. Judgment for plaintiff, and defendants appeal. Affirmed.

Dinkelspiel, Hart & Davey, John Dymond, Jr., and A. Giffen Levy, all of New Orleans, for appellants. Benjamin T. Waldo and Sumter D. Marks, Jr., both of New Orleans, for appellee.

LAND, J. Plaintiff sued the defendant firm and the two members thereof in solido to recover the sum of \$2,580, with legal interest thereon from December 9, 1912, the market value of three certain  $4\frac{1}{2}$  per cent. bonds of the New Orleans Railway & Light Company delivered on said day by the plaintiff to said brokerage firm as margin for the purchase of \$15,000 City 4's, falsely stated to have been purchased by said firm on December 9, 1912, for account of the plaintiff.

Danziger, having defaulted and absconded, was made a party through a curator appointed by the court.

Chas. A. Tessier, the other member of the firm, defended on the ground that the transaction set forth in the petition was an individual matter between the plaintiff and T. Walter Danziger, with which the firm had nothing to do.

There was judgment for the plaintiff, and the defendants have appealed.

Plaintiff's case is based on three exhibits made out in the office of the defendant firm, by its bookkeeper, and two of them signed by Danziger in the name of his firm, all three of them delivered to the plaintiff, reading as follows:

**Plaintiff's Exhibit No. 1.**

C. A. Tessier. T. W. Danziger.

Danziger & Tessier, 134 Carondelet St.

Tel. Main 204. New Orleans, La., Dec. 9, 1912.

Received from Mr. A. F. Culligan \$3,000.00 N. O. Rys.  $4\frac{1}{2}$  bonds, Nos. 8210, 8211, 8212, as margin for \$15,000.00 City Fours purchased this day for his account.

[Signed] Danziger & Tessier.

**Plaintiff's Exhibit No. 2.**

C. A. Tessier. T. W. Danziger.

Danziger & Tessier, 134 Carondelet St.

New Orleans, La., Dec. 9, 1912.

Mr. A. F. Culligan, City—Dear Sir: In accordance with your instructions we have this day purchased for your account \$15,000.00 City Fours at 96; deliver to-morrow.

Yours respectfully,

[Signed] Danziger & Tessier.

**Plaintiff's Exhibit No. 3.**

C. A. Tessier. T. W. Danziger.

Danziger & Tessier, 134 Carondelet St.

New Orleans, La., Dec. 9, 1912.

Bought \$15,000 City Fours at 96...	\$14,400.00
Interest, 5 mos. 9 days.....	285.00
Brokerage, \$2.50 per 1,000.....	37.50

\$14,702.50

To Mr. A. F. Culligan.

[4] These three exhibits were copied into the letter stock book of Danziger & Tessier, but no corresponding entries were made on the books of the firm.

The bookkeeper testified that Danziger told him that it was a private transaction, and that he thereupon wrote on the margin:

"Don't enter, private. T. W. D."

Danziger kept plaintiff's bonds, and converted them to his own use.

The use of the firm's name would have been entirely unnecessary if plaintiff was dealing with Danziger as an individual; and the fact that the three contemporaneous exhibits were all in the firm's name corroborates plaintiff's testimony that his deal was with the firm, represented by Danziger.

The few isolated facts suggesting the contrary cited by defendant's counsel are wholly insufficient to overcome plaintiff's direct and positive testimony on the subject-matter, sup-

ported as it is by the exhibits delivered to him at the time.

We agree with the judge below that plaintiff contracted with the partnership.

The answer of Tessier admits that his firm had previous transactions with the plaintiff, which were closed out May 15, 1912, and avers that the next and last transaction between them was on December 19, 1912, when the firm purchased for the plaintiff two certain bonds, for which payment was made on December 20, 1912.

The exhibits in the record show that Danziger & Tessier on August 21, 1911, purchased for account of the plaintiff 20 shares of Whitney Central National Bank stock on a margin, represented by a mortgage note for \$1,000, and on April 13, 1912, purchased 10 more shares of the same stock, and on May 12, 1912, sold the 30 shares and closed the account.

The exhibits also show that on December 19, 1912, the said firm purchased for the plaintiff \$2,000 Birmingham 4½ bonds.

This seems to have been a cash transaction.

Plaintiff pledged these bonds to Danziger to secure a demand loan of \$1,200.

On October 24, 1913, a statement was made up under the usual letter head of Danziger & Tessier, commencing:

"A. F. Culligan, in Account with T. W. Danziger"

—and giving an account of the purchase of \$15,000 City 4's on December 9, 1912, with debits of interest accrued on the purchase price and credits of coupons collected.

The plaintiff received the statement, but testified that he did not notice that the name of "T. W. Danziger" appeared instead of the firm's name.

Having reached the conclusion that the plaintiff dealt with the firm, we see no good reason for not accepting his explanation that, as the statement was under the firm's usual letter head, he paid no particular attention to the caption of the account.

[1] The plaintiff and Danziger were personal and business friends, and had a number of individual transactions between themselves.

As above shown, plaintiff's dealings were with the firm, represented by Danziger. There is nothing strange that in the familiar correspondence between them reference was made now and then to both firm and individual business.

The firm's dealings with the plaintiff prior to December 9, 1912, as shown by its books, conclude Tessier from asserting, as against the plaintiff, that Danziger, his partner, had no authority to bind the firm by the purchase of bonds and stocks on margins.

[2] The answer admits, as alleged in the first paragraph of the petition, that Danziger & Tessier was a—

"commercial partnership \* \* \* engaged in the stock, bond and securities brokerage busi-

ness and buying, selling, and dealing in stocks, bonds, and securities."

The facts thus judicially admitted conclude the contention made in this court that the firm of Danziger & Tessier was an ordinary partnership.

[3] The further contention that the transaction between the plaintiff and the firm was a gambling speculation was not made in the court below, and cannot be injected by argument into the defendants' pleadings in this court.

Judgment affirmed.

(140 La. 1056)

No. 21396.

WIRTH v. ALEX DUSSEL IRON WORKS.

CODE et al. v. SAME.

(Supreme Court of Louisiana. Feb. 12, 1917.

Rehearing Denied March 12, 1917.)

(Syllabus by the Court.)

1. MASTER AND SERVANT  $\S$  191(1)—MASTER'S LIABILITY—"FELLOW SERVANTS."

Those who are employed by a common master, but not in a common employment, and are not engaged in the same work or in the same department of service, are not fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 475, 477, 478.

For other definitions, see Words and Phrases, First and Second Series, Fellow Servant.]

2. MASTER AND SERVANT  $\S$  226(1)—ASSUMPTION OF RISK—MASTER'S NEGLIGENCE.

A servant does not assume the risk of a master's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659, 660.]

3. MASTER AND SERVANT  $\S$  217(1), 234(1)—INJURY TO SERVANT—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

Unless the danger be obvious, the defenses of assumption of risk and contributory negligence have no application, when the injured employé was engaged at the time in the performance of his work in the usual manner.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574, 706.]

O'Niell, J., dissenting.

(Additional Syllabus by Editorial Staff.)

4. DEATH  $\S$  98—INADEQUATE DAMAGES.

Award of \$3,000 to the widow and a similar amount to the three children of a deceased employé, who was 45 years of age, of good health and habits, in regular employment, and sole support of wife and children, and who suffered for 56 hours before death, was inadequate, and would be increased to \$6,000 for widow and same amount for children.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 124.]

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Suit by Mrs. Ida Helen Wirth, widow of Frederick William Code, and suit by Mrs. Ida H. W. Code, tutrix of Carrie Martha Code, and others, against the Alex Dussel Iron Works. Judgment for plaintiff individually, and as tutrix, and defendant appeals, and plaintiff, answering the appeal, asks that

both judgments be increased. Judgments amended by increasing the amount thereof, and as amended affirmed.

Lemle & Lemle and Arthur A. Moreno, all of New Orleans, for appellant. Samuel Wolf and Herbert W. Kaiser, both of New Orleans, for appellee.

SOMMERVILLE, J. Plaintiff, in her individual capacity, as widow, sues the defendant for \$15,000 damages for the loss and death of her husband, through the alleged fault and negligence of the defendant company. She instituted a second suit, based on the same cause of action, as tutrix of her minor children, claiming \$15,000 for each of the three children for the loss of their father. There was judgment in favor of plaintiff, as widow, in the sum of \$3,000, and also a judgment in her favor, as tutrix, for the further sum of \$3,000. Defendant has appealed, and plaintiff has answered the appeal and asks that both judgments be increased from \$3,000 to \$7,500. The two cases were tried at one time, on the same evidence; and there is but one transcript of appeal.

Plaintiff alleges that the defendant was engaged in converting a sailing vessel into an oil barge, in the Mississippi river, in the port of New Orleans; that it employed her husband to operate an oxy-acetylene gas engine stationed on the deck of said vessel; that it was his duty, in operating said engine, to see that there was an adequate supply of gas furnished to workmen in the hold who were engaged on ironwork, to observe the gauges on said engine, and to receive signals from the foreman and workmen in the hold; that, while he was performing the duties assigned to him, a laborer, who was working on the deck of said vessel, removing an iron bar, or davit, measuring about 8 feet in length, and about 1½ inches in diameter, carelessly and negligently permitted said iron bar to fall and strike plaintiff's husband, which knocked him into the hold of the vessel through a hole on the deck, and injured him to such an extent as to cause his death within 56 hours thereafter. She alleges that the ribs of her husband were fractured, that he received a lacerated wound of the scalp, and general contusions.

She further alleges that the workman who caused the accident was inexperienced, but she failed to prove this allegation. She alleged and proved that defendant's employé, who inflicted the injury upon her husband, was grossly negligent in removing said davit, and that the injury was the direct cause of his death.

[1] Defendant answered admitting that it was engaged in the converting of a sailing vessel into an oil barge, and that it had engaged the deceased in this extrahazardous work, and alleged that he had assumed the risks incidental thereto, that he had been assigned a safe place in which to work, and

that he had left such place without permission, or for any sufficient reason, and contrary to instructions; that if the injury to Code was due to the fault of the employé Schneider, who took the davit down, then it was through the fault of a fellow servant, for which it is not responsible. It denies fault or negligence.

The evidence shows that, while Schneider had had experience in the line of work in which he was engaged, he had never before removed a davit; he was working with saw, maul, and chisel; and he had sawed into the deck of the vessel for the purpose of loosening the lower end of the davit; that he struck the sawed woodwork with the maul after it was loose, and the davit fell on Code and injured him. The evidence further shows that Schneider did not give any warning to Code, the deceased, that the davit was about to fall, or for him to get out of the way. He says that he did not know how the davit would fall, or that Code was near enough to be struck. Schneider says that Code should have been at his machine, attending to his business, and that the davit would not have then hit him; that Code had walked away from his machine, without any reason therefor, and had left a safe place for one of danger.

The foreman of the defendant company testified that the deceased was employed to operate the gas machine, or oxy-acetylene tank, as he chose to call it; that his duties were to watch the gauge; "when the machine was empty, to charge it—to put nothing over 50 pounds of carbide in it." He further testified that it was the duty of Code to supply gas to the workmen in the hold of the vessel, who were engaged in working on iron down there, and who required heat for the purpose.

The evidence shows that the deceased moved only a short distance from the machine that he was operating, and that the gauges were large enough for him to see them at such distance. The foreman testified that:

"A man will move away from his work at times." "You can't keep no man standing exactly watching that there. You can tell him one hundred times a day not to move, and he will move anyhow." "It is a natural thing for a man to move, to move around while on the job." "He didn't have to stand exactly in one spot. He could take a step like this (indicating) from his gauges, but he did not have to go away from his gauges."

And Code is not shown to have moved any appreciable distance from the engine he was operating, and it was only reasonable to expect that he would move a short distance from it, and not stand in one spot all the time. He cannot be charged with fault because of having moved a short distance from the machine.

As Code was employed to operate this oxy-acetylene gas machine, he cannot be held to have been a fellow servant with the laborer who was engaged in taking down the davit.

In *Merritt v. Victoria Lumber Co.*, 111 La. 159, 35 South. 497, it is held:

"(1) When servants are engaged in different duties in the same establishment, and injury resulting to one by the carelessness or negligence of another, in the course of the latter's peculiar work, does not fall within the rule which exempts the master from liability by reason of a fellow servant's negligence."

"To bring a case within the exception (exemption of master from liability), this material fact must appear, that the servants engaged, one of whom is injured or killed, must be men in the same common employment, and engaged in the same common work under that common employment."

And in *Levins v. Bancroft, Ross & Sinclair*, 114 La. 105, 38 South. 72, it is held:

"(7) The fellow workman's doctrine is not in the case. The employé was working in a different department."

"Employés in a sawmill who are not associated in the same work are not fellow servants."

"The master, except in case of fellow servants, is answerable for the damage occasioned by his servants and overseers in the exercise of the functions in which they are employed." C. C. art. 2320.

"Where the negligent act of the servant caused injury, it is no defense that the particular injurious consequence was unforeseen, improbable, or not to be reasonably expected, if it was the natural sequence of the act itself."

"Even in case of fellow servants, the master is liable when his own negligence contributed to the injury, as where an employé in a sawmill carelessly pitched a shovel, which, rebounding, struck and released an unsafe wooden latch holding the lever which controlled the operation of the carriage." *Payne v. Georgetown Lumber Co.*, 117 La. 983, 42 South. 475.

"Under the settled jurisprudence of this state, a master is liable in damages to one servant, injured through the negligence of another servant in the performance of different work, under their common employment." *Taylor v. E. C. Palmer & Co., Ltd.*, 124 La. 531, 50 South. 522.

"The rule is deducible that those who are employed by a common master in a common employment, engaged in the same work, and in the same department of service, are fellow servants of each other." *Wilkinson on Personal Injuries*, p. 135.

There was no relation or interassociation between *Schneider* and *Code* in the work they were doing on the boat; they were working in different departments.

It may well be that the manner in which the laborer proceeded to take down the davit was a reasonably safe one, and the ordinary one pursued under such circumstances; but the evidence clearly shows that he was negligent in carrying out the work, and that it was through his fault that the accident happened to the deceased. He should have warned the deceased of the falling of the davit, and he should have been certain that it would have fallen in a direction away from the deceased.

It may also have been that the work in which defendant was engaged was extrahazardous, and that the persons working under it assumed greater risks than are ordinarily assumed by workmen; but, when it is shown

that injury and damage have resulted from carelessness and negligence, a workman cannot be said to have assumed such risk. Under such circumstances, the fault is with the employer or his employé, for which the employer is responsible.

[2, 3] Respondent admits that on the day of the accident practically all the superstructure on the vessel had been removed, that is, almost all the woodwork on the upper deck, and that at the time of the accident to *Code* defendant was removing the balance of said woodwork. And it was testified that the only thing standing to be removed on the deck of the vessel was the davit which was being removed at the time of *Code's* death. So that the work at the time of the accident cannot be said to have been extrahazardous.

"Unless the danger be obvious, the defenses of assumption of risk and contributory negligence have no application, where an injured employé was engaged at the time in the performance of his work in the usual manner." *Collins v. Krause-Managan Lumber Co.*, 136 La. 303, 67 South. 12.

The servant assumes the risks of such hazards as are entirely incidental to an employment intelligently undertaken, and those only. *Roff v. Summit*, 119 La. 572, 44 South. 302.

The contributory negligence pleaded by defendant has been noted before in connection with *Code* removing from a place of safety to one of danger.

"We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications." C. C. 2317.

[4] The deceased was a man in good health, and of good habits, aged 45 years, in regular employment, and the sole support of his wife and children. His sufferings, before his death, extended through some 56 hours; and for these sufferings, and the resulting loss to them, the widow and three children asked for judgment in the sum of \$15,000 each; now they ask that the judgment appealed from be amended so that they will receive \$15,000 altogether. The district judge allowed the widow \$3,000, and a similar amount to the three children. We are of the opinion that the amount allowed is too small, and that it should be increased to \$6,000 for the widow and a like amount for the three children.

It is therefore ordered, adjudged, and decreed that the two judgments appealed from be amended, and that the one in favor of the widow be increased to \$6,000 and that the one in favor of the widow, as natural tutrix of her three minor children, be increased to \$6,000, and that as thus amended the judgments are affirmed, costs to be paid by defendant.

O'NIELL, J., dissents.

(140 La. 1068)

No. 22307.

## STATE v. FICK.

(Supreme Court of Louisiana. Jan. 15, 1917.  
Rehearing Denied March 12, 1917.)*(Syllabus by the Court.)*CRIMINAL LAW  $\S$  108(1) — NONSUPPORT OF  
CHILD—OFFENSE—VENUE.

The offense of deserting and neglecting to provide for the support of a minor child, as denounced by Act No. 34 of 1902, is committed, not at the place to which a deserted wife, having the child in custody, may be compelled to go, in order to find the support which the husband and father fails to provide, but at the place where he is to be found, when, and so long as, his desertion and neglect occur and continue, and the lawful removal of the wife and child from one place to another operates no change of venue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 220-226, 230, 234.]

Appeal from Juvenile Court, Parish of Orleans; Andrew H. Wilson, Judge.

Joseph Fick was convicted of willfully neglecting and refusing to provide for the support of his destitute minor child, and he appeals. Affirmed.

Louis Charbonnet and Edward J. Ryan, both of New Orleans, for appellant. A. V. Coco, Atty. Gen., and Chandler C. Luzenberg, Dist. Atty., and Eugene Stanley, Asst. Dist. Atty., both of New Orleans (V. A. Coco, of Marksville, of counsel), for the State.

## Statement of the Case.

MONROE, C. J. Defendant, having been convicted of willfully neglecting and refusing to provide for the support of his minor child, in destitute and necessitous circumstances, and sentenced to pay a fine of \$100, or suffer imprisonment for six months, prosecutes this appeal. It appears from the proceedings, made part of certain bills of exception, that he was married in New Orleans, where he then lived, and now lives, in October, 1908, and that he and his wife resided together in that city until September, 1909, when, on account of alleged ill treatment, she abandoned him and the domicile that he had provided, and took their minor child, then two months old, with her; that she, however, remained in New Orleans, and, in November, 1909, filed an affidavit, in the juvenile court, charging defendant with nonsupport of the child, upon which charge he was convicted and sentenced to pay alimony, for the child's support, at the rate of \$5 per week, which he paid until March, 1910, when his wife moved with the child to Baton Rouge, in order, as she says, to earn a livelihood and secure peace of mind; that in October, 1910, defendant, who appears to have made no payments after the hegira of his wife and child, applied to the court for a reduction in the amounts that he was ordered to pay, and they were accordingly reduced, from \$5, to \$3.50 per week, but were no more made after the reduction than before;

and, in October, 1916, the assistant district attorney for the parish of Orleans filed an information in the juvenile court, charging defendant with nonsupport of the child, as of date October 7, 1916, to which he pleaded that the court was without jurisdiction either to grant the alimony or to award the custody of the child to the mother, for the reason that both mother and child resided out of the parish of Orleans and in the parish of East Baton Rouge. After hearing evidence and argument, on October 18, 1916, the court overruled the plea to its jurisdiction, found defendant guilty, and ordered him to pay to the criminal sheriff \$10, upon the 1st and 15th of each succeeding month, for the support of the child (the same to be collected by the mother), that he be released on furnishing a bond conditioned that he would appear when required during the following year and would comply with said order, and that the mother have the custody of the child. Defendant applied for appeals both from the judgment overruling the plea to the jurisdiction and from that which followed, and, his applications having been denied on the ground that the judgments were not final, he excepted and offered bills for signature, which, upon the same ground, the judge refused to sign. He then gave notice of his intention to apply to this court for writs of certiorari, etc., but does not appear to have done so; and thereafter on November 9th, the assistant district attorney filed a rule, alleging that defendant had been ordered to pay alimony, as above stated, and had been discharged on his bond, upon his promise to comply with the order, but that he had failed and refused so to comply, and praying that he be required to show cause why the judgment of the court should not be executed against him. The rule was made returnable on November 13, 1916, and on that day defendant filed a plea to the jurisdiction, similar to that previously filed, which having been overruled, he reserved bills of exception that were subsequently prepared by his counsel and signed by the judge. The court, then, after hearing evidence and argument, ordered that the rule be made absolute, and that defendant be fined \$100, or imprisoned for six months, the fine, if paid, to go to his wife for the support of the child, and thereupon he took the appeal.

## Opinion.

The bills of exception last above mentioned reserved to defendant the benefit of his plea to the jurisdiction, and of his objection to the admission of evidence on the ground that the court was without jurisdiction. The question of jurisdiction is therefore the only one that it is necessary for us to decide. For a better understanding of that question, as here presented, it may not be unprofitable however, in considering the law which con-

fers jurisdiction on the juvenile court and the decisions of this court construing the same, to at least mention some other decisions concerning questions not included in defendant's bills.

Act 34 of 1902 makes "it a misdemeanor to desert or willfully neglect to provide for the support and maintenance by any person of his wife or minor children in destitute or necessitous circumstances," and provides a penalty therefor; and it contains certain provisions which authorize the court vested with jurisdiction in cases arising under it to deal with them tentatively, with a view, first, of determining whether the person charged therewith is guilty of the offense denounced by the statute (which, for brevity, we will call, "nonsupport"), and, next, if he be found guilty, of affording him an opportunity to do that which he offends by not doing and in the meanwhile to suspend the imposition of the penalty of fine and imprisonment provided by the statute. Thus the statute after defining the offense and fixing the penalty, reads in part:

"Provided that before the trial (with the consent of the defendant) or after conviction, instead of imposing the punishment hereinbefore provided, or in addition thereto, the court in its discretion having regard to the circumstances and financial ability of the defendant, shall have the power to pass an order, which shall be subject to change by it from time to time as the circumstances may require, directing the defendant to pay a certain sum weekly for the space of one year to the wife, and to release the defendant from custody on probation for the space of one year upon his entering into a recognizance, with or without sureties, in such sum as the court shall direct. \* \* \* If the court be satisfied by information and due proof under oath, at any time during the year, that the defendant has violated the terms of such order, it may forthwith proceed to the trial of the defendant under the original indictment, or sentence him under the original conviction, as the case may be. \* \* \*

The constitutional provisions creating the juvenile courts and conferring jurisdiction on them are found in article 118, Const. 1913, which, among other things, declares that:

"Sec. 3. Said court shall also have jurisdiction of all cases of desertion or nonsupport of children by either parent. \* \* \*

"Sec. 1. Appeals from the said court shall be allowed upon matters of law only and shall be direct to the Supreme Court."

The refusal of the court a qua to grant the appeals first mentioned in the foregoing statement of the case was therefore predicated upon the general rule that an appeal does not lie from an interlocutory judgment unless it works irreparable injury, and upon the above-quoted statute, as construed by this court in *State v. Mioton*, 112 La. 180, 86 South. 814, and other cases, in which it is held that the preliminary order, directing the defendant to make weekly payments, is not the final judgment in the case, and is not appealable. It may also be stated that it has been held by this court that Act 34 of 1902 contemplates that a man shall, at all times, provide for his wife and children in

destitute or necessitous circumstances, and that his neglect to do so, during a period of time not covered by a conviction already secured, is a distinct offense to which the plea of autre fois convict, predicated upon the prior conviction, is not good. In *re Baurens*, 117 La. 136, 41 South. 442. Coming now to the precise question to be here decided, it is (as we understand from the bills of exception), that the removal of defendant's wife, carrying the child, from the parish of Orleans to the parish of East Baton Rouge shifted the venue of the offense with which defendant is charged from the one parish to the other, and divested the juvenile court for the parish of Orleans of jurisdiction of the same. We take it, however, that the offense of deserting and willfully neglecting to provide for the support of a wife and child, as denounced by the act of 1902, is committed, not at that place to which the deserted wife and child may be compelled to go, by reason of such desertion and neglect, in order to obtain the means of livelihood, but at the place where the husband is to be found, when, and so long as, his desertion and neglect continues; for it is the desertion and neglect that constitutes the offense, and not the being deserted and neglected. When, therefore, the husband and father deserts his wife and child at the place of the matrimonial domicile, and they go elsewhere in order to obtain the means of subsistence which he has denied them at such domicile, there is no law which changes the venue of the offense and either deprives the one court of jurisdiction thereof or confers such jurisdiction on the other. Where the wife is compelled to leave the domicile of the husband by reason of ill treatment, she is at liberty to select a domicile for herself, and, if she is made the legal custodian of a minor child of the marriage, she may take the child with her, unless there is some prohibition or condition in the decree awarding her such custody which would prevent her from so doing; and she and the child continue to be the beneficiaries of the law, which requires the husband and father to provide for their support, wherever they may lawfully reside, and he remains liable for such support wherever he may remain or may choose to remove himself, within the reach of Act 34 of 1902.

In *State v. Baurens*, supra, it was said by this court:

"It is the duty of the husband and father to provide for the support of his wife and minor children, in necessitous circumstances, at the matrimonial domicile, and that obligation is not discharged if, by reason of his cruel treatment, the wife is compelled to find shelter, with her minor children, at the house of her father, in a neighboring parish, nor does any change of venue, as to the offense of neglecting to provide, etc., denounced by Act No. 34, p. 42, of 1902, result from that circumstance."

Counsel for the state cite also the cases of *Bayne v. People*, 14 Hun (N. Y.) p. 181; *State ex rel. Draker v. Bergen*, 36 Hun (N. Y.) 241;

State ex rel. Delevan v. Justus, 85 Minn. 115, 88 N. W. 415; Commonwealth v. Douglas, 2 Lanc. Law Rev. (Pa.) 179, in support of the proposition that neither the deserted wife nor the state can change the venue of the offense in question and confer jurisdiction upon the court of the place to which the wife may remove.

"That she cannot so do [said the court in State ex rel. Delevan v. Justus] is too obvious to justify any discussion of the proposition, for this case does not fall within the limited class of cases in which a party may become liable to punishment in a particular jurisdiction while his personal presence is elsewhere; for example, circulating a libel in a county in which he is not personally present. If the relator deserted his wife, abandoned her, and omitted to support her, such acts were done and omitted in the county of Hennepin [the county of his domicile], and not in the county of Ramsey [to which the wife had removed]."

We are therefore of opinion that there is no error in the judgment herein appealed from, and it is accordingly affirmed.

(140 La. 1069)

No. 21821.

EGAN v. SIGNAL PUB. CO.

(Supreme Court of Louisiana. Feb. 12, 1917.  
Rehearing Denied March 12, 1917.)

(Syllabus by the Court.)

**LIBEL AND SLANDER** §48(2)—**PRIVILEGE—CRITICISM OF PUBLIC OFFICER.**

There are many matters in which sharp differences of opinion arise between a public officer and his constituents, and, as he is charged with the responsibility of acting for them, his acts are open to their criticism, and such criticism should not be construed as a libel of the individual when conscientiously directed, not against him, or his motives, but against his acts and their effects.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 145.]

Appeal from Eighteenth Judicial District Court, Parish of Acadia; Wm. Campbell, Judge.

Action by William M. Egan against the Signal Publishing Company. Judgment for plaintiff, and defendant appeals. Judgment annulled, plaintiff's demand rejected, and suit dismissed.

Smith & Carmouche, of Crowley, for appellant. Philip S. Pugh, of Crowley, for appellee.

Statement of the Case.

MONROE, C. J. This is an action in damages for libel, in which the evidence discloses the following facts:

In May, 1909, during the administration of plaintiff's predecessor in the office of mayor of Crowley, the city council passed Ordinance 349, establishing a "restricted district." Plaintiff was elected in April, 1910. In April, 1912, an ordinance was introduced for the repeal of Ordinance 349, and failed of adoption, by a vote of four to five. At some time preceding an election, to be held in April, 1914, some of the opponents of the "restricted district" revived the agitation of

the question of abolishing it, and began to take steps to organize with a view to the election of a mayor and council who would make their opposition effective. Meetings were talked about, and perhaps held. A petition for the repeal of Ordinance 349 was prepared and signed by some 200 persons. An anti-administration ticket was in process of being made up for submission to the electors; and, either about that time or afterwards, notice was given of the intention to introduce another repealing ordinance. On the eve of the election, however, Mr. A. Reiber, one of the agitators, had a conversation with plaintiff, from which he derived the impression that, if they would withdraw their opposition ticket and not insist upon immediate action, but would wait until January 1, 1915, he (the Mayor) would, then, accede to their wishes and have Ordinance 349 repealed. There is some conflict in the testimony in regard to the understanding, or misunderstanding, that was reached, but it is shown beyond dispute that there was a conversation concerning which defendant, himself, testifies as follows:

"Q. And you also heard the statement he (Reiber) made, that you had agreed, in the presence of Mr. Burt, I believe, to abolish the red light district, provided no opposition was put up against you? A. I never made such a statement. \* \* \* Q. Do you remember anything about a conversation, held with Mr. Reiber in the mayor's office, in the presence of Mr. Underwood? A. Yes, sir. Q. Please explain what took place between you and Mr. Reiber at that time? A. I said I had no objection to their being there, or not being there; that I was not a party to the creation of the district; that it was put there before my time; and, I think, if I remember right, he made the statement that it should be abolished right now, and I said I would not consider it before January, 1915; and he spoke of a petition, and I said it was not necessary, so far as I was concerned, to have a petition, nor would it be. Q. Did you promise him, positively, that you would remove the district by January 1, 1915? A. No, sir; he promised to see me again, and he never came back."

It may be here remarked that this case was tried in 1915, and the evidence shows that plaintiff was, at that time, again before the people as a candidate for re-election to the office of mayor; that Burt, the then chief of police, was running on the same ticket; and that the candidate opposed to the mayor was J. W. Miles, the member of the council by whom the last-mentioned repealing ordinance had been introduced. Mr. Burt, called in rebuttal by plaintiff, gave testimony to the effect that the mayor made no promise in his presence to abolish the red light district, but that he (Burt) told Reiber that the mayor would do the right thing, provided he (Reiber) did not antagonize and keep annoying him; that he was satisfied that he would do the right thing; and further as follows:

"Q. You say that you were satisfied that he would do the right thing if he were not antagonized, and, if he were antagonized, he would not



do the right thing? A. I meant to say that he would remove the district. I meant that he would remove the district if he would be let alone, because he told me so; I had done asked, myself."

C. W. Underwood, also, called by plaintiff in rebuttal, gave the following testimony concerning the conversations between the mayor and Reiber to which the latter testifies, to wit:

"I was in there to see the mayor by invitation of Mr. Reiber. He was in there, and he asked the mayor what he intended to do about the red light district. That is how it started. And he said, 'Mr. Mayor, do you want me to get up a petition to present to you?' And he said, 'No, it is not necessary.' And he said that, in the event he should see fit, he would put them out of business on the 1st of January, if he did put them out at all, it was the middle of the summer then—I think it was then we were talking; and they went on talking, and he said that he would consider the matter, not from the standpoint of the petition, as suggested by Mr. Reiber, but, in the event that he did put them out of business, he would not do it before the first of the year, if he put them out at all. Q. Did he assign any reasons for his decision? A. He may have done so. I do not remember anything in particular; no, sir. Q. You are positive that he did not make any promise to put it out? A. He stated specifically, but he made no promise; he was willing to take the matter up with a few representative citizens, is the way I understood him."

Reiber, however, appears to have carried out what he supposed to have been the understanding, so far as he could. The petition was not presented to the council, and, among those with whom he was immediately associated, the opposition ticket idea was abandoned. There were others, however, who do not appear to have been governed by Reiber's advice, and were disposed to press matters to an early issue. The summer came on, the heat of the discussion rose with the temperature, and an effort was made to have the repealing ordinance passed at once, to take effect in January; but, while it was the custom of the council to hold its regular meetings monthly, that custom became, just then, more honored in the breach than the observance, and, though there seemed to be no difficulty about special meetings, no regular meeting (which was required for the purpose in question) was held between June and October; also, there were two vacancies, occasioned by resignations in the membership of the council, and no special elections were called to fill them, between June, 1914, and April, 1915. On October 8, 1914, a regular meeting was convened, the repealing ordinance was adopted, by a vote of four to three, the mayor vetoed it, and, on the following day, there appeared in defendant's newspaper, "The Daily Signal," an editorial containing a portion of the matter here charged to be libelous and reading, in part, as follows:

**"The Mayor's Veto.**

"Early in the summer, there was interest shown with reference to abolishing the red light

district, and Mr. J. W. Miles, alderman at large, gave notice of intention to introduce an ordinance to that effect, which he did, and it has been awaiting a regular meeting, at which it might be considered, until last night.

"For reasons best known to the opponents of the adoption of this ordinance, a period of four months elapsed without a regular meeting of the council. When the matter came up, Tuesday night, the vote stood, four for the adoption to abolish this plague spot and three to retain it. \* \* \* As to members of the council, the measure carried, but Mayor Egan vetoed the measure. We should like to know how Mayor Egan is going to square himself with the people on this matter. He had pledged himself to support a measure to remove the district at the close of the year, and, when the ordinance came up, regularly, received a majority vote, without the second ward having a representative present, Mayor Egan has the nerve to go back on his promise and veto the ordinance. How do you like that, good people? Do you approve of the action of this self-constituted champion of the red light?"

The matter set out in the petition as libelous is that beginning with the words, "As to members of the council," of which, "Do you approve the action of this self-constituted champion of the red light," are italicized, and it is alleged, concerning them, that:

They were "intended to refer, and did refer, to your petitioner as the champion of the 'red light,' to the knowledge of the readers of said paper; that the 'red light' was intended to apply to the restricted district in the city of Crowley; \* \* \* that the said false, scurrilous, defamatory, and malicious editorial was reproduced \* \* \* in the Crowley Signal, the weekly paper of the Publishing Company; and that said article was published in the said two newspapers aforesaid for the purpose of injuring, maligning, and libeling your petitioner in his official capacity of mayor of the said city, as well as for the purpose of injuring his private character."

Plaintiff also complains of passages in certain letters from correspondents, members of the clergy, mostly, that were published in defendant's papers within a week or ten days after the veto of the ordinance.

The matters charged as libelous in the letters, respectively, are (in one letter):

"We may well stand ashamed and aghast at the spectacle of any man or woman, especially those in authority, being a party to a district the shame of male and female alike."

In another letter:

"Now the die is cast, the Rubicon must be crossed. If the mayor pledged himself to support a measure to abolish the hell-hole, the skunk's resort, and, then, in the face of that pledge, and the majority of the council, deliberately vetoes the measure, I consider he has offered insult to the people he made the promise to and proposes to retain this cursed institution in our city in open defiance of the best people. Men and women of Crowley, do you stand for such? I think not. Shall we keep silent? Shall these four councilmen and the Signal stand alone in the fray? No, never. As a citizen, I shall speak out; as a Christian, I shall pray; and, as a preacher of the Gospel of Christ, I shall proclaim against such public or private injustice. As to the vice district (it is well named, for nothing else but vice is taught and practiced within its hellish domain), there is but one of two reasons why men want to keep it going. One is to make money. The other is that vile men may gratify their hellish lusts. As to the first mentioned, it occurs to me that,

if men want to maintain a vice district to make money, it would be nothing but fair for them to furnish the material from their own families with which to run the business. I am perfectly willing for any member of my family to give part of their time working in any institution that I support. I think men should put up the material or shut up their nonsense."

In a letter from a third correspondent, the paragraph complained of amounts to but an elaboration of the idea last above expressed.

On the trial of the case, the different writers, editorial and epistolary, disclaimed any intention of injuring the plaintiff, either in his official or personal character, and stated that their attacks were directed against the thing, institution, or whatever it may be called, which, by virtue of his veto, he had maintained in their midst. Considerable testimony was adduced by plaintiff on the subject of damages, but none were proved, and his re-election, after the trial, would seem to indicate that he has sustained none. Nevertheless, it was competent for the trial judge to assess and award damages, if he believed that plaintiff had been libeled. C. C. 2315, 1934.

#### Opinion.

1. We can discover no libel in the editorial. The ordinance, which, in effect, abolished the "restricted district," had been passed by a majority of the council, and it was within plaintiff's discretion to make it effective, by his approval, or to annul it, by his veto. He chose to annul it, and thereby left the "restricted district" to a continued existence. His complaint is that he was referred to in the editorial as the "self-constituted champion" of the "red light." "Red light" is merely another name for "restricted district." "Champion" is defined to be:

"(1) One who engages in any contest; a combatant; a fighter; esp. in ancient times, one who contended in single combat in behalf of another's honor, or rights, or sometimes, of his own; now, one who acts or speaks in behalf of a person, or a cause; defender; an advocate." Web. New Int. Dic.

Plaintiff therefore falls entirely within the definition of "champion," as the term is now used. He was of opinion that the maintenance of the "restricted district" was the proper, or better, method of dealing with an existing evil, and he acted in support of that "cause," or opinion, thereby maintaining it, successfully, which is something more than to have merely advocated it, and, as he did that of his own volition, he was a self-constituted champion.

2. Nor, can we discover any libel in the second matter of which plaintiff complains.

He was the mayor of the city, placed in that position by the people of the city; his official acts were those of the people, through their chosen representative; and, if those acts did not represent their views, or were not in their interest, it was their privilege to criticize them. If they believed that they

tended to vice and misgovernment, and hence were ashamed of them, they had the right to say so. Many people have, within the past year or two, expressed themselves as ashamed of the President of the United States, and of our country; some, because he has not involved us in war; others, because, it has looked, at times, as though we might become so involved. The words, "being a party to a district, the shame of male and female alike," as used in the paragraph under consideration, when considered with their context, mean nothing more than that plaintiff, by his vote, continued the "restricted district" in existence when it was within his power to have destroyed it; and, as he has been re-elected, with that issue presented to the people of Crowley, it would seem that the writer of the letter must now be ashamed of a majority of his fellow citizens. On the other hand, they may feel a sense of superiority upon the assumption that they are better informed and entertain more enlightened views than he, as to the subject under consideration, and feel ashamed of him. Who knows?

3. The next paragraph to be considered is more objectionable and makes unpleasant reading, but it will be observed that the writer of the letter, after expressing himself upon the subject of the mayor's veto, proceeds to give an opinion of mankind in general, including, perhaps, more particularly, the men of Crowley who were not in favor of abolishing the restricted district.

"There is but one of two reasons," he says, "why men want to keep it going. One is to make money. The other is that vile men may gratify their hellish lusts."

Which we take to be intended rather as a commentary upon the depravity of the average man, in which he should not be allowed to indulge himself, than as a libel upon the mayor. The writer of the letter believes, apparently, that a restricted district is, in effect, a means of propagating vice and not of segregating and dealing with an existing evil, and yet we are quite sure that he would be willing to admit that, whatever may be its practical operation, the intention is to segregate a certain class of vicious or unfortunate people, and thereby subject them, more conveniently, to control and perhaps protection, and thereby, also, the better to protect society from the influence of their more immediate presence. However that may be, we do not think the quoted expression can reasonably be considered as directed against the plaintiff any more than against any other man who may entertain a different view from that of the writer of the letter upon the subject of the policy and morality of establishing a restricted district. And the same thing may be said of the remainder of the quoted language, consisting of a mere argument ad hominem equally unconvincing and offensive, but not libelous, and of the last publication mentioned in the preceding statement of the case.

In justice to the plaintiff, we may say that, while the revenue derived by the city was an element that was considered by him in his veto of the repealing ordinance, his main reason for the veto was that he believed segregation and regulation was much better than to have "that class of people" all over the town, or as he says in another place:

"I have seen it tested here, and, after considering the matter, I decided that the regulation was the best solution of the question. It was better to have them all together, and you could know what was going on and keep them straight, than to have them all up and down the street."

There are many matters in which sharp differences of opinion arise between a public officer and his constituents, and, as he is charged with the responsibility of acting for them, his acts are open to their criticism, and such criticism should not be construed as a libel of the individual, when conscientiously directed, not against him or his motives, but against his acts and their effects.

In our opinion, the criticism of which plaintiff complains is of the character thus indicated and furnishes no basis for this action.

It is therefore ordered that the judgment appealed from be annulled, that plaintiff's demand be rejected, and that this suit be dismissed, at his cost in both courts.

(140 La. 1078)

No. 21904.

CITY OF SHREVEPORT v. SOUTHWESTERN GAS & ELECTRIC CO.

(Supreme Court of Louisiana. Feb. 12, 1917. Rehearing Denied March 12, 1917.)

(Syllabus by the Court.)

1. STATUTES §181(1), 183, 188—CONSTRUCTION—OBVIOUS INADVERTENCE—PRESUMPTION.

Occasions may now and then arise when, from the necessity to make particular statutes intelligible and operative, courts will correct or ignore obvious inadvertences therein, but it should never be forgotten that the power to make the laws is not vested in the judiciary; that, when the department in which that power is vested has expressed itself in unambiguous language, the presumption arises that it intended that which the language imports, and that in this state it has prescribed for the judiciary and for the public at large a rule of interpretation which is expressed in language of that character.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 261, 266, 267, 276.]

2. ASSIGNMENTS §24(2)—ASSIGNMENT OF CLAIM FOR PERSONAL INJURIES—PUBLIC POLICY.

The public policy of a state is determined by its laws, and, where a statute has been enacted authorizing an injured employé to subrogate his employer to his right of action in damages against a third person through whose fault the injury was inflicted, and another statute has been enacted authorizing his widow, in the event of his death from injury, to assign her claim for such damages and for the damages resulting to her from his death, or such proportion thereof as may be agreed on, to the attor-

ney whom she employs for its collection, it cannot be said that she offends against such public policy by making a similar assignment to some one else, under conditions which may, perhaps, be more favorable to her.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 43.]

3. CONSTITUTIONAL LAW §70(3)—JUDICIAL DEPARTMENT.

This court is not charged with the function of determining either the morality or the expediency of legislation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131.]

Appeal from First Judicial District Court, Parish of Caddo; R. D. Webb, Judge.

Action by the City of Shreveport, subrogee, against the Southwestern Gas & Electric Company. Exception of no cause of action sustained, and suit dismissed, and plaintiff appeals. Judgment annulled, and cause remanded.

Murff & Roberts, of Shreveport, and J. C. Henriques, of New Orleans, for appellant. Alexander & Wilkinson and E. W. & P. N. Browne, all of Shreveport, for appellee.

MONROE, C. J. Plaintiff has appealed from a judgment sustaining an exception of no cause of action and dismissing its suit.

The petition alleges, in substance, that Crayton Williams was employed by plaintiff as a fireman, and on February 5, 1915, in the discharge of his duties, attended a fire, at which he lost his life by coming in contact with a heavily charged electric wire owned or controlled by defendant, and, through defendant's gross negligence, allowed to remain exposed and uninsulated; that he left a widow and a minor child who had been dependent on him for support, to whom, by reason of the facts stated, the defendant herein became indebted in the sum of \$15,000, and to whom petitioner owed compensation as provided by Act No. 20 of 1914, the amount of which, having been fixed by judgment, has been, and is still, regularly paid; that, according to the provisions of said act and by reason of said judgment, petitioner has been legally subrogated to the right of said widow individually and as tutrix with respect to the debt due by defendant, and has moreover been so subrogated by virtue of a notarial contract of date March 16, 1915. Wherefore it prays that defendant be cited and for judgment in the sum of \$15,000.

Act No. 20 of 1914 is entitled:

"An act prescribing the liability of an employer to make compensation for injuries received by an employé in performing services arising out of and incidental to his employment in the course of his employer's trade, business or occupation in certain trades, business(es) and occupations, abolishing in certain cases the defenses of assumption of risk, contributory negligence and negligence of a fellow servant in actions for personal injury and death, establishing a schedule of compensation, regulating procedure for the determination of liability and compensation thereunder and providing for methods for payments of compensation thereunder."

The text of the act comports with the title, and, taking the two together, they disclose the object to be to provide that in certain classes of employments and industries and under certain conditions the employer shall make compensation when the employé is injured; and, as it contemplates the making of the compensation as well when the employé dies of his injury as when he survives, it follows that the conditions and regulations with respect thereto were in all probability intended to be applied in the one case to the injured employé, and in the other to those who survive him and succeed to his rights. It will be observed that the words "injury and death" are associated in the title of the act, and elaborate provision is made in the text for the payment of the compensation therein contemplated to the dependents of the injured employé after his death; the remedies afforded to the one being, as a rule, the same as those afforded to the other. The parties to whom the act applies are variously referred to therein as "the employer," "the employé," "the interested parties," "the person to whom compensation is due," "the dependents," "the representatives," etc. Most frequently, no doubt, where employer and employé and the dependents of the latter are intended, it is so expressed, but there are many instances in which the intention to include the dependents is obvious enough, and yet they are not mentioned.

Thus section 17 provides that "the interested parties" (meaning the employer, the employé, and the dependents of the latter) shall have the right to settle all matters of compensation between themselves, but that their agreements shall be in writing and approved by the judge. It then declares that "the agreements between employer and employé shall be presented to the court upon joint petition of employer and employé," thus entirely ignoring the dependents of the employé. Section 18 provides that, in case of failure of employer and employé or dependents of employé to agree upon a claim for compensation, either party may present a complaint to the judge, but section 19 declares that "either employer or employé shall have the right to appeal to the proper appellate tribunal," and plaintiff's counsel call attention to eight other instances of a similar character. The provision of the statute upon which this controversy appears to hinge is the following:

"Sec. 7. \* \* \* That, when an injury for which compensation is payable under this act shall have been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employé may, at his option, either claim compensation under this act or obtain damages from, or proceed at law against, such other person to recover damages, and, if compensation is claimed and awarded under this act, any employer, having paid the compensation or having become liable therefor, shall be subrogated to the rights of the injured employé to recover against that person, and may compromise the claim therefor in his discretion:

Provided, if the employer shall recover from such other person damages in excess of the compensation already paid or awarded to be paid under this act, then any such excess shall be paid to the injured employé, less the employer's legitimate and reasonable expenses and costs of the action, which payment shall be credited upon the balance of compensation, if any, that may become due thereafter."

The contention of the defendant is that, whilst the section thus quoted provides that the employer who pays compensation to an injured employé shall be subrogated to the rights of such employé with respect to his claim against the third person who might be liable in damages for his injury, it does not so provide with regard to the claim of the employé's dependents, which is quite true. But neither does the quoted section provide that the dependents shall have the option, in case the injuries of the employé result in his death, of claiming compensation from the employer, under the act, or claiming damages from the "other person" through whose fault the injury to the employé may have been inflicted, and yet the act declares that for injury causing death within a year payment of compensation shall be made to those wholly dependent and to those partially dependent upon certain bases; that the wife and certain others shall be presumed to have been wholly dependent, that in other cases the matter shall be determined by the facts, and that the dependents shall have the right to present their claims to the judge, and, in general, confers upon the dependents about the same rights, to be exercised after the death, that the employé may exercise before his death, and C. C. 2315, confers on the wife and children and brothers and sisters of the decedent the right of action in damages that he may have possessed at the time of his death, and also the right to sue for such damages as they may have sustained by reason of his death. Section 7 appears, therefore, to have been equally unnecessary to either the employé or his dependents, so far as the option is concerned, and is important only with reference to the subrogation.

Upon that point it may reasonably be inferred that, in enacting a statute under which an employer may be held liable to the employé for the fault of a third person over whom he (the employer) has no control, it was thought advisable to make some provision whereby that burden might be shifted to the shoulders of the person really at fault, though it was not thought advisable either to relieve the employer of the obligation to make compensation to the employé or to give the latter an action under the statute in addition to that given by the Code. On the other hand, it was clearly the proper thing to provide against the employer's making a profit out of the transaction by collecting more than he was required to pay out. The idea that was adopted, therefore, was to allow the employer to recoup himself and to require him to pay over to the employé what-

ever amount he might be able to collect from the party at fault in excess of that required to make him whole; and, as his liability to the dependents of the injured employé who dies is the same as his liability to the injured employé who survives, there appears to us to be no conceivable reason why he should not be allowed the same subrogation in the one case as in the other. Section 7, however, is an exceedingly important one, and we feel bound to assume that it was fully considered, and that the lawmakers found reason, though it is not apparent to us at this time, for according to the employer the right of subrogation to the injured employé's claim and for denying that right as to the claim of his dependents; and as the fact is that the section does not provide for the subrogation of the employer to the rights of the dependents, we do not feel authorized to substitute our view of what may have been intended for what was actually done or left undone. The conclusion thus reached seems all the more inevitable in this case when we consider section 34 of the statute in question, which reads:

"That the rights and remedies herein granted to an employé on account of a personal injury for which he is entitled to compensation under this act shall be exclusive of all other rights and remedies of such employé, his personal representatives, dependents, relations, or otherwise, on account of such injury."

One of the rights granted to the employé is that of subrogating his employer to his right of action against the person through whose fault he was injured, and whilst the literal interpretation of section 34 must, no doubt, in some other respects yield when construed with other provisions of the statute, there is nothing to prevent its being interpreted as written so far as the right thus mentioned is concerned.

[1] Occasions may now and then arise when, from some necessity to make particular statutes intelligible and operative, courts will correct or ignore obvious inadvertences therein, but it should never be forgotten that the power to make the laws is not vested in the judiciary, that, when the department in which that power is vested has expressed itself in unambiguous language, the presumption arises that it intended that which the language imports, and that in this state it has prescribed for the judiciary and the public at large a rule of interpretation which is expressed in language of that character, to wit:

"When a law is clear and free from all ambiguity, the letter of it is not to be disregarded under pretext of pursuing the spirit." C. C. 13. *Walker v. S. & P. Railroad Co.*, 110 La. 718, 84 South. 749.

[2] We are of opinion, however, that plaintiff is subrogated to the rights of the widow as set forth in the notarial contract, made part of the petition, though we express no opinion in regard to the rights of the minors of whom she is natural tutrix. Counsel for

defendant argue that no such assignment or subrogation can be sustained, for the reason that (quoting from the syllabus of their first brief):

"Both at the civil law and at the common law, the assignment, transfer, sale, subrogation, or any other form of alienation of an action for personal injuries is reprobated as being against public policy and good morals."

The learned counsel seem to forget that the public policy of a state is determined by its laws, and to ignore the fact that the statute here in question authorizes an injured employé to subrogate his employer to his right of action for damages against the person through whose fault he was injured.

And we may also call their attention to Act No. 124 of 1906, amending and re-enacting R. S. 2897, and providing:

"That, by written contract, signed by the client, attorneys at law may acquire as their fee in such matter an interest in the subject-matter of the suit, proposed suit or claim, in the prosecution \* \* \* of which they are employed, whether suit or claim be for money or for property, real, personal or of any description whatever."

If, then, according to the authoritatively declared public policy of the state, an injured employé may assign his claim for the damages resulting from such injury to his employer, and his widow may assign her claim for such damages, and for the injuries inflicted upon her in the event her husband dies of such injuries (as provided by C. C. 2315), or such proportion thereof as may be agreed on, to the attorney whom she employs for its collection, how can it be said that she offends against such public policy by making a similar assignment to some one else, under conditions which may, perhaps, be more favorable to her?

[3] As to the moral aspect of the case, this court is not charged with the function of determining either the morality or the expediency of legislation, but in answer to the suggestion of counsel will venture to say that it discovers no immorality in a contract the apparent purpose of which is to relieve a person who has not incurred a debt from the obligation of paying it and to shift that burden to the shoulders of the real debtor (not that we are saying that the counsel's client is the real debtor in this case, but, as the suit has been dismissed on an exception of no cause of action, we must proceed upon that theory). Our conclusion then is that there was error in the judgment appealed from, and it is therefore annulled, and the case is remanded to be proceeded with according to law and the view expressed in this opinion, the costs of the appeal to be paid by defendant, and those of the trial court to await the final judgment.

O'NIELL, J., concurs in the decree, but is of the opinion that subrogation took place as a matter of right to the extent of the payment made by the city, under the provisions of the Civil Code, art. 2161.

(140 La. 1086)

No. 22327.

## STATE v. BALLOU.

(Supreme Court of Louisiana. Feb. 12, 1917.  
Rehearing Denied March 12, 1917.)

(Syllabus by the Court.)

## 1. CRIMINAL LAW §1186½(12)—TRIAL—REMARKS OF TRIAL JUDGE.

When the trial judge during the course of the trial, in the presence of the jury, makes remarks prejudicial to the accused or his witnesses, the verdict will be set aside.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3125.]

## 2. CRIMINAL LAW §600(1) — TRIAL — EVIDENCE OF ABSENT WITNESSES.

Where a defendant in a criminal case asks for a continuance on the ground of the absence of important and material witnesses, and the district attorney admits that if the witnesses were present they would testify as indicated in the motion for a continuance, the prosecuting attorney cannot withdraw his admission, after the evidence is all in; and the trial judge must permit the statement to be read to the jury, although it may be cumulative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1342, 1345, 1804.]

Appeal from Fifteenth Judicial District Court, Parish of Jefferson Davis; Alfred M. Barbe, Judge.

Ed. Ballou was convicted of shooting with intent to kill, and he appeals. Judgment reversed, and case remanded.

John J. Robira, of Jennings, for appellant. A. V. Coco, Atty. Gen., T. Arthur Edwards, Dist. Atty., and J. H. Jackson, Asst. Dist. Atty., both of Lake Charles (Vernon A. Coco, of Marksville, of counsel), for the State.

SOMMERVILLE, J. Defendant was charged with shooting with intent to kill and murder. He was convicted of shooting with intent to kill, and he has appealed from the verdict and sentence.

Appellant depends upon two bills of exceptions, wherein it is shown that the judge made a remark affecting the credibility of one of defendant's witnesses; and upon the refusal of the judge to permit defendant to offer in evidence the written admission made by the district attorney on the trial of a motion for a continuance, as to what certain absent witnesses would testify to, if they were present on the trial of the cause.

[1] It appears from the bill of exceptions and the per curiam of the judge that defendant produced a witness, who said that he could not speak English, and who asked to be questioned in French; and that the judge remarked, in the presence of the jury:

"If he (referring to the witness) was at the end of his rope he could speak English."

It is not clear what the judge meant by the remark made by him; but it is certain that he reflected on the credibility of the witness, and that he had no right to do so. The remark made was prejudicial to the accused,

and the case will be remanded for a new trial. The judge should not comment on the credibility of a witness or on the evidence in the course of the trial of a criminal case. These are matters entirely within the province of the jury, and not of the judge.

[2] The other bill of exceptions is taken to the ruling of the court in excluding from the jury the admission by the district attorney that a certain absent witness would, if present, testify in a certain way.

The law provides:

"That in all criminal cases, whenever either the state or the defendant asks for a continuance on the ground of the absence of an important or material witness, the other shall be entitled to an immediate trial on admitting that if said \* \* \* witness were present, that he would testify as stated in the affidavit made for a continuance, but in no case shall either the state or defendant be required in order to get a trial to admit that the statements made in the affidavit \* \* \* are true." Act 84 of 1894, p. 117.

The district attorney states:

"The admission was made on the affidavit of accused that he had no other witness by whom he could prove the fact set out in the motion for a continuance, and counsel for defendant stated in open court that this was a fact. Accused regularly called as a witness in his behalf one Philogene Cole, who was present at the scene of the difficulty and testified to the fact set out in the motion for a continuance. The evidence of the absent witness was purely cumulative. To hold that under the circumstances the evidence should have been admitted would have the effect of allowing an accused to perpetrate a fraud upon the court."

And the court, in its per curiam, says:

"The statement of the district attorney is correct. Other witnesses offered by the defendant testified to the fact set out in the motion for a continuance. The rule otherwise would be to put the state at the mercy of the defendant in the matter of continuances."

The motion for a continuance made by the defendant, based on the absence of two material witnesses, contains a synopsis of the evidence which the two witnesses would swear to respectively; and the evidence is shown to be material. After having agreed to admit the testimony of the absent witnesses, if the trial should be proceeded with, the district attorney should not have objected to the reading of the statement to the jury. In the case of State v. Washington, 136 La. 855, 67 South. 930, the court say:

"The prosecuting attorney has no right to withdraw his admission after the evidence is all in."

It may be, as stated by the district judge, that the evidence was cumulative, and other witnesses had testified to the same thing. This very cumulation of witnesses and evidence may have been sufficient to have altered the verdict in this case. The jurors are the sole and exclusive judges of the sufficiency of the evidence pertaining to the guilt or innocence of the accused and the judge cannot pass upon it.

In the case of State of Louisiana v. Joe

Glover, recently decided, 140 La. 726, 73 South. 843, the court held, on the trial of a motion for a new trial on the ground of newly discovered evidence where such evidence did not appear to be incredible to the trial judge, and where it was shown to be material and important to the main issue in the case:

"The trial judge was not justified in refusing the new trial, either because the evidence was cumulative or because he did not believe that it would have had sufficient weight to have produced a different verdict if it had been heard by the jury."

And, in this case, the trial judge was not justified in refusing to permit the evidence referred to, which the district attorney had previously agreed should be admitted, to go to the jury.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; and that this case be remanded to the district court to be there regularly proceeded with.

(140 La. 1090)

No. 20575.

RISER v. RISER.

(Supreme Court of Louisiana. June 30, 1916.  
On Rehearing, March 12, 1917.)

(Syllabus by the Court.)

1. PARTNERSHIP ⚡306 — ACCOUNTING — CREDIT.

In organizing a partnership to conduct a sawmill business, one of the partners sold his standing timber to the firm. In the final settlement and liquidation of the partnership affairs, it developed that the other partner understood that the timber was sold at a price less than the price which the vendor believed he was to receive for it. *Held*, the vendor of the timber is entitled to credit for its actual value, not to exceed the price he understood he was to receive.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 702, 703-705.]

On Rehearing.

2. PARTNERSHIP ⚡304 — ACCOUNTING — CLAIMS.

A statement made by an accounting partner, as the basis of a settlement with his copartner, which purports to show all receipts and disbursements, and, among the latter, the payment of a claim for money borrowed by the accountant and advanced to the firm, should also show the receipt of the money by the firm; but where the fact that the money was so borrowed and so advanced is otherwise made to appear, the claim may be allowed.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 701, 702.]

Appeal from Fourth Judicial District Court, Parish of Lincoln; John B. Holstead, Judge.

Action by Adam Riser against Melvin Riser for an accounting of partnership funds. Judgment for plaintiff, the amount of which was modified on defendant's motion for a new trial, and defendant appeals. Judgment amended, and, as amended, affirmed.

Howard B. Warren and Price & Price, all of Ruston, for appellant. J. S. Atkinson, of Shreveport (Freidrichs, Moise, Barksdale & Barksdale, of New Orleans, of counsel), for appellee.

O'NIELL, J. This is an action for the dissolution and liquidation of a commercial partnership and a final settlement of its affairs. The plaintiff and defendant, who are brothers, were the only members of a commercial firm operating a sawmill in the name of the Ruston Milling Company, which ceased to be a going concern in or about the year 1907. The members divided the funds and other assets of the partnership, retaining as partnership property the idle sawmill and planing mill machinery and equipment. Thereafter the defendant bought in his own name a tract of standing timber near the sawmill, at the price of \$2,000, for which he gave his four promissory notes of \$500 each. The defendant sold the timber to a firm styled Scott & Robinson; and the Ruston Milling Company sold its sawmill and planing mill to Scott & Robinson. Robinson was succeeded by one Gandy; and the new firm, styled Scott & Gandy, proceeded to manufacture into lumber the timber bought from the defendant. They paid to the defendant, for the Ruston Milling Company, \$200 on account of the purchase price of the sawmill machinery, and sold some of the planing machinery, for which they received in payment or part payment two promissory notes of \$268 each, which were also turned over to the defendant in part payment of the debt due to the Ruston Milling Company. They also paid to the defendant \$500 in part payment of the price of the timber they had bought from him, with which the defendant paid one of the notes due on the timber, leaving a balance of \$1,500 to be paid. Thereafter Scott & Gandy failed in business. The Ruston Milling Company sued Scott & Gandy to collect the balance due for the machinery they had sold, obtained judgment, and seized and bought in the sawmill machinery for two-thirds of its appraised value (\$660) in satisfaction or part satisfaction of the debt due by Scott & Gandy to the Ruston Milling Company. The defendant brought suit against Scott & Gandy for the balance due on the timber, obtained judgment, and seized and bid in the timber for \$1,000, two-thirds of its appraised value, in part satisfaction of the debt due him. The plaintiff and defendant resumed their partnership relations; and, under the defendant's management, began manufacturing into lumber the remaining timber that the defendant had recovered from Scott & Gandy. It appears that the defendant understood that the firm would assume the payment of the three notes of \$500 each, which he owed for the timber. On the other hand, it appears that the plain-

tiff was under the impression that the firm would pay the defendant only the price at which the defendant had bid in the timber at the sheriff's sale in the suit of *Melvin Riser v. Scott & Gandy*. This misunderstanding as to the price at which the firm took over the defendant's timber gave rise to the most serious contention in the final settlement of the partnership. The mill was operated by the defendant as managing partner of the reorganized firm about a year and a half.

In his answer to this suit for an accounting of the funds received by him as managing partner, the defendant filed a statement showing receipts and disbursements amounting to \$16,731.11, and representing the plaintiff to be indebted to the firm in the sum of \$163.08. The trial, involving only questions of fact and figures, resulted in a judgment fixing the indebtedness of the defendant to the plaintiff at \$1,437.78. On motion of the defendant a new trial was granted, which resulted in a judgment fixing the defendant's indebtedness to the plaintiff at \$839.69. The defendant appealed, and the plaintiff has answered the appeal, praying that the judgment be amended by increasing the amount to \$5,115. In his brief, however, he only claims that the judgment should be increased to \$2,004.48. The defendant contends that the amount of the judgment should be reduced to \$82.38.

[1] The first item on the account complained of by the plaintiff represents the price paid for the timber taken over by the firm from the defendant, with interest, \$1,781.27. The district court reduced this credit on the defendant's account to \$1,000, the price bid by the defendant for the timber at the sheriff's sale in the suit against *Scott & Gandy*. In this we think the court erred. In the absence of a mutual agreement as to the price at which the timber was taken over by the firm, the plaintiff is entitled to credit for its value; and the evidence discloses that it was worth all, if not more than, the defendant has taken credit for. The firm got more than 1,000,000 feet of timber from the land. The plaintiff testified that it was worth only \$1 per thousand feet, and the district judge put that value on it. Other witnesses, however, fixed the value at from \$2.50 to \$3 per thousand feet. The price for which the defendant has taken credit made the timber cost the firm about \$1.64 per thousand feet, which is less than the testimony warrants. Besides, it appears that the firm sold some hardwood and cypress off of the land, for which the firm received \$380; hence the timber made into lumber cost the firm approximately only \$1.40 per thousand feet. There is no good reason why the defendant should only have credit for the price at which he bid in the timber at the sheriff's sale of the property of *Scott & Gandy*, because that price did not represent the cost of the timber to the de-

fendant, and did not represent its true value. In respect to that item, the defendant's account is correct.

An item of \$680, paid by the defendant to a Mrs. Finley, in the list of disbursements on the defendant's account, was properly rejected by the court. The defendant borrowed the amount personally, and claims that he used it for the benefit of the firm; but his accounts do not show that the firm received the proceeds of the loan. Another item of \$50 for interest paid on this debt with the firm's funds was also properly rejected.

The defendant failed to charge himself with the \$200 collected from *Scott & Gandy* as a part of the price of the machinery sold by the firm; and his account must be corrected in that respect.

He took possession of 200,000 shingles, for which he owes a balance of \$532.12. He has also failed to charge himself with the following collections of debts due to the firm: From the Foster-Tignor Company, \$146.90; from Swartz Lumber Company, \$250; from Ruston Manufacturing Company, \$175.55; and from D. J. Hall, \$139.

The defendant paid with the firm's funds the costs of court and attorney's fees incurred in his suit against *Scott & Gandy*, as well as the costs and attorney's fees incurred in the suit of the partnership against *Scott & Gandy*. The total amount of costs and fees paid was \$225.80. The costs and fees incurred in the plaintiff's suit were not partnership debts. In the absence of an itemized account of the costs and fees in each suit, we will amend the account by charging to the defendant one-half of the total costs and fees paid, as demanded by the plaintiff.

The defendant has taken credit for an item of \$30 paid for cutting timber for the firm. The record shows that the amount was paid with a check on the firm's bank account; hence the defendant is not entitled to the credit.

An item of \$64 which had been deposited with the old firm to secure it against loss on a bond signed for the depositor was returned by the defendant after the reorganization of the firm. It was properly paid with the firm's funds.

The plaintiff complains of several credits amounting to \$379.50, because the checks representing them were drawn, in some instances, to the order of the defendant, and, in other instances, to the order of the firm, for expenses; but we conclude from the evidence that the amounts were disbursed for firm debts and expenses, and that the account in that respect is correct.

The evidence shows that the plaintiff owes the firm, for collections of firm debts from Wilkes, Calcote, and Skinner, \$75.50; and that the plaintiff is entitled to credit for \$190 for rent of a team of mules. The plaintiff also owes the defendant for house rent \$180, for which the defendant retained funds



due the plaintiff by the partnership. Although this is not strictly speaking a partnership debt, both parties agree that it shall be treated as such in this final settlement of their differences.

Recapitulating, therefore, the account rendered by the defendant must be recast by charging him with the following items, viz.:

Personal debt and interest paid to Mrs. Finley .....	\$ 710 00
Amount collected for machinery.....	200 00
Value of shingles received.....	532 12
Collection from Foster-Tignor Company...	146 90
Collection from Swarts Lumber Company...	250 00
Collection from Ruston Mfg. Company.....	175 55
Collection from J. D. Hall.....	129 00
Costs in suit against Scott & Gandy.....	112 90
Amount paid for cutting timber.....	20 00

Amount due firm..... \$2,296 47

The plaintiff's account with the firm must be revised as follows, viz.:

To balance shown on account.....	\$ 163 08
To collections of firm debts.....	75 50

By rent of mules..... \$ 238 58  
190 00

Balance due firm.....	\$ 48 58
Amount due by defendant to firm.....	\$2,296 47
Amount due by plaintiff to firm.....	48 58

Difference due by defendant to firm....	\$2,247 89
One-half due by defendant to plaintiff.....	\$1,123 94
Rent due by plaintiff to defendant.....	180 00

Net balance due by defendant to plaintiff \$ 943 94

For the reasons assigned, the judgment appealed from is amended by increasing the amount to \$943.94, and, as thus amended, it is affirmed at the cost of the appellant.

#### On Rehearing.

MONROE, C. J. [2] The rehearing was granted for the correction of an error, alleged to have been committed by the court, in rejecting defendant's claim of credit for an item of \$660 (included in an item of \$710, appearing in our recapitulation as "Personal debt and interest paid to Mrs. Finley," and in holding that defendant's account does not show that the firm received the proceeds of the loan thereby represented. The item represents the repayment (with interest) of \$600 borrowed by defendant from Mrs. Finley about the time of the formation of the partnership and deposited in bank to his individual credit, but expended, as he testifies, in paying the expenses incident to the starting of the business. Defendant admits, and his account shows, that the amount in question was repaid from the funds of the firm, but, although he testifies to its having been borrowed, deposited, and expended as stated, his account fails to show that the firm ever received the money. Upon the face of the account, therefore, it does not appear that Mrs. Finley was a creditor of the firm with respect to the item in question, nor, in fact, was she; and the error that has been committed is not properly attributable to the court but was committed by defendant

in the preparation of the account which he is offering as the basis for a settlement with plaintiff, and which consists, in part, of a certain exhibit A, purporting to show "total receipts from every source by the Ruston Milling Company" (that being the title under which the "firm" conducted its business), "from March, 1908, to February, 1909," but which does not show the receipt of the \$600, either from Mrs. Finley or from the defendant. Concerning that error, defendant's counsel offer the following explanation, to wit:

"When this new firm began business, in March, 1908, it had no money or credit. Melvin Riser went to Mrs. Finley and borrowed \$600 upon his individual note, and secured it with a mortgage on his individual property. The new firm had no bank account, and they had not decided in what name they would operate. Melvin Riser placed this money in the bank in his own name. During the continuation of the business, he paid, out of his private funds, for the firm's account, \$1,613.29, as shown by Exhibit B, to his statement. But, as \$600 of the money expended was the money borrowed from Mrs. Finley, he paid the note and interest due her out of the firm's funds, on March 24, 1909, and, instead of charging the firm with \$1,613.29, paid out of his individual account, he only charged the firm with \$1,013.29, which appears plainly on the recapitulation, Exhibit F, to the account. In other words, he treated \$600 of the money checked out of his individual account as the firm's money, and let the firm assume the obligation given when it was borrowed, all of which the complaining partner knew, or had the opportunity to know."

But neither the complaining creditor nor the courts, nor, we venture to say, the most accomplished bookkeeper, could ever have arrived at the explanation thus offered from the account which shows, clearly, and is corroborated by defendant's testimony, that the \$660 was paid to Mrs. Finley by the firm, and not by defendant, and that the \$1,613.29 with which he credits himself, as having been paid in behalf of the firm, was made up of other items, not including the amount so paid to Mrs. Finley. The correctness of those items is not, however, disputed, and it is true, as stated by counsel, that while Exhibit B shows payments made by defendant for account of the firm to the amount of \$1,613.29, Exhibit F (purporting to be a recapitulation of the totals shown by the other exhibits) shows "total expenses paid by M. Riser, personally, \$1,013.29," thus making a difference to defendant's prejudice of \$600, and amounting to the same thing as though that amount had originally been entered on the account as having been received by the firm through defendant from Mrs. Finley, and the \$1,613.29 advanced by him had been carried into the recapitulation without reduction. The question of plaintiff's liability for his proportion of the interest that appears to have been paid upon the loan is not raised, and we conclude that defendant should be allowed credit for the \$660.

In granting the rehearing, the inquiry was restricted to the item thus referred to; hence

we are hardly at liberty to consider the \$50, which is added thereto (making up the \$710 appearing in our recapitulation). We may say, however, that though that item may possibly be connected with another loan from Mrs. Finley, the testimony of defendant is so unsatisfactory that we should not be disposed to change our ruling concerning it, even if we felt at liberty so to do.

For the reasons thus assigned, it is ordered that the decree heretofore handed down be amended by reducing the amount of the award in favor of plaintiff from \$943.94 to \$283.94, and, as thus amended, reinstated and made the final decree in the case.

SOMMERVILLE, J., takes no part.

(140 La. 1098)

No. 20772.

DOUGLAS et al. v. NICHOLSON et al.

(Supreme Court of Louisiana. Dec. 11, 1916.  
Rehearing Granted March 12, 1917.)

(Syllabus by the Court.)

1. ESTOPPEL  $\S$  68(1) — PLEADING  $\S$  229 — ADMISSION—AMENDMENT—CHANGING POSITION.

A judicial admission cannot be denied or retracted to the prejudice of the adverse party, nor will a party be permitted to shift his position at will to a contradictory one in relation to the subject-matter of litigation to defeat the action of the law upon it.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig.  $\S$  165, 167; Pleading, Cent. Dig.  $\S$  591.]

2. HUSBAND AND WIFE  $\S$  252—COMMUNITY—HOMESTEAD—PUBLIC LANDS.

Where a United States homestead entry was perfected by the entryman furnishing the final proofs required by law to entitle him to a patent for 100 acres of land, and the United States commissioner held up the patent because a more recent survey showed an acreage of 100.48 acres, and the entryman died before paying for said fraction of an acre, which, however, was paid for shortly after his death, and the patent thereupon issued in the name of the original entryman, *held*, that the homestead did not become the separate property of the surviving wife, but fell into the marital community.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig.  $\S$  895.]

3. HUSBAND AND WIFE  $\S$  179—WIFE'S SEPARATE ESTATE—ALIENATION.

Before the passage of the recent statute (Act No. 84 of 1916) a married woman had no capacity to alienate or incumber her separate property without the authorization of her husband or of a competent court.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig.  $\S$  711, 939.]

4. ESTOPPEL  $\S$  29(1) — GRANTEE — WIFE'S SEPARATE ESTATE—SUIT TO ANNUL.

Where a married woman sued to annul a sale of her separate real estate, on the ground that she had not been authorized by her husband or by a competent court to make such alienation, *held*, that the purchaser as a defendant in a petitory action could not dispute her title.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig.  $\S$  69-71, 73.]

5. ESTOPPEL  $\S$  32(1) — WIFE'S SEPARATE PROPERTY—ALIENATION—PETITORY ACTION.

Where the defendant in a petitory action is estopped to dispute the heirship of a widow, one of the plaintiffs, and the exclusion of her co-plaintiffs would make her the sole owner of the property in dispute, *held*, that defendant had no legal interest in contesting the status of the coplaintiffs.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig.  $\S$  81.]

O'Neill, J., dissenting in part.

Appeal from Thirtieth Judicial District Court, Parish of La Salle; George Wear, Sr., Judge.

Petitory action by Sallie Douglas and others against George R. Nicholson and others, and in which Sallie Douglas sued to annul a sale of her interest in a tract of land to George R. Nicholson. Judgment for plaintiff declaring the sale from Sallie Douglas to George R. Nicholson to be void, and judgment for defendants against plaintiffs in solido for a certain amount, and plaintiffs appeal. Judgment reversed in part and amended, and, as reversed in part and amended, affirmed.

Henry Moore, of Texarkana, Ark., and H. H. White and White, Holloman & White, all of Alexandria, for appellants. George Wear, Jr., of Jena, for appellees.

LAND, J. This is a petitory action in which the plaintiffs in their original petition claimed to be the owners of an undivided half interest in the S.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$  and the W.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  section 22, township 8, range 3, situated in the parish of La Salle, containing 100 acres.

Plaintiff alleged that they acquired said property by inheritance from Joseph Tarpley, as the nearest of kin and sole heirs of said decedent, "that the said Joseph Tarpley was never married but once, and that there were never any issue from the marriage, the said marriage being with Jane Tarpley, who is now living," and that the said Joseph Tarpley at the time of his death had no ascendants or descendants, or brothers or sisters, except the plaintiffs.

The petition further alleged that said Joseph Tarpley acquired the said land from the United States government by homestead entry, receiving his final receipt and patent about the years 1882 and 1890, respectively.

One of the plaintiffs, Sallie Douglas, claiming to be sister of the said Joseph Tarpley, also sued to annul a sale made by her in 1900 of her interest in said tract of land to one George R. Nicholson, on the ground that she was never authorized by her then husband, since deceased, or by any competent authority, to make said sale; that she received no consideration for said conveyance and, being ignorant, did not know she was parting with her interest in said property.

The other plaintiffs, James Douglas and

Annah Griffin, alleged nephew and niece of Joseph Tarpley, deceased, claim by representation of their mother, alleged to have been a sister of the deceased.

The facts alleged in the petition were sworn to by Sallie Douglas, one of the plaintiffs.

Defendants filed exceptions of vagueness and no cause or right of action, which were overruled.

Defendants then, on June 9, 1913, answered at great length, averring, *inter alios*, that after Joseph Tarpley made a homestead entry on the land in dispute, on December 5, 1882, he died, and that his wife, Jane Tarpley, completed the residence necessary to complete the entry, made the final payment, and procured patent to the land on February 26, 1897, but that said patent erroneously issued in the name of Joseph Tarpley.

The answer avers that the alleged conveyance from Sallie Douglas to G. R. Nicholson was a good, valid, and perfect deed and conveyed any interest that the said Sallie Douglas may have had in such land, and further avers that at the time she signed said deed she was a *feme sole*.

The answer denies the alleged heirship of James Douglas and Joe Tarpley.

The answer denies that the defendant Good Pine Lumber Company is claiming more than an undivided half interest in the lands in dispute, and avers that the whole tract belongs in indivision to said company, and the Trout Creek Lumber Company.

The answer sets up the chain of title under which said defendant claims and pleads the prescription of ten years.

The answer denies that the said Joseph Tarpley ever had any interest in said land, for the reason that the patent issued after his death, and the title passed to his surviving widow.

The answer avers that Joe Tarpley, from whom plaintiffs claim to inherit, was the illegitimate son of Joe Tarpley, Sr., and that Sallie Douglas and Martha Douglas, or Tarpley, were the illegitimate sisters of Joe Tarpley, Sr., who had two natural sons duly acknowledged, Louis and George Tarpley, who would have inherited from him in preference to the plaintiffs, that Joe Tarpley had other illegitimate brothers, one of whom left issue, and that the said Martha had three other children, who would be entitled to share with the plaintiffs.

Further answering, the Good Pine Lumber Company reconvened, in the alternative, for \$275, amount of taxes paid on the land, and for \$185 for the price paid.

The plaintiffs on November 13, 1913, filed an amended petition, on leave granted *ex parte*, which the defendants moved to strike out, on the ground that the same made material alterations in the subject-matter of the suit after issue joined. This motion was overruled.

The most material allegations of the amended petition are, in substance, that since the filing of the original petition they had learned that Joseph Tarpley was never married to Jane Tarpley, and that subsequently they were the owners of all of the land in dispute instead of one-half interest therein; and the plaintiffs amended and supplemented the allegations of their original petition accordingly.

Defendants answered denying the allegations of the amended petition; and the cause was in due course tried on its merits.

Judgment was rendered in favor of the plaintiffs, decreeing them to be owners in indivision of the whole tract in dispute, and further declaring the said sale from Sallie Douglas et al. to George R. Nicholson to be null and void.

Judgment was rendered in favor of the defendants against the plaintiffs in solido for the sum of \$185 and taxes from October 2, 1900 to 1913, inclusive, with interest from judicial demand; defendants to pay all costs of suit.

[1,2] We are of opinion that plaintiffs' amended petition should have been disallowed and stricken from the files, because directly contradicting the sworn allegations of the original petition that Joseph Tarpley and Jane Tarpley were married, and that the land in dispute was acquired by Tarpley during the marriage, and that on his death the plaintiffs, as next of kin, inherited an undivided half interest therein, and because raising, four months after answer filed, a new issue, excluded by plaintiffs' sworn allegation of the marriage of Joseph and Jane Tarpley, and defendants' admission of their status as married people.

We note the allegation in the original petition that Sallie Douglas was induced to sign the deed to Nicholson "for the purpose of securing some money for her sister-in-law, Jane Tarpley."

The amended petition does not disclose how, when, or where Sallie Douglas, after the institution of this suit, discovered that her brother, Joe, had never married her sister-in-law, Jane.

Solemn judicial admissions cannot be contradicted or withdrawn, except perhaps in clear cases of error, shown by convincing proof of honest mistake in, and timely discovery of the falsity of, the admissions.

No such case is here presented. It is evident that the amended petition was an attempt by the plaintiffs to shift their position to meet the averments of the defendants that Jane Tarpley, as surviving widow, became the owner of the homestead.

A judicial admission cannot be retracted to the prejudice of the adverse party. *Boatner v. Scott*, 1 Rob. 546.

Any consent or admission in the progress of a suit from which the other party may derive any legal right cannot be withdrawn

without his consent; he being entitled to its full legal effect. *Kohn v. Marsh*, 3 Rob. 48.

A judicial admission solemnly made cannot be denied. *Gridley v. Conner*, 4 La. Ann. 416; *Edson v. Freret*, 11 La. Ann. 710.

A party cannot deny a judicial admission solemnly made, nor shift his position at will to a contradictory one in relation to the subject-matter of litigation to defeat the action of the law upon it. *Denton v. Erwin*, 5 La. Ann. 18. See, also, *In re Immanuel Presbyterian Church*, 113 La. 911, 37 South. 873.

If a judicial admission cannot be retracted, or withdrawn, without the consent of the other party, it is obvious that such an admission cannot be amended out of existence.

The record facts of this case are, in substance, as follows:

Joseph Tarpley entered the land on December 5, 1882, and in February, 1890, made his homestead, pre-emption, and commutation proof before the clerk of the Seventh judicial district court of Louisiana.

Tarpley described himself as 45 years of age, a farmer, having a wife and one child, and testified to his residence on said land since the spring of 1882, and to its improvements and cultivation.

The deposition of Tarpley was corroborated in the main by the depositions of two witnesses, who, among other things, testified to the residence of Tarpley and his family on said tract.

On July 7, 1896, the Acting Commissioner of the United States General Land Office wrote the register and receiver at New Orleans, La., and after referring to the original entry of the land by Joseph Tarpley, and the "Final proof" made by him on February 26, 1890, and after informing him that there was an excess of 0.48 of an acre in the tract, continued as follows:

"You will therefore notify Jane Tarpley, widow of the deceased entryman at Jena, Catahoula parish, La., and any other known parties in interest, using form 4-485, that she will be allowed sixty days from the receipt of notice within which to pay the excess due on  $\frac{48}{100}$  of an acre or appeal herefrom, failing in which the final proof, herewith suspended, will be rejected."

The above official letter was ruled out by the trial judge, but comes up annexed to a bill of exception.

On February 26, 1897, a United States patent issued conveying the said land unto Joseph Tarpley and to his heirs and assigns forever.

On October 2, 1900, "Jane Tarpley, widow of Joseph Tarpley, Sallie Douglas, sister of Louis Tarpley, son of Joseph Tarpley, deceased, and Robert Jackson, of the parish of Catahoula," sold the whole tract of land to George R. Nicholson for \$185 cash in hand paid.

The title passed from Nicholson by mesne conveyances to the Good Pine Lumber Company and the Trout Lumber Company, the former possessing for both.

It follows that whatever title Jane Tarpley

had in the tract of land passed to said two companies in indivision.

As plaintiffs are concluded by their sworn allegations from disputing the fact of the marriage of Joseph Tarpley and Jane Tarpley, the tract of land, in any event, belonged to the community, and her half interest therein passed to her vendee and his assigns.

The records of the United States Land Office show that Joseph Tarpley made his final proofs in the year 1890, and disclose nothing further until the year 1896, when the Commissioner wrote the letter to the register and receiver of the state land office, as above stated.

That letter indicates that the Commissioner had received notice of the death of Joseph Tarpley, and that Jane Tarpley was his widow. She, or some other party in interest, paid the excess price for the 0.48 of an acre of land, on account of which the final proofs had been held up by the Commissioner.

As we understand the legal situation, Joseph Tarpley perfected his homestead entry by furnishing final proofs which entitled him to a patent to 100 acres of land, but the Commissioner did not wish to leave unsold a remnant of .48 of an acre in one of the subdivisions, and therefore required payment of the same from the widow or other parties in interest. The record does not disclose who paid for this fraction of an acre. We assume that the diligence of defendants' counsel has discovered and produced all documents in the United States Land Office relating to the land entry in question.

[3] The record shows that Sallie Douglas was a married woman when she joined Jane Tarpley, widow, in the sale of the homestead to Nicholson; and it does not appear on the face of the deed, or by any other writing, that Sallie Douglas was authorized by her husband or by a competent court to join in said conveyance.

In such a case the wife has no capacity to sell. Civil Code, art. 122.

The nullity of such a sale by the wife is relative; and proceedings to annul the same can be instituted only by the husband or wife or by their heirs. Article 134, Civil Code.

The act on its face is a conveyance of real estate by the widow and heirs of Joseph Tarpley, deceased. Sallie Douglas was the sister of the deceased and of his next of kin, but the other persons who joined in the deed were not heirs of the decedent.

The defendants in their answer set up the sale from Sallie Douglas to Nicholson as good and valid in law, and as transferring to him and his assigns her whole interest in the land in dispute.

[4, 5] It has been held that a defendant in a petitory action, who admits that he holds under plaintiff, cannot dispute his title. *Watson v. Succession of Barber*, 105 La. 456, 20 South. 949.

It has also been held that a party who

acquired by purchase from another is estopped to deny that his vendor had a title to convey. *Thompson v. Vance*, 110 La. 26, 34 South. 112.

Where a party buys property from a married woman, he cannot, when sued by her to annul the contract, set up that the property never belonged to her, but to community existing between her and her husband at the time of the purchase. *Keating v. Wilbert*, 119 La. 461, 44 South. 265.

It follows that, as defendants cannot dispute Sallie Douglas' title as heir, and as the exclusion of her niece and nephew, coplaintiffs, would make her the sole heir of the decedent, the defendants have no legal interest in contesting their status as heirs.

It is therefore ordered that the judgment appealed from be so reversed and amended as to decree the plaintiffs to be the owners of an undivided half interest in the land described in said judgment, and as to reduce by one-half the sums allowed to the defendants on their reconventional demand, and it is further ordered that, as thus reversed in part and amended, the said judgment be, and is hereby, affirmed, and that the plaintiff pay the costs of appeal.

O'NIELL, J., dissents from the ruling that the supplemental or amended petition should not have been allowed.

NOTE.—Before this cause was heard upon the rehearing which had been granted, the case was ordered by the court to be dismissed from its docket, upon the request of all counsel in the suit, who informed the court that a compromise had been entered into between the litigants.

(141 La. 1)

No. 22191.

HARWOOD-BARLEY MFG. CO. v. ILLINOIS CENT. R. CO.

(Supreme Court of Louisiana. Feb. 12, 1917.  
Rehearings Denied March 12, 1917.)

(Syllabus by the Court.)

1. CARRIERS § 83, 98 — MISDELIVERY OF GOODS—LIABILITY.

A railroad company received for shipment freight consigned to "shipper's order, notify J. E. H. & Co." The bill of lading indorsed by the shipper was forwarded to a bank at the place of delivery, attached to a sight draft on the purchaser for the invoice price of the freight. The carrier delivered the freight to J. E. H. & Co., without the surrender or production of the bill of lading, on an indemnity bond to protect the railroad company. Because of a misunderstanding as to the terms of the sale, J. E. H. & Co. did not pay the draft, and the bill of lading was returned to the shipper. He sued the railroad company for the value of the goods, fixed in the bill of lading as the bona fide invoice price. The defendant called in warranty the principal and surety on the indemnity bond; and the latter contended, as a defense to the main action on the bill of lading, that the reason why the purchaser had not paid the draft or obtained the bill of lading was that the ship-

per had violated his contract with the purchaser. The plaintiff objected to the introduction of any evidence in support of that defense to the main action. *Held*, that the railroad company could not relieve itself of its liability on the bill of lading to the shipper by taking an indemnity bond in lieu of the bill of lading and delivering the freight to one who was not entitled to receive it without producing and surrendering the bill of lading, and that the defendant and warrantors could not inject into the suit, as a defense to the main action on the bill of lading, the complaints which the purchaser of the freight had against the shipper.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 299, 308-315, 356-362.]

2. CARRIERS § 83—MISDELIVERY OF GOODS—ACTION BY SHIPPER—EXCUSE.

The doctrine that a common carrier, when sued by the holder of a bill of lading for the value of freight received by the carrier for shipment, may show, as an excuse for having delivered the freight to another party without requiring the surrender or production of the bill of lading, that the party to whom the goods were delivered on demand was the true owner, is founded upon the principle that a bailee of property received from a bailor who was not the owner cannot acquire any greater right to withhold the property from its lawful owner than if the bailee had bought the property from one who was not the owner. But that doctrine has no application to a case where the party to whom freight was delivered by a common carrier was not the holder or owner of the bill of lading and had no right to receive the goods without the bill of lading.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 308-315.]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by the Harwood-Barley Manufacturing Company against the Illinois Central Railroad Company, which called in warranty J. E. Hirschberg & Co. as principal and Max Schwabacher as surety on an indemnity bond, and sought a judgment over against such principal and surety in solido for the amount of any judgment rendered against it. Judgment for plaintiff against defendant, and judgment for the same amount in favor of defendant against the principal and surety on the indemnity bond in solido, and the defendant and the principal and surety on the indemnity bond appeal. Judgment amended by reserving to the warrantors whatever right of action they may have against the plaintiff, and, as so amended, affirmed.

Hunter C. Leake and Gustave Lemle, both of New Orleans, and Blewett Lee and R. V. Fletcher, both of Chicago, Ill., for appellant, Dart, Kernan & Dart, of New Orleans, for appellee. Solomon Wolff, of New Orleans, for warrantors.

O'NIELL, J. In February, 1915, the Harwood-Barley Manufacturing Company, of Marion, Ind., entered into a written contract with J. E. Hirschberg & Co., of New Orleans, for the sale and shipment of five automobiles to the latter at the price of \$2,975 each—that is, \$14,875 in all. The purchaser paid \$500 in cash when the contract was signed, of which \$100 was to remain on deposit until

shipment of the last car, according to the terms stated in the contract. The contract provided that \$400 was to be paid 30 days before shipment of each car, \$475 on the arrival of each car, and the balance of the price of each car, \$2,100, was to be payable in ten equal monthly installments, bearing 8 per cent. interest. The first car was to be shipped as soon as possible, and the other four were to be shipped as ordered by the purchaser, at intervals not less than 30 days for each car. On or about the 26th of March, 1915, J. E. Hirschberg & Co. made a further remittance of \$200 to the Harwood-Barley Manufacturing Company, and on the 9th of April, 1915, instructed the latter to apply the payment to the price of the first car to be shipped, and draw the sight draft, to be attached to the bill of lading, for \$275, instead of \$475.

On the 27th of April, 1915, the first car was shipped, and was routed over the Illinois Central Railroad. It was consigned to the order of the Harwood-Barley Manufacturing Company, of New Orleans, La., with instructions to notify J. E. Hirschberg & Co., in that city. The invoice was made out accordingly, and delivered to the shipper.

On the 27th of April, 1915, the Harwood-Barley Manufacturing Company indorsed the bill of lading in blank, attached it to a sight draft on J. E. Hirschberg & Co. for \$275, together with ten notes for \$210 each, due 30 days apart, to be signed by J. E. Hirschberg & Co., and forwarded the same to the Canal Bank & Trust Company, in New Orleans. In the letter inclosing the bill of lading, sight draft and notes, the bank was requested to have the notes signed and returned with the proceeds of the draft, and to have the attorneys of the bank prepare a chattel mortgage or conditional bill of sale, according to the laws of Louisiana, to secure the payment of the notes. On the same day the Harwood-Barley Manufacturing Company wrote to J. E. Hirschberg & Co. inclosing an invoice for the car and advising the latter that the sight draft for \$275, and the ten notes of \$210 each, with bill of lading attached, had been forwarded to the Canal Bank & Trust Company, with instructions to prepare a chattel mortgage on the automobile to secure the payment of the notes. The letter contained the information that the automobile had been shipped on the 23d of April, routed over the Illinois Central Railroad, and gave the number of the railroad car on which it was shipped.

The car arrived in New Orleans on the 29th of April, 1915, and J. E. Hirschberg & Co. were promptly notified of its arrival. They had not yet received the letter advising them where the bill of lading was sent, nor had the bank received the bill of lading. Having inquired at a number of banks, and failing to locate the bill of lading, J. E. Hirschberg & Co. requested the railroad com-

pany to deliver the automobile without the production of the bill of lading; and the railroad company consented to do so on an indemnity bond. Accordingly, on the 30th of April, 1915, J. E. Hirschberg & Co. signed and delivered to the railroad company an indemnity bond for \$3,000, signed by Max Schwabacher as surety, and received the automobile. The condition of the bond was that J. E. Hirschberg & Co. should deliver the original bill of lading to the railroad company within 30 days, and protect, defend, and hold harmless the railroad company from all liability and from every loss, damage, injury, expense, and costs, including attorney's fees, that the railroad company might become liable for or suffer by reason of the surrender of the automobile to J. E. Hirschberg & Co. without the bill of lading.

On receipt of the sight draft with notes and bill of lading attached, on the 3d of May, 1915, the Canal Bank & Trust Company returned them to the Harwood-Barley Manufacturing Company, because the bank was unwilling to take the responsibility of obtaining the chattel mortgage to secure the payment of the notes, as requested by the Harwood-Barley Manufacturing Company.

A member of the firm of J. E. Hirschberg & Co. called at the bank a few days later to pay the draft, sign the notes, and obtain the bill of lading, but was informed that the documents had been returned to the Harwood-Barley Manufacturing Company.

On the 5th of May, 1915, the Harwood-Barley Manufacturing Company returned the sight draft and notes and bill of lading to the Canal Bank & Trust Company, with instructions to place the matter in the hands of an attorney for attention; and on the same day wrote to J. E. Hirschberg & Co., advising them that the papers had been returned to the bank. Two days thereafter the bank delivered the documents and the correspondence from the Harwood-Barley Manufacturing Company to the attorneys who represent the plaintiff in this suit. When a member of the firm of J. E. Hirschberg & Co. called at the attorney's office, on or about the 8th of May, 1915, one of the attorneys said he had some doubt regarding the validity of a chattel mortgage, and would look into the matter. A few days later the member of the Hirschberg firm again called at the attorney's office and declared that, as the giving of a chattel mortgage was not one of the conditions of the contract, he had also placed the matter in the hands of an attorney.

Thereafter much correspondence and a number of interviews were had between the attorneys representing the Harwood-Barley Manufacturing Company and J. E. Hirschberg & Co., respectively. In the meantime J. E. Hirschberg & Co. had possession of the automobile and were using it as a jitney bus or sight-seeing car. It appears that, after an investigation of a new statute on the subject,

the attorneys for the Harwood-Barley Manufacturing Company agreed to accept the chattel mortgage to secure the payment of the notes, but J. E. Hirschberg & Co., on the advice of their attorney, declined to give the mortgage, on the ground that it was not a condition of the contract.

On the 15th of May, 1915, the attorney for Harwood-Barley Manufacturing Company made demand on the Illinois Central Railroad Company for the balance due on the automobile, \$2,375. On that day J. E. Hirschberg & Co. wrote to the Harwood-Barley Manufacturing Company confirming a telegram which they had sent the day before, demanding the bill of lading and the carrying out of the contract. In the letter they suggested that they would pay the balance due for the automobile in cash if the Harwood-Barley Manufacturing Company would "make the inducement acceptable." The latter replied, stating what discount would be allowed, but it was not acceptable to J. E. Hirschberg & Co. On the 22d of May, 1915, J. E. Hirschberg & Co. offered to return the automobile to the Illinois Central Railroad Company, but the latter declined to receive it, on the ground that it had been used and was then a secondhand car. Thereafter J. E. Hirschberg & Co. stored the car, and took up the correspondence direct with the Harwood-Barley Manufacturing Company. In the meantime the attorney of J. E. Hirschberg & Co., in a letter to the attorney of the Harwood-Barley Manufacturing Company, suggested that he would advise his clients to sign a chattel mortgage and settle the controversy if the Harwood-Barley Manufacturing Company would make a deduction of \$1,000; which proposition was declined. On the 27th of July, 1915, in response to a letter from J. E. Hirschberg & Co., and in an attempt to bring about a settlement of the controversy, Harwood-Barley Manufacturing Company wrote a lengthy letter, in which they used the expression:

"We will either eventually get our money or our truck, and for your own information we want to say that we have never had a case yet where we failed to get one or the other."

And they said further:

"We want our money or we want our truck, or some satisfactory security whereby we are assured that we will get our money."

Referring to that letter, a few days later, the attorney of J. E. Hirschberg & Co. wrote to the attorneys of the Harwood-Barley Manufacturing Company that he thought the letter pointed out a method by which the affair could be adjusted without further trouble; and he proposed that, if the Harwood-Barley Manufacturing Company would return \$1,000 which J. E. Hirschberg & Co. claimed to have paid (\$400 of which they alleged was paid on the four other trucks), the latter would return the automobile, which, he said, had only been used three or four days. That proposition was declined,

and the subsequent negotiations failed to bring about an amicable settlement.

The Harwood-Barley Manufacturing Company instituted this suit against the Illinois Central Railroad Company on the bill of lading to recover the balance due on the purchase price of the automobile, \$2,375, with legal interest from the 15th of May, 1915, the day on which demand was made for the delivery of the car.

In answer to the suit the defendant admitted that the automobile had been delivered to J. E. Hirschberg & Co. without the surrender of the bill of lading, but denied liability to the plaintiff on the following grounds: That, when J. E. Hirschberg & Co., who had bought the automobile, called at the Canal Bank to pay the \$275 and sign the ten notes of \$210 each representing the balance due on the purchase price, and to obtain the bill of lading, the bank declined to accept the money and notes or to deliver the bill of lading, stating that the contract contemplated the giving of a chattel mortgage, for which the laws of Louisiana did not provide; that thereafter J. E. Hirschberg & Co., denying that the contract contemplated a chattel mortgage, offered to return the automobile to the plaintiff, which the latter declined to accept. The defendant prayed that J. E. Hirschberg & Co., as principal, and Max Schwabacher, as surety, on the indemnity bond, be called in warranty, and that, if judgment should be rendered in favor of plaintiff, it should also be rendered in favor of defendant against the principal and surety on the indemnity bond in solido for the same amount. The district judge ordered that the principal and surety on the indemnity bond be called in warranty.

In answer to the call in warranty and to the demand of the plaintiff, J. E. Hirschberg & Co. admitted the contract for the purchase of the five automobiles on the terms stated above, and they annexed a copy of the contract to their answer. They admitted the signing and delivery of the indemnity bond to the railroad company and the receipt of the automobile without the surrender of the bill of lading. They alleged that they had been unable to obtain the bill of lading without giving a chattel mortgage on the automobile, that they had first declined to give the chattel mortgage, because the contract did not require it, but that they had subsequently consented to give the chattel mortgage, and the attorney for Harwood-Barley Manufacturing Company had declined to accept it, saying it would not be valid under the laws of Louisiana. Referring to the letter written by the Harwood-Barley Manufacturing Company on the 29th of July, 1915, the defendants alleged that they were thereby given the option either to return the automobile or to pay for it or to give satisfactory security for the payment, and that they, in turn, offered and agreed to return the

truck. They alleged that in the meantime they had tendered the automobile to the railroad company, and on the latter's refusal to receive it had stored it, and had advised the plaintiff that they would hold the latter liable for all damages and expenses incurred. They alleged that they had paid \$1,000 on the contract, which, they alleged, the plaintiff had violated, and that, if judgment should be rendered against them directing them to return the truck to the railroad company or to the plaintiff, such judgment should be made contingent upon the return to them of the \$1,000 paid to the plaintiff. They prayed for judgment annulling the indemnity bond and directing the plaintiff to take back the truck and to pay to the defendant \$1,000 and for reservation of their right to sue the plaintiff for damages.

In his answer to the call in warranty and to the plaintiff's demand, Max Schwabacher made substantially the same allegations and defenses urged by J. E. Hirschberg & Co., and prayed for judgment annulling the indemnity bond which he had signed as surety.

When the case was called for trial, before any evidence was offered, the plaintiff's counsel moved to strike from the answer of the railroad company the call in warranty, and to strike out the answers of the so-called warrantors, and he objected to the introduction of any evidence in support of the defenses made in the answers of the so-called warrantors, on the ground that the calls in warranty and the defenses urged by the respondents were not provided for nor permitted under the law of this state. The district judge ruled that the objection went to the effect of such evidence as might be offered, and it was agreed that the objection should apply to any evidence that might be offered on the issues raised by the calls in warranty.

Judgment was rendered in favor of the plaintiff and against the defendant railroad company, as prayed for in the plaintiff's petition, and judgment for the same amount was rendered in favor of the railroad company and against the principal and surety on the indemnity bond in solido. The defendant railroad company and the principal and surety on the indemnity bond have appealed, and in answer to the appeal the plaintiff prays for 10 per cent. damages for a frivolous appeal.

#### Opinion.

[1] In support of their motion to strike out the call in warranty and the answers of the warrantors, and in support of the objection to the introduction of evidence on the issues raised by the answers of the warrantors, counsel for the plaintiff cite the decision rendered by this court in the case of *Bain v. Arthur et al.*, 129 La. 143, 55 South. 743, to the effect that one who is sued on an obligation has no right to call in warranty a third party who has signed an indemnity contract.

In contradiction of that doctrine counsel for the defendant and warrantors cite the decision in *Muntz v. Algiers & Gretna Railway Co.*, 114 La. 437, 38 South. 410, where it was said that the right of a defendant to call a third party in warranty did not depend upon any privity between the warrantor and the plaintiff in the main action, but upon the existence of a contract of warranty between the defendant and the party called in warranty. We find it unnecessary to distinguish or reconcile the decisions cited, because neither of them is applicable to the case before us. In each of the cases cited the party called in warranty filed an exception of no cause of action, which in one case was overruled, and in the other was sustained. In the case before us the parties called in warranty did not except or object to being called upon to defend the suit, or to stand in judgment as the warrantors of the defendant in the main action. The plaintiff in this suit is not concerned with the issues between the defendant railroad company and its warrantors so long as those issues do not prevail as a defense to the original suit on the bill of lading.

Counsel for the defendant railroad company admit in their brief that the presence of the warrantors in this case cannot affect the plaintiff's rights against the defendant in any way. Notwithstanding that admission, the learned counsel for the railroad company attempt to use the defense made by the warrantors as a defense to the main action on the bill of lading. They contend that J. E. Hirschberg & Co. was the owner of the automobile, and that the railroad company was justified in delivering the vehicle to its true owner without the production of the bill of lading, although such delivery was contrary to the terms of the instrument. The warrantors join in that contention, and urge that they had a right to inject into this suit, as a defense to the original action against the railroad company on the bill of lading, whatever defenses they might have had if the plaintiff had sued J. E. Hirschberg & Co. for the price of the automobile. The defenses which the warrantors have thus injected into the original suit against the railroad company on the bill of lading are: (1) That the plaintiff's demanding a chattel mortgage was a breach of the contract for the sale of the automobile; and (2) that the plaintiff, in its letter of July 27, 1915, offered to take back the car, and the proposal of the attorney of J. E. Hirschberg & Co. in his letter of July 29, 1915, to return the car on the repayment of the \$1,000 that J. E. Hirschberg & Co. claimed they had paid was an acceptance of the plaintiff's offer.

Our opinion is that the warrantors, J. E. Hirschberg & Co., could not, by taking possession of the automobile, on furnishing an indemnity bond instead of procuring and surrendering the bill of lading to the railroad company, deprive the Harwood-Barley



Manufacturing Company of its right of action against the railroad company on the bill of lading and compel the Harwood-Barley Manufacturing Company to look to Hirschberg & Co. for the payment of the price of the automobile. And our opinion is that the railroad company could not, by accepting from J. E. Hirschberg & Co. an indemnity bond in lieu of the bill of lading, relieve itself of its liability on the bill of lading, and compel the Harwood-Barley Manufacturing Company to look to J. E. Hirschberg & Co. for payment of the price of the automobile. In delivering the automobile to J. E. Hirschberg & Co., without requiring the latter to surrender the bill of lading, the railroad company did not act upon a belief that J. E. Hirschberg & Co. was entitled to receive the automobile without producing the bill of lading, but upon the railroad company's faith in the security afforded by the indemnity bond. In fact, the railroad company admitted in its correspondence with the plaintiff's attorney that the railroad company was not concerned with the controversy between the Harwood-Barley Manufacturing Company and J. E. Hirschberg & Co. regarding the payment of the price of the automobile, because the railroad company was amply secured by the indemnity bond. Hence the railroad company has no interest in urging, nor right to urge, the contentions of J. E. Hirschberg & Co. as a defense to this action on the bill of lading.

The instrument sued on contains the following clauses, viz.:

"The surrender of this original order bill of lading, properly indorsed, shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper."

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

[2] In support of the contention that the delivery of the automobile to J. E. Hirschberg & Co. and the latter's complaint of a breach of the original contract of sale are proper and sufficient defenses to relieve the railroad company of liability in this action on the bill of lading, the defendant and warrantors cite the decision in *Hentz v. The Idaho*, 93 U. S. 575, 23 L. Ed. 978.

In the case cited it was held that a common carrier might show, as an excuse for nondelivery of freight pursuant to a bill of lading, that the carrier delivered the goods on demand to the true owner without the bill of lading. It was said that a common

carrier, as the bailee, of goods received for shipment from one who was not the true owner, could not acquire any greater right to withhold the property from its lawful owner than if the bailee had purchased the goods from one who was not the owner. Hence it was held that, if the bailee delivered the property to the true owner, having the right to the possession of it, on the latter's demand, such delivery was a sufficient defense to a suit by the bailor against the bailee for the return of the property. In that case, however, the court was dealing with a lot of cotton that had been delivered to the defendant steamship on a bill of lading that was assigned to the party to whom the steamship company afterwards delivered the cotton, and who was the true and lawful owner of it. The cotton had been confused with other cotton in the cargo, and there was a fraudulent attempt to divert it to respond to another bill of lading held by the plaintiff, *Hentz*. The principle on which the decision was rendered against the plaintiff, *Hentz*—that is, that a bailee cannot acquire from one who is not the owner of the property a greater right to withhold it from its true owner than if the bailee had bought it from the one who was not the owner—has no application to the case before us. The defendant in this case does not pretend that the plaintiff was not the owner of the automobile delivered to the railroad company. Nor is it pretended that J. E. Hirschberg & Co. was entitled to take possession of the automobile without the production and surrender of the bill of lading. If the railroad company had not surrendered the automobile to J. E. Hirschberg & Co. without the bill of lading, the latter would have paid for it or given satisfactory security for the payment of the balance due on the purchase price, or it would have been returned to the plaintiff in the condition in which it was received by the railroad company, and no loss would have resulted to any one.

The learned counsel for the defendant and warrantors also refer us to the case of *The Asiatic Prince* decided by the United States Circuit Court of Appeals, reported in 108 Fed. 287, 47 C. C. A. 325. In that case the plaintiff or libellant shipped to Delmarco & Co., at Santos, Brazil, a consignment of goods to be paid for on delivery. The goods were consigned to the order of the shipper, who attached the bill of lading to a sight draft on Delmarco & Co., and forwarded the same to a bank in Santos. Having given Delmarco & Co. credit for a balance due them by the shipper, the sight draft was made for only the balance due on the purchase price of the goods shipped. Delmarco & Co. consented to the credit being applied in part payment of the price of the goods, but, before the goods arrived, made further remittances to the consignor, in ignorance of the draft. When the draft was presented by the bank, Delmarco

& Co. first objected to paying it, because of the remittances they had made after the draft was drawn, but later deposited the amount of the draft at the bank and demanded the surrender of the bill of lading. During a discussion between the manager of the bank and a representative of the firm of Delmarco & Co. as to the rate of exchange on the draft, the bank received a cable from the shipper stating that a draft for a larger amount had been drawn and instructing the bank not to surrender the bill of lading on the payment of the first draft. It appears that a few days after the Asiatic Prince had sailed with the consignment of goods, the shipper changed his mind about applying the credit due to Delmarco & Co. on the price of the goods, and applied it to another indebtedness of Delmarco & Co. The bank refused to surrender the bill of lading to Delmarco & Co. without payment of the second and larger draft that had been received by the bank. Delmarco & Co. instituted judicial proceedings in Santos, and, on an order of the local district court, deposited in the bank, for the account of the shipper, the amount of the first draft. It appears that, according to the law and usage of Brazil, the steamship company was compelled to deliver all dutiable goods, like those involved in the case, to the customs authorities, and that the allowance of entry and responsibility for a delivery of the goods to the person entitled thereto, on payment of the duties, thereafter devolved entirely upon the customs authorities. Accordingly the steamship company had delivered the goods to the customs authorities during the controversy between the bank and Delmarco & Co. The customs authorities delivered the goods to Delmarco & Co., on proof of the deposit made in bank pursuant to the orders of court, and on the furnishing of an indemnity bond by Delmarco & Co., without the production of the bills of lading. The steamship company, as defendant in the libel suit instituted by the shipper on the bill of lading, was permitted to show that the remittances made by Delmarco & Co. to the shipper and applied on the purchase price of the consignment, together with the amount first credited thereon by the libellant, reduced the amount due for the purchase price below the amount deposited in bank by Delmarco & Co. to the credit of the shipper, under the orders of the court in Santos, and that the goods were therefore delivered to the true owner.

In our opinion, the decision last cited has no application whatever to the case before us. It would be applicable here if the railroad company were attempting to show that

J. E. Hirschberg & Co. had paid to the plaintiff all that was due on the price of the automobile, and that the purchaser to whom it was delivered was entitled to it without the bill of lading. In other words, the doctrine of the case cited is that the common carrier may successfully defend a suit by the shipper on the bill of lading by showing that the shipper has been paid by the purchaser, to whom the goods were delivered, the entire purchase price that was due to the shipper, and that he is not entitled to recover anything either from the carrier or from the purchaser to whom the goods were delivered.

There is no authority in law or reason for the doctrine advanced by the learned counsel for the defendant and warrantors that a common carrier who receives goods consigned to the order of the shipper, with instructions to notify a certain party at the destination, may deliver the goods to the party so notified, on an indemnity bond from the latter to protect the carrier, and compel the shipper to look to the party to whom the goods were delivered, as the purchaser, for the payment of the price or value of the goods. Such a doctrine would destroy the security afforded in the sale of goods, "B/L attached to sight draft," and shipments "to shipper's order, notify ———." And it would destroy a very general and important commercial custom.

Our conclusion is that the judgment appealed from is correct, except that, as the issues raised by the warrantors against the plaintiff were not decided or considered as a proper issue in this case, whatever claims the warrantors have against the plaintiff should be reserved to them. For that reason, if for no other, the appeal cannot be regarded as frivolous. Whatever right of action the warrantors may have against the plaintiff would, perhaps, not be affected by the judgment rendered in this case without an express reservation in favor of the warrantors; hence our amendment of the judgment in that respect does not justify putting the costs of appeal on the plaintiff.

The judgment appealed from is therefore amended by reserving to the warrantors whatever right of action they may have against the plaintiff, and, as thus amended, the judgment is affirmed. The defendant and warrantors are condemned in solido to pay the costs of both courts, the defendant having recourse against the warrantors in solido for reimbursement of whatever costs of court the defendant shall have paid, and the warrantor, Max Schwabacher, having recourse against J. E. Hirschberg & Co. for reimbursement of whatever costs of court he shall have paid.

(141 La. 18)

No. 21808.

**FRENCH et al. v. TROUT CREEK LUMBER CO.**

(Supreme Court of Louisiana. Feb. 12, 1917.  
On Application for Rehearing March 12, 1917.)

*(Syllabus by Editorial Staff.)***1. COURTS  $\Leftarrow$  224(11) — SUPREME COURT — JURISDICTION — AMOUNT — TRANSFER OF CAUSE.**

Where it was manifest that plaintiffs' son did not, in any view of the case, sustain injury exceeding \$2,000, the Supreme Court on appeal, would consider the demand in the petition for \$5,000 damages to be inflated in order to vest jurisdiction in the Supreme Court, and would transfer the cause to the Court of Appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 617.]

**On Application for Rehearing.****2. COSTS  $\Leftarrow$  238(1)—COSTS ON APPEAL.**

Where a cause on appeal was transferred to the Court of Appeal on the ground that the ad damnum was inflated, in order to vest jurisdiction in the Supreme Court, that court would condemn plaintiff, appellee, to pay the costs of appeal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 908-911, 915-919.]

Appeal from Thirtieth Judicial District Court, Parish of La Salle; George Wear, Sr., Judge.

Action by H. M. French and another against the Trout Creek Lumber Company. Judgment for plaintiffs, and defendant appeals, and plaintiffs pray for an increase of the award. Cause transferred to the Court of Appeal for the parish of La Salle.

Henry Moore, of Texarkana, Ark., and White & Thornton & Holloman, and White, Holloman & White, all of Alexandria, for appellant. Richey & Harper, of Jena, for appellees.

LAND, J. [1] Plaintiffs, the father and mother of Mack French, a 16 year old boy, sued the defendant for \$5,000 damages alleged to have been sustained by him by reason of a collision between a two mule team, which the said boy was driving, and a train of skeleton cars belonging to the defendant, at a public road crossing.

The defendant has appealed from a judgment for \$250 in favor of the plaintiffs; and the plaintiffs have not prayed for an increase of the award.

The record shows that the boy was not seriously injured, and about two weeks after the accident resumed his job of driving a similar livery team.

It being manifest that the boy did not, from any view of his case, receive damage or injury exceeding \$2,000 in amount, we consider the demand in the petition to be inflated for the purpose of vesting jurisdiction in the Supreme Court.

It is therefore ordered that this cause be

transferred to the Court of Appeal for the parish of La Salle, and that the defendant and appellant pay costs in this court.

**On Application for Rehearing.**

O'NIELL, J. [2] Pursuant to the ruling made in the case of Ham v. Louisiana & N. W. R. Co. et al., on application for rehearing, 136 La. 1083, 68 South. 133, the decree rendered in this case is amended so as to condemn the plaintiff, appellee, to pay the cost of the appeal to this court. The application for rehearing is denied.

(141 La. 20)

Nos. 22130, 22177.

**RAY v. ROBERT WERK & CO. et al.**

(Supreme Court of Louisiana. Feb. 12, 1917.  
Rehearing Denied March 12, 1917.)

*(Syllabus by the Court.)***MASTER AND SERVANT  $\Leftarrow$  243(1)—INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE — RECOVERY.**

A plaintiff cannot recover damages from a defendant where injury to him resulted through his fault.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 759, 775.]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by John Ray, for use of Nicholas Ray, a minor, against Robert Werk & Co. and others. Judgment for plaintiff, and defendants appeal. Judgment reversed, and judgment ordered in favor of defendants and against plaintiff dismissing the suit.

Emile Pomes, of New Orleans, for appellants. Benjamin T. Waldo, Joseph Harris Brewer, and Sumter D. Marks, Jr., all of New Orleans, for appellee.

SOMMERVILLE, J. In September, 1909, when this suit was filed, Nicholas Ray was a minor; and he was represented by his father, as party plaintiff. Since that time Nicholas has attained the age of majority; and he has made himself party plaintiff in the cause.

Plaintiff, a boy of 12 years of age, alleged that he was employed to work in defendant's factory, and that while thus employed, through the fault and negligence of defendant, he was severely injured; and he asked for damages in the sum of \$5,000.

The case was tried four times before juries. The first verdict was for \$1,500; the second, for \$2,500; the third trial ended in a mistrial; and the last verdict was for \$2,500. Defendants have appealed.

The plaintiff, Nicholas Ray, testified on his own behalf that he had been employed by the defendant company to operate and clean a heckler, which is a part of a hair-cleaning machine, and is used for straightening horse hair which is to be converted into press cloth for use in oil mills. He further testified that the machine was a dangerous one,

and that he was put to work thereat without proper instructions; that during the first hour of his employment one of the boys in the establishment showed him how to take the belt off the machine with his hands and how to put it on with his hands; that defendant Werk, who was standing near the machine at the time, said that he would be back in a half hour. Plaintiff said:

"I threw the belt off the machine, and I started to clean it, and I threw the belt off about twice and put it on, and then when I threw the belt off and I was cleaning the heckler Mr. Robert Werk walked in and halloood out, 'Are you going to stand there all day?' and with that I grabbed the belt, and my arm went around, and Pat Nunez [a fellow servant who had just previously given him instructions] jumped through the window and halloood to Mr. Robert Werk to cut off the motor."

It was then that plaintiff's arm was broken, and he was severely injured. When asked, "Why did you want to put the belt on with your hands?" he answered:

"Because that was my work. I had to do that. That was the only way you could do it."

He further testified:

Mr. Werk "told me he would show me [how to work the machine] in a half hour. He would be back in a half hour."

Upon cross-examination he said, in answer to the question:

"But he told you—you are positive of the fact that he told you that he would learn you how to work that machine? A. Yes, sir; he told me that he would learn me, but he never— Q. Why, then, if it was working, was it necessary for you to put the belt on it again? A. Because it got tangled up. I had to clean it." "I grabbed the belt, and the belt grabbed me." "The belt was stuck on the wheel there on the chair, stuck to something. It was stuck on it. Q. Then what did you do? A. Then it started hitting the machine. \* \* \* I will explain it myself. When the belt got stuck to this wheel, it got stuck to something and started flapping, and when it started flapping Mr. Werk was about two yards from the motor, and then Pat Nunez told him to cut the motor off, and when he cut the motor off I was standing up there, and Mr. Werk halloood at me, 'What are you going to do; stand up there all day?' Then I went to grab the belt, and the belt grabbed my hand."

Subsequently he said:

"He [Mr. Werk] told me to put the belt on; sure he did."

This testimony was contradicted in part by Paul Francingues, a witness for plaintiff, who said that it is impossible to clean the machine while it is running, as plaintiff testified he had done. He was further contradicted by a second one of his witnesses, Edward Bailey, who said that he heard Mr. Werk halloo to the plaintiff to keep away from there; away from the flapping belt. When asked, "Did he say to anybody to take the belt, to put a belt on, or anything of that kind, on the machine?" he answered, "No, sir; I never heard it."

Defendants' witnesses all testified that it was not the business of plaintiff to clean the machine, and that he did not clean it. Louis Cousin, another fellow servant, said that he told plaintiff to get out of the way when he heard the belt hitting the machine. He said:

"I told him to get away from there. \* \* \* I told the boy to get away from there."

In answer to the question, "What did Mr. Werk say to plaintiff?" he answered:

"He said, 'Get away from there, and go pick up that dirt.' He told him to get away from the machine and to go pick up the dirt."

This witness also testified that plaintiff said that the accident happened through his own fault.

Defendant Robert Werk testified that when he employed the boy he did not know what work to put him at, but he thought him large enough to run the machine, as lots of smaller boys had done. He said:

"I told him that all he had to do was to feed the hair to the rollers, to feed it even; that if he fed it in lumps it would wrap around the rollers. I didn't like the way he was doing it, and I called Pat Nunez, and I said to him, 'Stay here and show this boy how to feed the machine,' and I went off, and probably a half hour after I heard a lot of noise, and there were very few engines running, but all of a sudden I heard a lot of noise, and I looked and saw the belt flapping all around, the belt which was attached to this heckler that the boy has been testifying about. It was a small belt to turn the rollers, not the driving belt, and this belt was hitched to the shaft, and it was going around, and this boy was standing up looking at it, and I halloood at him to keep away and to go and clean that hair and to pick up the dirt outside, and the boy stood there."

He said further that when he heard the belt flapping around he pulled off the switch, so as to stop the motor. He further said that he cautioned the boy about the dangers of the machine, and told him particularly to keep away from the belt. He denied positively that he had told the boy to put on the belt, whether the machinery was in operation or not.

The testimony of defendant Werk is corroborated, particularly as to warning the boy to go away from the machine, and to do other work. This order of the employer was disobeyed by the plaintiff; and he was injured through his own fault; and not through the fault of the defendants. He cannot recover damages. He was old enough to hear and understand orders which were issued to him; and he should have obeyed them.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that there be judgment in favor of defendants, and against plaintiff, dismissing this suit at his cost.

(112 Miss. 611)

MCNEER & DODD et al. v. NORFLEET et al.  
(No. 18921.)(Supreme Court of Mississippi, Division B.  
March 19, 1917.)**1. FRAUD  $\Leftrightarrow$  54—MISREPRESENTATION—INTENT.**

To constitute fraud, it is unnecessary that a statement be made with the intention to deceive, if it is a statement of fact, or a statement purporting to be a fact, but not true as a matter of fact.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 2.]

**2. FRAUD  $\Leftrightarrow$  57—MISREPRESENTATION—EVIDENCE.**

In suit for damages for misrepresenting the acreage of land leased, the court was in error in excluding from the consideration of the jury evidence of items of damage suffered by plaintiffs making up the necessary and reasonable expenditures incurred by them in preparing to cultivate the land, since the jury should have such information, coupled with other proof, as will enable them to determine the extent of the damage, if they find certain facts favorably to plaintiff.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 54.]

**3. EVIDENCE  $\Leftrightarrow$  213(4)—ADMISSION—COMPROMISE.**

In a suit for damages from misrepresentations as to the acreage of land leased, the court improperly excluded evidence as to a statement of fact made by the lessor at the time of negotiations with reference to the adjustment of the parties' differences, while an offer of compromise cannot be shown as being an admission of the party making the offer, any statement of fact made by him as such may be proved as an admission, though made during the discussion of the compromise.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 751.]

**4. TRIAL  $\Leftrightarrow$  25(4) — DISTRESS FOR RENT — TRIAL OF ISSUE ON AVOWRY—BURDEN OF PROOF—STATUTE.**

Under Code 1906, § 2864, providing that, on trial of an issue on an avowry, the burden of proof shall be on the avowant, the landlord, and he shall have the right to open and conclude the argument, when an issue has been tendered on the avowry, denying the allegations of the avowry, the burden is on the landlord, or avowant, and if the relation of landlord and tenant, the amount of the contract, or the amount of supplies furnished, is denied, the landlord must assume the burden and prove his contention, but if the relation be admitted, and the amount of the rent contract for supplies furnished is not denied, no issue is made on the avowry, and, if plaintiff undertakes to confess and avoid by an affirmative plea setting up new matter, and issue is tendered on the plea, the burden shifts, plaintiff assuming it, and having the right to open and conclude the evidence and argument.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 47, 60-75.]

Appeal from Circuit Court, Panola County; E. D. Dinkins, Judge.

Distress for rent by F. M. Norfleet and others against McNeer & Dodd and others, wherein the latter replevied the goods, and the former filed an avowry as assignees of a rent contract, alleging a landlord's lien, McNeer and Dodd filing a plea of recoupment alleging the landlord's misrepresentation as to acreage. From a judgment for the avow-

ants, defendants appeal. Reversed and remanded.

Elmore & Ruff, of Lexington, for appellants. Shands & Montgomery, of Sardis, for appellees.

ETHRIDGE, J. The appellees sued out a distress for rent against appellants in the circuit court of Panola county for the year 1914, and seized 90 bales of cotton. This attachment was founded on a contract between J. L. Roseborough and the appellants, by which the appellants leased from Roseborough a plantation in Quitman county for the years 1914, 1915, 1916, 1917, and 1918 for the sum of \$3,000 per year. Appellants replevied the cotton, and the appellees, as assignees of the rent contract, filed an avowry under the chapter on Landlord and Tenant alleging that they had a landlord's lien upon said cotton for the term beginning January 1, 1914, and ending December 31, 1918, and at the time of the said seizure the appellants were indebted to them in the sum of \$3,000, and that they had a landlord's lien for said amount, and with this plea filed a copy of the lease contract as an exhibit. Thereupon the plaintiffs for replication filed a plea of recoupment, alleging that in leasing said lands it was the purpose of the plaintiff to employ negro tenants and laborers sufficient to farm the land, and it was necessary to furnish supplies, stock, seed, tools, etc., with which to farm said land in cotton, and that this purpose was known to J. L. Roseborough at the time of making the said lease contract, and that, preceding the execution of the said contract, and while the negotiations were pending about said lease, and on the day of the execution of the lease, in order to induce the plaintiffs to enter the said contract, the said Roseborough and his agents positively stated to the plaintiffs that there was then in said land 600 acres of cleared land fit, suitable, and ready for cultivation, which would require 30 mules to cultivate; that Roseborough and his agents were familiar with the lands, and intended for such statements and representations to be believed by the plaintiffs; and that neither of the plaintiffs were familiar with the plantation, and had only seen it for about two hours a few days before; and that they relied wholly on the representations of Roseborough and his agents for information, which fact Roseborough well knew; and that Roseborough, knowing of their ignorance and lack of knowledge with respect thereto, made said representations; and that the plaintiffs relied thereon, and, so relying, secured 26 squads of negroes to work said lands in the year 1914, and purchased in the market 21 head of mules and horses in the expense of \$2,200; and that they already had 10 head of mules, and that said amount of stock

would be necessary to cultivate 600 acres; and that they procured foodstuff for the live stock at an expense of \$1,200, and farming tools, etc., to the extent of \$500, spent \$500 building roads and drains, and \$300 in clearing up land; and that they furnished their tenants with supplies to the amount of \$3,000; and that all of said expenditures were necessary under the circumstances for the cultivation of said farm if it contained 600 acres; but that in reality at said time there were only about 300 acres of land cleared and fit for cultivation, but, relying on said representations, they believed there were 600 acres; and that the lands were so situated in irregular bodies that they could not determine from a brief inspection the amount in actual cultivation, but when they broke the land in the spring of the year, they found that it was short, and they had to discharge part of their tenants, and had to retain more than was needed both of stock and tenants to cultivate the premises actually open and suitable for cultivation; that they did all they could to place their tenants elsewhere, and did all they could to secure other lands and to dispose of all the stock in excess of what was necessary to cultivate 308 acres in actual cultivation, and by reason of said facts they were damaged in the sum equal to, or exceeding, the rent contract. Issue was joined on this plea, and thereupon the plaintiffs moved the court to allow them to have the opening and closing both in introducing the evidence and in presenting the arguments, which motion was overruled by the court. Defendants thereupon put in evidence the contract, and introduced M. P. Moore, who identified the lease contract, and testified that nothing had been paid upon the contract for the year 1914. Thereupon defendants rested. The appellants (plaintiffs) offered evidence to prove the allegations of their plea set forth, and each testified that the agent of Roseborough, the original landlord, made the representations contained in the plea, and that he stated, in showing them over the plantation, that there was 150 acres of the land which he represented would make a bale of cotton per acre, 300 acres that would make a half bale per acre, and that one-fourth of the land was, at the time of making the contract (which was in the fall of 1913), planted in corn which could be cultivated in cotton. Plaintiffs offered to prove that, after discovering the land was short as to the 600 acres (but only contained about 308 acres), they went to Dr. Roseborough, the owner, and complained that the land did not contain the 600 acres which had been represented to them that it did contain, and that Dr. Roseborough stated that it did contain 600 acres, and that some compromise was discussed and propositions of compromise made during this interview, but the court excluded these statements on the theory that they were made pending a compromise of differences. The court also

excluded much of the evidence offered to show loss on the part of the plaintiff, excluded all the evidence of the expense of repairs, and of building roads and drains, and excluded proof that they would not have made the said drains and incurred the expense if they had known that there was less acreage than 400 acres, and declined to permit plaintiffs to prove the cost of the mules purchased by them and the price at which they were sold, and prove that they were sold at the best price that could be obtained and at a loss to the plaintiffs; also excluded proof that the plaintiffs went to Norfleet and complained of the shortage of the land, and that Norfleet stated to them to go ahead and stay on the place, and that the matter would be adjusted properly, and proof that they went to Senatobia, where Norfleet, Gabbert, Moore, Dr. Roseborough, Dodd, and McNeer were present, and made complaint to them. The court declined to permit them to state what statements were made at that time with reference to this matter, and refused to permit them to prove what was done about the matter at that time, and refused to permit them to prove that Dr. Roseborough at that meeting made admissions as to the shortage of the land.

At the conclusion of the evidence the court instructed the jury on behalf of the plaintiffs, and in the second instruction given for the plaintiffs instructed the jury that it was not necessary for the jury to believe from the evidence, in order to find for the plaintiffs, that Dr. Roseborough or his agent intentionally misled the plaintiffs as to the acreage in cultivation at the time of the lease, but that it was only necessary for the jury to believe that Roseborough or his agents made representations as to the actual acreage in cultivation which were materially untrue, and that if plaintiffs believed such statement, if one was made, and relied on it in good faith, and was materially damaged, and if the plaintiff was misled as to the actual acreage, the jury should find such damage as the evidence showed to exist on account of such false representations as to the actual acreage of the land.

In the sixth instruction given for the defendant the court charged the jury for the defendant that plaintiffs must satisfy the jury's minds by a preponderance of the evidence that before the execution of the contract Dr. Roseborough, in person or through agent, represented that there were 600 acres of land fit and suitable for cultivation on the leased premises, and that such representation was false, and that it was made by Roseborough with knowledge that it was false, or made in reckless disregard of whether it was true or false; and that it was made with the intention of deceiving and defrauding McNeer & Dodd, and that McNeer and Dodd acted on such representations and believed them to be true, and did not rely upon their

own knowledge or investigation, and unless the jury did so believe, they should find for the defendant in the sum of \$3,000, with interest at 6 per cent.

In the third instruction given for the defendants the court instructed the jury that they could not allow plaintiffs by way of recoupment for or on account of any of the following items asked for in said plea: Price paid for mules and horses, \$2,200; amount paid for farming tools, plows, gear, wagons, necessary improvements, repairing of tenant houses, roads and drains built, \$500; amount paid for clearing land, \$300; salary of J. E. Dodd, \$800.

[1] We think it was reversible error to grant the sixth instruction for the defendant, which told the jury that the representations made, or claimed to have been made, must be made with the intention of deceiving and defrauding McNeer and Dodd. Under this instruction the jury may have believed that Roseborough, either in person or by agent, made the statement that the place did contain 600 acres, and that, notwithstanding he may have made such statement, he may not have made it for the purpose of deceiving and defrauding McNeer and Dodd. It was in direct conflict with the instruction given for the plaintiff as to this feature of the case, and it does not contain an accurate statement of the law. To constitute fraud it is unnecessary that a statement be made with the intention of deceiving, if it is a statement of fact, or a statement purporting to be a fact, but not true as a matter of fact. It has all the effect, so far as inducing the contract is concerned, as it would have had if made deliberately for the purpose of deceiving.

In *Vincent v. Corbett*, 94 Miss. 46, 47 South. 641, 21 L. R. A. (N. S.) 85, the court in the fourth syllabus says:

"A statement by an owner of a tract of land that a designated number of acres thereof was cleared is an averment of a fact, and not the expression of an opinion, and, if false, an action of deceit can be predicated of it."

In the fifth syllabus the court says:

"Proof of a false statement by defendant touching the area of cleared land in a tract he was seeking to sell, materially overstating the number of acres, and that plaintiff bought on the faith thereof, makes out a prima facie case against the vendor in an action of deceit by the vendee, although plaintiff gave defendant credit for an honest mistake."

[2] In the case of *Estell v. Myers*, 54 Miss. 174, it was held that a false statement with reference to the safety of a place from overflow was an inducement to the vendee to purchase, and that the vendee may recoup in a suit to enforce the security for the purchase money to the extent of his injury, and that misrepresentations, even if they were made honestly and the plaintiff did not know they were false, or were not made with fraudulent intent, would enable the party wronged by such representations to prove

damages by recoupment. This case is an instructive case, and shows that many of the rulings on the evidence were erroneous in the present case, and shows that the court was in error in excluding from the consideration of the jury evidence of items of damage in the plea of recoupment. Of course the jury are to judge as to the necessity and reasonableness of expenditures made, but should have such information, coupled with other proof, as will enable them to determine the extent of the damage of the party in case they find facts favorable to the plaintiff. See, also, *Rimer v. Dugan*, 39 Miss. 477, 77 Am. Dec. 687; *Davidson v. Moss*, 5 How. 673; *Parham v. Randolph*, 4 How. 435, 35 Am. Dec. 403.

[3] It was error for the court to exclude the evidence as to a statement of fact made by Dr. Roseborough at the time of the negotiations with reference to adjustment of their differences. While an offer of compromise cannot be shown as being an admission of the party making the offer, still if the party makes a statement of fact, as a fact, it may be proved as an admission even though it was made during the discussion of the compromise. The rule is stated in *Encyclopedia of Evidence*, vol. 1, p. 599, as follows:

"*Admission of Fact Competent.*—While offers of compromise cannot be proved as admissions, a distinct admission of a fact in the course of negotiations therefor is held admissible" (citing, among other authorities, *Grubbs v. Nye*, 18 Smedes & M. 443; *Garner v. Myrick*, 80 Miss. 448, which fully sustain the rule stated).

[4] In reference to the errors assigned on the right to open and close the proof and the argument, it seems that the trial court proceeded under the theory that under section 2864 of the Code the burden was on the landlord in the case. The concluding clause of 2864 reads as follows:

"And on the trial of an issue on an avowry, the burden of proof shall be on the avowant, the landlord, and he shall have the right to open and conclude the argument."

As we understand it, this means that when an issue has been tendered on the avowry, denying the allegations of the avowry, then the burden is on the landlord or avowant; and, under the pleading, if either the relation of landlord and tenant, or the amount of the contract, or the amount of supplies furnished, is denied, then the landlord must assume the burden and prove his contention; but if the relation be admitted, and the amount of the rent contract for supplies furnished is not denied, no issue is made on the avowry. If the plaintiff undertakes to confess and avoid by an affirmative plea setting up new matter, and issue is tendered on this plea, then the burden shifts and the plaintiff assumes the burden, and has the right of opening and concluding the evidence and the argument. In the present case the pleadings do not take issue on the amount agreed upon in the contract, but undertakes to reduce or overcome the amount agreed to be paid by an

affirmative plea setting forth facts not in denial of the plea of avowry, but setting up new matter upon which issue was tendered, and upon which the whole case was tried, and the instructions given the jury placed the burden upon the plaintiff to prove the issues of this plea. This question is settled in favor of the appellant by the case of *Porter v. Still*, 63 Miss. 357, which is quoted with approval in the later case of *Timberlake v. Thayer*, 16 South. 878. The rule, in the case in 63 Miss. 357, supra, is stated as follows:

"The party on whom the burden of proof lies, whether plaintiff or defendant, is entitled to open and conclude the argument before the jury. And this is not a mere privilege, but a right determined by law. If there be several issues, and the plaintiff holds the affirmative of any one of them, he is entitled to open and conclude. The party on whom the burden of proof in any cause rests may be determined by considering which would succeed if no evidence were offered by either side, and by examining what would be the effect of striking out of the record the allegation to be proved. The onus must be on the party who, under such tests, would fail in the suit."

For the errors indicated, the case is reversed and remanded.

Reversed and remanded.

(199 Ala. 377)

**SOUTHERN RY. CO. v. FISHER.**  
(8 Div. 887.)

(Supreme Court of Alabama. Dec. 21, 1916.  
On Rehearing, Feb. 15, 1917.)

**1. MASTER AND SERVANT §180(1)—INJURIES TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT.**

Every common carrier by railroad while engaging in commerce between the states is liable in damages under federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), to any person suffering injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 359, 368.]

**2. NEGLIGENCE §101—INJURIES TO SERVANT — FEDERAL EMPLOYERS' LIABILITY ACT — CONTRIBUTORY NEGLIGENCE.**

Under the federal Employers' Liability Act, the fact that an employé was guilty of contributory negligence does not bar a recovery; its only effect being to diminish the damages awarded by the jury in proportion to the amount of negligence attributable to the employé.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 85, 163, 164, 167.]

**3. MASTER AND SERVANT §204(1)—FEDERAL EMPLOYERS' LIABILITY ACT — ASSUMPTION OF RISK.**

The federal Employers' Liability Act has not eliminated the defense of assumption of risk other than where the violation by the carrier of any statute enacted for the safety of employées contributed to the injury or death as provided therein.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 544.]

**4. MASTER AND SERVANT §204(3)—INJURIES TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—ASSUMPTION OF RISK.**

A switch engine conductor's contract of employment did not involve him in any general

assumption of risk for the negligence of co-employees, for, otherwise, the provision of the federal Employers' Liability Act that the employé may recover by showing that one of the co-operating causes of his injury was the negligent act or omission of a coemployé would be inoperative.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 546.]

**5. NEGLIGENCE §117—FEDERAL EMPLOYERS' LIABILITY ACT—PLEADING—CONTRIBUTORY NEGLIGENCE.**

Under the provision of the federal Employers' Liability Act that contributory negligence is not a bar to an action thereunder, pleas of contributory negligence pleaded in bar of a railroad employé's action for injuries rather than in mitigation of damages were defective.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 195-197.]

**6. DAMAGES §173(1)—EVIDENCE §471(13)—EMPLOYERS' LIABILITY ACT—ADMISSIBILITY—CONCLUSIONS.**

In action for injuries under the federal Employers' Liability Act, plaintiff's testimony that for many years he had been employed by defendant in the service he was performing at the time of his injury, that his injury had disabled him to further perform such service, and that he was at the time of the trial unable to perform any service requiring the constant use of his injured foot, was material to be considered in ascertaining the effect of plaintiff's injury upon his ability to earn a livelihood in the employment for which he was fitted by long experience and some degree of disability in other lines, and was not objectionable as conclusions.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 490-492, 501; *Evidence*, Cent. Dig. § 2167; *Witnesses*, Cent. Dig. § 833.]

**7. EVIDENCE §317(9)—HEARSAY.**

In action for injuries, testimony of a witness, who went to the place of accident immediately after it happened, as to what three members of the crew operating the engine by which plaintiff was injured said concerning the manner of the accident, however closely they followed upon the accident, was merely narrative of a then past transaction, was hearsay, and should have been excluded.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1182.]

**8. APPEAL AND ERROR §1050(1)—REVIEW—HARMLESS ERROR.**

In action for injuries under the federal Employers' Liability Act, the admission of hearsay testimony as to statements made by three members of the crew operating the engine by which plaintiff was injured was harmless, where these men were witnesses and testified to the same effect substantially, and no light was thrown on the questions in controversy, and to the extent the hearsay evidence differed it was not offered in impeachment and was not objected to on the ground that no predicate was laid.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153, 4157.]

**9. TRIAL §253(9) — FEDERAL EMPLOYERS' LIABILITY ACT — INSTRUCTIONS — IGNORING EVIDENCE.**

In action for injuries under the federal Employers' Liability Act, whatever may be the duty in general of employées while going about their work in a railroad yard to look and listen before going upon or crossing a track, special charges requested by defendant on that subject were refused without error because they ignored plaintiff's evidence tending to show that he had directed the crew that the engine should not be moved until a certain train had passed through the yard.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 620.]



**10. MASTER AND SERVANT — 236(15)—INJURIES TO SERVANT — CONTRIBUTORY NEGLIGENCE.**

Where the conductor of a yard locomotive directed his crew not to move the engine until a special had passed, he had a right to assume that he would be obeyed, and so he might go upon the track without taking additional precaution against the movement of the engine until the appointed time.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 739.]

**11. MASTER AND SERVANT — 294(2)—FEDERAL EMPLOYERS' LIABILITY ACT—INSTRUCTIONS.**

Evidence that plaintiff had instructed the crew not to move the engine until a special train had passed justified the refusal of charges requested by defendant that defendant's employes, operating the engine at the moment, were under no duty to look out for plaintiff or give him warning of the engine's approach, since plaintiff's duties took him about the yard from one track to another, as the engine crew knew, and, if they would move the engine notwithstanding his direction to the contrary, it was clearly their duty to take precautions against the possible presence of plaintiff on the track over which they moved it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1162.]

**12. TRIAL — 252(11)—FEDERAL EMPLOYERS' LIABILITY ACT—INSTRUCTIONS.**

In a switch engine conductor's action for injuries under the federal Employers' Liability Act in which it did not appear that the engineer operating the engine which injured plaintiff discovered the dangerous situation of plaintiff, an instruction, that under the issues and evidence of this case the plaintiff is not entitled to recover on account of any negligence of the engineer after he discovered the peril or dangerous situation of the plaintiff, should have been given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 603.]

**13. APPEAL AND ERROR — 1067—TRIAL — 260(8)—REVIEW—REVERSIBLE ERROR—INSTRUCTIONS.**

Under the direct provisions of Code 1907, § 5364, as amended by Acts 1915, p. 815, in a switch engine conductor's action for injuries under the federal Employers' Liability Act, error in refusing a requested charge on subsequent negligence was not reversible, where the jury was substantially and fairly instructed in a way to remove all apprehension that a verdict would be founded on subsequent negligence, and plaintiff was not proceeding on theory of subsequent negligence and withdrew all counts except one upon which such a finding could be predicated.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Trial, Cent. Dig. §§ 475, 657.]

**14. COMMERCE — 27(7)—RAILROADS—"INTERSTATE COMMERCE."**

Where a railroad was engaged in interstate traffic, and the division of its road upon which a switch engine conductor was employed extended through several states, and at the time of an injury to the conductor caused by the switch engine he was noting cars to be made up into trains for through traffic, at a time when no local freights were handled, such conductor was engaged in "interstate commerce."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Action by E. A. Fisher against the South-

ern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lawrence E. Brown, of Scottsboro, and Stokely, Scrivner & Dominick, of Birmingham, for appellant. Bouldin & Wimberly, of Scottsboro, for appellee.

SAYRE, J. [1, 2] This action was brought by appellee under the federal Employers' Liability Act. The argument against the seventh count of the complaint is that it failed to show that defendant owed any duty to plaintiff. Since every common carrier by railroad while engaging in commerce between the states is made by the statute liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, defendant was liable in the case stated by the count. Southern Railway v. Peters, 69 South. 611. Possibly the count leaves plaintiff's case open to the inference that he was guilty of contributory negligence, since, notwithstanding his duty to exercise reasonable care for his own safety, and notwithstanding it was his duty in general to direct the operations of the engine, he was at a place where the engine would strike him as, for anything alleged to the contrary, he would have known had he exercised due care; but under the federal statute that fact does not bar a recovery, its only effect being to diminish the damages awarded by the jury in proportion to the amount of negligence attributable to the employe, with some provisos of no consequence here. There was no error in overruling the demurrer to this count.

[3-5] Congress has not eliminated the defense of assumption of risk in cases like that presented by counts 5 and 7 upon which this case went to the jury. Seaboard Air Line Ry. v. Horton, 233 U. S. 502, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475. Considering special pleas, 8, H, I, Z—1, and Z—2 with reference to the facts alleged rather than their labeling by defendant, they were not pleas of assumption of risk, or, if so intended by defendant, they were plainly defective. Plaintiff's contract of employment did not involve him in any general assumption of risk from the negligence of coemployes, for, otherwise, the statute counted upon, and declaring, in effect, that an employe may recover on showing that one of the co-operating causes of his injury was a negligent act or omission of a co-employe, would be inoperative. Louisville & Nashville v. Fleming, 69 South. 125. As pleas of contributory negligence, they were defective because pleaded in bar of the action rather than in mitigation of damages.

[6] There is no reversible error in allowing the plaintiff to testify that for many years he had been employed by defendant in the

service he was performing at the time of his injury, that his injury had disabled him to further perform such service, and that he was at the time of the trial unable to perform any service requiring the constant use of his injured foot. The testimony as to all these facts was material to be considered in ascertaining the effect of plaintiff's injury upon his ability to earn a livelihood, in the employment for which he was fitted by long experience, and, it may be, some degree of disability in other lines, and were competently rendered by the witness; that is, none of them were objectionable as statements of mere conclusions. They were incapable of rendition in any other form.

[7, 8] The testimony of Woodin, a witness for plaintiff, was taken by deposition. He was close at hand and went to the place of the accident immediately after it happened. His testimony as to what he then and there heard Sparks, Malone, and Clem, members of the crew operating the engine by which plaintiff was injured, say concerning the manner of the accident, was allowed to go to the jury over defendant's objection. However closely the statements may have followed upon the accident, they were merely narrative of a then past transaction, were hearsay, and should have been excluded. But the court is of opinion that the judgment should not be reversed on that account. Sparks, Malone, and Clem testified as witnesses for defendant. What Malone and Clem said to or in the hearing of Woodin after the accident was of no consequence. It did not tend to contradict their testimony at the trial, nor did it throw any light upon the questions in controversy between the parties and about which the result of the case turned, viz. whether Sparks, who stood upon the forward footboard of the tender as the engine "backed" through the yard and whose duty it was, according to tendencies of plaintiff's evidence, to keep a lookout for employes upon the track, was negligent in that respect, or whether, after he discovered plaintiff's peril, he failed to exercise due care to have the engine stopped. They said only that they did not see plaintiff, meaning, very clearly, that they did not see him leaving or after he left a place of safety on the track adjacent to that upon which the engine was moving. What Sparks said was more material because it related to the immediate circumstances of plaintiff's injury; but the judgment should not be reversed for the error in allowing Woodin to repeat it—this for the reason that it tended to support defendant's denial of negligence on the part of Sparks, while, if on mature reflection it may be said to differ somewhat from Sparks' testimony, the difference was so slight as hardly to amount to a contradiction. The evidence does not appear to have been offered to impeach Sparks, nor was it objected to on the ground that no predicate had been laid.

*Southern Railway v. Smith*, 177 Ala. 367, 56 South. 429.

We are not of opinion that the exceptions to parts of the court's oral charge to the jury need to be treated *seriatim*. Those parts to which exceptions were reserved, read in connection with their context, do not appear to involve error.

[9-11] Plaintiff was conductor of the switch engine that ran against him. The crew operated the engine about the yard under his direction, breaking up trains as they came in, and making up trains to be taken out. Whatever may be the duty in general of such employes while going about their work in a railroad yard to look and listen before going upon or crossing a track, special charges requested by defendant on that subject were refused without error because they ignored plaintiff's evidence going to show that he had directed the crew that the engine should not be moved until the Memphis special had passed through the yard. Defendant holds that plaintiff's direction to the engine crew meant only that they should not take the engine out upon the main line. Suffice it to say that the jury may have found, very reasonably under the evidence, that the direction was given and understood in accordance with plaintiff's contention, in which event plaintiff had a right to assume that he would be obeyed, and so that he might go upon the track without taking additional precaution against the movement of the engine until the appointed time. Several of the charges requested by defendant predicated plaintiff's duty to look and listen for the engine without regard to—that is, notwithstanding—the duty of the crew not to move the engine. They were therefore refused without error. The evidence to which we have referred above was enough to justify also the refusal of charges by which defendant requested the court to say to the jury that defendant's employes, operating the engine at the moment, were under no duty to look out for plaintiff or give him warning of the engine's approach by ringing the bell or otherwise. Plaintiff's duties took him about the yard from one track to another, as the engine crew knew of course, and, if they would move the engine notwithstanding his direction to the contrary, it was clearly their duty to take precautions against the possible presence of plaintiff on the track over which they moved it. Besides, there was other evidence tending to show that it was the duty of the crew generally to look out for plaintiff, and that especially was this the duty of Sparks whose place on the forward footboard of the tender was one of peculiar advantage for that purpose. These tendencies of the evidence were ignored in the charges refused.

[12, 13] It seems likely that the court refused charge 17, requested by defendant, through inadvertence; or it may be that it was considered abstract, since there was no

evidence to support a charge of negligence against the engineer Clem after the actual discovery of plaintiff's danger, in which last event it would have been better to give the charge as requested, for a good deal was said in the testimony concerning Clem's operation of the engine and in a proper state of the evidence a finding of subsequent negligence on his part might have been referred to count 7 in which negligence was charged generally against "the agents or employes of the defendant engaged in operating said engine." But, for whatever reason the court marked the charge "refused," a reversal cannot be based upon its refusal, for the court very explicitly instructed the jury in its general oral charge that there could be no recovery for any subsequent negligence of Clem, and at defendant's request gave the affirmative charge in writing against count 1 which specifically charged Clem with negligence after he discovered plaintiff's presence and peril at the place where he was injured, and upon the whole record it is quite clear that the case turned upon the charge of negligence preferred against Sparks. Thus it was that the jury was substantially and fairly instructed in a way to remove all apprehension that a verdict would be founded upon any alleged subsequent negligence of Clem. Section 5364 of the Code as amended by the Act of September 25, 1915 (Acts, p. 815).

[14] Other special charges refused to defendant need not be specially noticed, except to say that the general affirmative charge on the whole case was properly refused. This charge proceeded upon the idea that plaintiff was not engaged in interstate commerce at the time of his injury. Defendant was engaged in interstate traffic, and the division of its road upon which plaintiff was employed extended from Chattanooga in Tennessee, through Georgia and Alabama, to Memphis, Tenn. Trains that came into the yard consisted of cars passing from one state to another, and, according to plaintiff's testimony, he was walking through the yard noting cars to be made up into trains for through traffic. On that day, Sunday, no local freights were handled. This testimony warranted the jury in finding that plaintiff was engaged in interstate commerce.

The damages awarded were ample; we cannot say they were excessive.

Affirmed.

ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., concur.

On Rehearing.

SAYRE, J. On appellant's application for rehearing this case went to the full bench, whereupon the court upon due consideration directed the following statement and conclusion:

On appellant's brief on its application for rehearing it is urged with great and renewed

vigor that the judgment in this case should be reversed for the trial court's error in refusing appellant's requested charge No. 17 which reads as follows:

"The court charges the jury that under the issues and evidence of this case the plaintiff is not entitled to recover on account of any negligence of the engineer Clem after he discovered the peril or dangerous situation of the plaintiff on the occasion complained of."

After a careful re-examination of the evidence, we are still unable to find any justification for the theory that the engineer discovered the peril or dangerous situation of the plaintiff on the occasion complained of. It follows hence that the charge might have been given with perfect propriety and that its refusal constituted error for which the judgment should be reversed, unless it appears upon the whole record that defendant had in another way the benefit, substantially, of the proposition of the instruction refused.

In our original opinion we stated that the court at defendant's request had given the affirmative charge in writing against count 1 which specifically charged Clem with negligence after he discovered plaintiff's presence and peril at the place where he was injured. In the brief it is now suggested that the charge as to count 1 was given for the reason that it was drawn under the Employers' Liability Act of this state. That may have been the reason; but, considering that the answer to the question whether plaintiff and defendant were engaged in interstate commerce rested in inference to be drawn by the jury, the cogency of the reason is not quite clear. But we are not so much concerned about the court's reasons as we are about the effect of the record. The bill of exceptions shows that the court in its general statement and oral charge to the jury, after stating the effect of counts 3 and 7, said to the jury:

"The other count, gentlemen of the jury, by number I believe is 4. The plaintiff makes the same charges I have suggested to you about the negligence of Mr. Clem who, he says, had charge of the engine in the switch yard at Loyal, and his negligence consisted in this: That Clem discovered that the plaintiff Mr. Fisher was in dangerous proximity to the track he was running the engine on and likely to be injured unless something was done to prevent it, and that after the discovery of that peril he failed to give a signal, a warning, or failed to stop his engine, and as a result of that he was injured."

At one place in the record, after what purports to be the court's oral charge to the jury which at that place, we take it, is set out in compliance with the remedial act of September 25, 1915, requiring that every general charge shall be in writing or taken down by the court reporter as it is delivered to the jury and set out in the transcript on appeal, though this case was tried on September 8, 1915—and this must have been after the court had stated the meaning of count 4 to the jury—this appears:

"Before the court completed his charge, the plaintiff's counsel asked leave to withdraw all

the counts of the complaint except counts Nos. 5 and 7. Thereupon the court instructed the jury as follows: 'Now the plaintiff has the right at any time to withdraw any of these counts, and those that were left in—before that the court had given the affirmative charge against counts 1 and 2—have been withdrawn until we have only counts 5 and 7, and these are the only ones you will consider.'

The bill of exceptions contains an identical account of what happened, as stated above, but this in addition:

"At the conclusion of the court's oral charge, in open court, and in the presence of the jury and before it retired, plaintiff's counsel withdrew all the counts of his complaint except counts 5 and 7, stating to the court that all the issues charged in the counts withdrawn were embraced in these two counts."

The process set forth above eliminated not only counts 1 and 2, to which we have referred, but counts 3 and 4, in both of which plaintiff's injury was ascribed to the negligence of Clem and in the last named, or numbered, in which it was alleged that, "Clem discovered plaintiff's peril in time to avoid injuring him by giving signals of warning and stopping said switch engine, one or both, and negligently failed to give warning signals or to stop said engine," thus stating the only conceivable form of subsequent negligence that might have been attributed to Clem in the circumstances. In the fifth count plaintiff counted upon the negligence of Sparks after discovering plaintiff's peril, while count 7 contained only the general charge that:

"The agents or employes of the defendant, engaged in operating said engine, negligently propelled the same against the person of the plaintiff, inflicting great personal injury."

It is true that under our decisions it was possible for the jury to return a verdict against defendant under count 7 on a finding that any agent of defendant, engaged in operating the engine, after discovering plaintiff's peril, negligently failed to take proper precautions against the danger of the situation thus brought to his knowledge, and that, on this showing, nothing else appearing, a reversal would be ordered for the error in refusing the charge numbered 17. But on the record here shown we think it appears with reasonably certainty, notwithstanding the statement of plaintiff's counsel to the effect that "all the issues charged in the counts withdrawn were embraced" in counts 5 and 7, that neither the court nor the jury understood that the case was submitted on the charge of subsequent negligence against Clem, but rather that they understood that, practically, the case was given to the jury on the issue whether plaintiff's injury had been caused by the negligence, initial or subsequent, of Sparks, as it should have been under the evidence. Nor, in view of these circumstances tending to exclude the conclusion, do we find it necessary to indulge the conclusion that perchance the jury may have erroneously based their verdict upon a state of supposed facts that was without warrant

in the evidence. In these peculiar circumstances, common sense rebels against the idea that the court's refusal of charge 17 should necessitate a reversal. Certainly the court would proceed upon a highly technical ground, having no support in the meritorious issues litigated, to adjudge a reversal of this judgment because the general count No. 7 had the legal content of a charge of subsequent negligence against Clem when, as matter of fact, it appears that plaintiff was insisting upon a different ground that had support in the pleadings and the evidence, and this conclusion is not affected by the fact that a statement, capable of, though not necessarily requiring, a different interpretation, is attributed by the bill of exceptions to counsel for plaintiff, nor by the fact that counsel have here made a futile effort to sustain the proposition that there was evidence of Clem's negligence subsequent to a discovery of plaintiff's dangerous movement towards defendant's track. So far as we are advised, we have no case holding that a reversal must be ordered in such circumstances, and we think that the case here falls within the remedial purpose of section 5364 of the Code as amended by the act of September 25, 1915.

As to the ruling on the exception reserved to the admission of the testimony of the witness Woodin: The court is of opinion that this witness' testimony as to what Sparks said shortly after the accident, taken in a natural and unstrained way, tended to support Sparks' testimony at the trial and so, as far as it went, defendant's version of the accident. Therefore the court holds it to be quite clear that the admission of this evidence worked no harm to appellant and that no reversal should be predicated upon it.

Application overruled.

All the Justices concur, except ANDERSON, C. J., who dissents on the point raised by the refusal of defendant's charge No. 17.

(44 La. 24)

No. 21072.

LYONS v. NEW ORLEANS, T. & M. RY. CO.  
(Supreme Court of Louisiana. Feb. 12, 1917.  
Rehearing Denied March 12, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §1002 — REVIEW — VERDICT—CONFLICTING EVIDENCE.

Where the testimony is conflicting, the verdict of the jury should be affirmed, if not clearly against the preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937.]

2. MASTER AND SERVANT §101, 102(1), 208(1) — SAFE PLACES AND APPLIANCES—ASSUMPTION OF RISK.

The employer's continuing duty to furnish a reasonably safe machine and appliances to his employes, and to keep the same in proper repair, is one of his basic obligations, and the employer's failure or neglect to perform such

duty is not one of the incidental risks which the employé assumes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 185, 171, 178, 179, 551.]

O'Niell, J., dissenting.

(Additional Syllabus by Editorial Staff.)

**B. DAMAGES —132(13)—PERSONAL INJURY—EXCESSIVE DAMAGES.**

A verdict of \$7,500, awarded an experienced workman who lost five fingers of his right hand, was excessive in view of his testimony that he was laid up with his hand for eight weeks, suffered a good deal, and that he estimated his pain and suffering at \$2,000 and his mental pain, etc., at \$1,000.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 384.]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

Action by B. J. Lyons against the New Orleans, Texas & Mexico Railway Company. Judgment for plaintiff, and defendant appeals. Judgment reduced to \$5,000, and, as so amended, affirmed.

Wm. C. Dufour, H. Generes Dufour, and George Janvier, all of New Orleans, and Frank E. Powell, of De Ridder, for appellant. Gayle & Porter, of Lake Charles, for appellee.

LAND, J. Plaintiff, an experienced workman, sued the defendant company for the sum of \$8,000, as damages for the loss of the five fingers of his right hand, which were cut off while he was operating a jointer machine.

The petition alleges, in substance, that the accident was caused by the defective condition of the screw rod of the rear or right-hand table, which was loose, badly worn, and ill fitted to the table; and that, by reason of the said defects, the said rear or right-hand table "suddenly slipped or fell and became lower," allowing the revolving knives to project an inch above the level of the two tables, thereby causing said knives to gouge deeply into the board which plaintiff was shoving across them, jerking the board from his hands, and throwing the same with great force and violence a distance of some 40 feet, striking the rear wall of the mill; and that, when said board was so jerked or thrown from plaintiff's hands, his right hand, which was holding said board, was thrown on said revolving knives, which cut off from his right hand all five of his fingers, where they join the metacarpus.

The petition further alleges that, in order to properly operate said machine, the operator has to press downward on the board or other piece of wood being planed, in order to hold the same firmly against the revolving knives; that plaintiff on the occasion in question was so pressing the board firmly on said revolving knives; that his right hand was resting on the board about eight inches in front of said revolving knives; and that

when said rear table suddenly fell downward, allowing said knives to dig into said board, and throwing it backward from his hold, his hand was thrown in said knives as above set forth.

The petition further alleges that the accident was caused by the worn and faulty mechanism of said rear table; that it was the duty of defendant's managing agent to inspect and keep in repair the said jointer machine as well as others in said plant; that it was not the duty of the plaintiff to inspect or repair said machine; and that he had no knowledge of its dangerous defects until after the said accident.

The petition charges that the defendant was negligent in not providing the plaintiff with a safe jointer machine to work with, in providing him with a jointer machine highly defective and dangerous, and in not warning him of said defects.

Plaintiff alleged damages, in the sum of \$2,000 for physical pain and suffering, in the sum of \$1,000 for mental pain, embarrassment, and humiliation; and in the sum of \$5,000 for the loss of earning capacity.

Defendant in its answer admits that the plaintiff, an employé, while working at a jointer machine, was injured as alleged, but specially denies that the accident occurred in the manner and for the causes stated in the petition.

The answer specially denies that the rear table suddenly slipped or fell and became lowered, as alleged, and avers that the said table in all of its parts was in good condition.

"Defendant admits that, when the said board was jerked from plaintiff's hands, plaintiff's right hand fell on the said revolving knives, and that the said knives cut off all five fingers of plaintiff's right hand as alleged."

The answer denies that the said injury was caused by any fault or negligence whatever on the part of the defendant, but avers that the said injury was caused solely by the gross carelessness and "contributory" negligence of the plaintiff himself.

Defendant in the answer then proceeds to set forth its own theory of the accident, based on averments that it was caused by the careless and improper handling of the board by the plaintiff; and pleads that, if the machine was defective, he knew or should have known its condition, and assumed the risk.

The case was tried before a jury, which returned a verdict for \$7,500 in favor of the plaintiff; and, from a judgment pursuant to the verdict, the defendant has appealed.

Plaintiff's testimony as to how the accident happened may be briefly stated as follows:

As plaintiff was dressing a board 1x12 by 3 feet long, it came across the table, he bearing down and shoving, when all at once the board jerked out from under his hand,

and drew his right hand under the knives, and cut off his five fingers.

The board was jerked straight back about 40 feet. Plaintiff was holding the board in the usual manner. The machine had four knives. He was dressing the board down to  $\frac{3}{8}$  or  $\frac{1}{2}$ , he believes, and was pushing it over the knives for the first time. Plaintiff could not say exactly how much of a cut he intended to make. He had his right hand about 12 or 15 inches on that part of the board which had passed the knives, and was on the front or stationary table. His left hand was also on the board about from 4 to 6 inches slightly in front of his right hand. He was bearing down and shoving all he could.

Witness Smith testified, in substance, that he had just dressed two boards, when the plaintiff came up to help him, and took hold of the board in question; that the witness pushed the same board up to about 8 inches of the end of it, turned it loose, and turned to pick up another, when the board on the table came back like lightning, and flew to the end of the shop, about 30 feet; that the same table sometimes would slightly fall or lower itself, because of the worn condition of the set screw.

The witness further stated that the board was slightly warped, so that the operator had to shove pretty hard, as the knives would kick the board up all the time; and that the plaintiff was handling the board in the same manner as the witness usually did.

The board is before us as one of the exhibits produced before the jury.

The witness Welch, the subforeman of the plaintiff, testified to the following effect:

After identifying the board which the plaintiff was planing at the time of the accident, the witness stated that all of the board, except a few inches on the rear end, had been planed down by the plaintiff to a thickness of  $\frac{1}{2}$  of an inch; that the cut or gouge across the rear end of the plank was about  $\frac{1}{8}$  of an inch deeper; that from the point where the knives first began to gouge into the board to the end of the board was  $2\frac{1}{2}$  inches; that at the instant the board was jerked back about half an inch was resting on the rear table.

The board itself shows a double gouge, or cut extending across the entire width of the board, and appreciably below the level of that part of the board which had already been planed down to the thickness of  $\frac{1}{2}$  of an inch.

It follows that, when all but  $2\frac{1}{2}$  inches of the board had passed the knives, it was suddenly pressed down further on them, and was hurled back with tremendous force.

The decisive question of fact in the case is: What caused the sudden lowering of the end of the plank?

Plaintiff's contention is that it was caused by the sudden drop of the back table, due to the giving way of the set screw.

Smith, as stated above, testified that the

table sometimes lowered itself gradually on account of the worn condition of the set screw.

Welch, subforeman, testified to the same effect.

The same witness further stated that the distance between the two tables, when the machine was taking off a  $\frac{3}{8}$ -inch cut, was  $2\frac{1}{2}$  inches; that the table could be screwed down not over half an inch, if working light stuff. "Could not say that it done it then," referring to the time the plaintiff was hurt, or on any previous occasion. No such defect was ever reported to him. He inspected the machine every morning. The machine appeared to be in good condition immediately after the accident.

Mr. Welch on re-examination stated that since the accident several of the workmen had reported to him about the back table of the machine falling down, and that the machine had been fixed so that said table would not fall.

Mr. Welch stated that he was a first cousin of the plaintiff, and was still in the employment of the defendant.

The testimony of Spangler is confused and contradictory.

He evidently had a good deal of practical experience in the working of jointer machines, but his explanations of the working of the machine are not satisfactory.

Among his statements is one in substance that the dropping of the rear table "hadn't ought to" have any effect on the board.

Defendant avers, in answer, that the space between the two tables was about  $2\frac{1}{2}$  inches; that the amount of the cut is regulated by moving the two tables up and down, thus allowing the revolving knives to project through said space the desired distance; and that the accident occurred after the said board had been pushed by the plaintiff entirely off the rear or right-hand table of said machine, and when the rear 2 inches of said board was resting on said knives.

[1] The defendant denies that the rear right-hand table slipped or fell or became lowered, and avers that, when said board was jerked from plaintiff's hands, his right hand fell on said revolving knives.

Harvey Rhodes, defendant's master mechanic, testified that he thoroughly inspected the jointer machine, including the screw, 15 or 20 minutes after the accident, and found everything in good condition.

"Q. Did you find that screw to be working or loose?"

"A. No.

"Q. Did you make any test at any time, then or after, as to whether or not that table would drop or fall?"

"A. No, sir."

The witness further stated that no complaint was made to him, before the accident, that the rear table would drop or fall.

A. Bischoff, defendant's superintendent of reclamation service, testified, in substance, that he examined the machine in question

about an hour and a half after the accident; that he took the screw out and found it in good condition; that the same screw was in the machine at the time of the trial below; that the screw was not worn, and if it had been the table would not have dropped because the bevel would have taken up the slack; and that, if all the screws slipped, the table would not fall down—it might slide down easy if the screw was stripped, but there would be no sudden drop.

On his cross-examination, the witness stated that the screw was worn, but not loose.

The same witness further testified that, when he examined the tables on the day of the accident, they were set for a cut of  $\frac{3}{8}$  of an inch, which, in the opinion of the witness, was too large for safe operation.

The court ordered that the evidence as to the opinion of the witness be stricken out.

Carter, carpenter, testified that he handed to the plaintiff the board in question, and it was going through the machine for the first time when the plaintiff was hurt; and that the two boards planed a few minutes before by Smith went through the machine twice.

Pettingwill, former general foreman of the car department of the defendant, testified, in substance, that he inspected the machine in question before and after the accident; that he never heard of any report before the accident that the set screw was loose and that the table would fall or become lowered in the operation of the machine; that the witness heard of such a defect after the plaintiff was injured, and thereupon inspected the machine and could discover nothing wrong about it.

We make the following excerpts from defendants' brief:

"The two tables are quadrangular in shape, absolutely level, have no connection with one another, and are so managed that there is room between them for the shaft or knives to project."

"The second table is so set that it is level with the top of the knives so that the lumber when planed off slides from the top of the knives to this table."

"The first table is adjustable and is raised or lowered according to the desired size of the cut to be made."

"If this table, for instance, be adjusted to a position one-quarter of an inch below the top of the knives, and the board was then pushed from this table over the knives, one-quarter of an inch will be cut off the bottom of the board, and it will then slide to the second table, which is exactly level with the top of the knives."

"If the first table is set at the height of the second table, which is even with the top of the knives, necessarily no cut will result. The table is raised or lowered by a hand-set screw, which operates on four wedged-shaped iron blocks under the table. The set screw pulls these wedges forward or backwards as desired, and the table is thus raised or lowered to the desired height."

The board in question had been previously planed on one side, and its thickness thereby reduced to  $\frac{3}{8}$  of an inch. The plaintiff undertook to plane the rough side, and the evidence and the board itself show that he reduced the thickness of some 34 inches of

that side from  $\frac{3}{8}$  to  $\frac{1}{2}$  or  $\frac{4}{8}$  of an inch, thus demonstrating that he cut off  $\frac{3}{8}$  of an inch of the thickness, and that the rear table was set to cut  $\frac{3}{8}$  of an inch.

But the board and the evidence show that, at a point between 2 and 3 inches from the end of the board next to the knives, there is a cut or gouge into the board of an additional  $\frac{1}{8}$  of an inch, making a total cut there of  $\frac{4}{8}$  or  $\frac{1}{2}$  of an inch. This simple fact demonstrates that the rear table, set to cut  $\frac{3}{8}$  of an inch, must have dropped  $\frac{1}{8}$  of an inch more, or  $\frac{1}{2}$  of an inch in all; that is as far as it can drop.

The table could not have dropped, if the screw had held, and it follows that the dropping of the table was caused by the drop of the screw, on account of its worn condition.

The circumstance that defendant's expert, Bischoff, about an hour and a half after the accident, noticed that the table was set to cut  $\frac{3}{8}$  of an inch, is without probative force, since any foreman or mechanic about the mill could in the interval have reset the table.

Defendant's theory that the plaintiff must have placed his hand on the rear end of the board and shoved it  $\frac{1}{8}$  of an inch further down on the knives has no foundation in the evidence, and is refuted by the positive testimony of the plaintiff and of Smith that the former's hands were in their proper position in front of the knives.

We are not prepared to hold that the verdict is contrary to the evidence.

There was sufficient testimony, if believed, before the jury, to warrant a finding that the set screw was old and worn, and liable at times to drop, and that this defect could have been discovered by proper inspection, and was not known to the plaintiff.

[2] In *Roff v. Summit Lumber Co.*, 119 La. 571, 44 South. 302, the general rule applicable to cases of this kind was correctly stated by Nicholls, J., in the syllabus as follows:

"The employer's duty to furnish safe appliances to his employé is one of the basic obligations of the employer, and it is a continuing duty. It is not sufficient for him to see that they be safe and proper at one time. He must see that they continue so, so long as the work is to be performed."

"The willful violation of an employer of his obligation to furnish his employé with appliances which are safe, \* \* \* and the results which flow from such violation, are not risks ordinarily incident to the business which the employé assumes."

This doctrine is in accord with "universally recognized" rules of jurisprudence. See *Scheurer v. Banner Rubber Co.*, 28 L. R. A. (N. S.) page 1221, note.

[3] Defendant complains that the quantum of damages allowed by the verdict is excessive.

The jury seemingly allowed \$2,500 for physical pain and suffering and mental pain and humiliation, and \$5,000 (all that was claimed) for loss of earning capacity.

Plaintiff testified that he supposes he was

laid up with his hand for eight weeks and suffered a good deal; and that the value of his pain and sufferings, he thought, was \$2,000.

He further testified that he thought \$1,000 was right for his mental pain and embarrassment, humiliation, etc.

On such vague and indefinite evidence we are of opinion that an award of \$7,500 as damages is excessive, and should be reduced to \$5,000.

It is therefore ordered that the verdict and judgment below be reduced to \$5,000, and, as thus amended, be affirmed, and that the plaintiff pay the costs of appeal.

SOMMERVILLE, J., takes no part.

O'NIELL, J., dissents, being of the opinion that the accident was caused by the plaintiff's bearing down on the rear end of the board with his hand over the revolving knives, which was a negligent manner of operating the machine.

(141 La. 33)

No. 22030.

**CITY OF BOGALUSA v. BLANCHARD.**

(Supreme Court of Louisiana, Feb. 12, 1917.  
Rehearing Denied March 12, 1917.)

(Syllabus by the Court.)

**1. SUNDAY §2—REPEAL OF LAW BY LATER STATUTE—CLOSING OF MOVING PICTURE THEATERS.**

Though the Act of 1886 (No. 18) known as the Sunday Law excepts theaters and places of amusement from the requirement of closing on Sundays, the Act of 1898 (No. 136) providing for the creation and government of municipal corporations (as in part amended and re-enacted by Act No. 111 of 1912) confers upon the corporations so to be created the power to "regulate, suppress and impose a privilege tax on" such places, and, being a later expression of legislative will, controls in that respect the act of 1886, and authorizes such corporations to require theaters, including moving picture shows, to be closed on Sundays.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. § 2.]

**2. SUNDAY §2—CONSTRUCTION OF STATUTES—REGULATION OF THEATERS AND SHOWS.**

The legislative charter of the city of Bogalusa (Act No. 14 of 1914) contains a grant to that city of all the powers conferred by the act of 1898 and other general statutes upon corporations created under the authority of those statutes, save as otherwise provided in said charter, and contains also a certain specific grant of authority "to regulate the police of theater, \* \* \* balls, dance halls, concert saloons," etc., which grants are to be construed together, and, so construed, vest said city with the power to require that theaters and moving picture shows be closed on Sundays.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. § 2.]

**3. CONSTITUTIONAL LAW §240(1), 296(1)—DUE PROCESS OF LAW—EQUAL PROTECTION OF THE LAWS—CLOSING OF MOVING PICTURE SHOWS ON SUNDAY.**

There is nothing in the legislation mentioned which contravenes the guaranties of due process

of law and equal protection of the laws as contained in the federal and state Constitutions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 683, 693, 697, 698, 825-829, 836, 838, 840-846.]

Land, J., dissenting.

Appeal from City Court of Bogalusa; C. Ellis Ott, Judge.

R. Blanchard was charged with the violation of an ordinance of the City of Bogalusa in conducting a moving picture theater on Sunday. Motion to quash the affidavit sustained, and the City appeals. Judgment annulled, and case remanded.

Bascom D. Talley, City Atty., of Bogalusa, for appellant. Benj. M. Miller, of Covington, and A. Sidney Burns, of Bogalusa, for appellee.

**Statement of the Case.**

MONROE, C. J. Defendant, having been charged with the violation of a city ordinance by conducting a moving picture theater on Sunday, moved to quash the affidavit, on the grounds:

(1) That it charges no offense against the laws of the state or the ordinance invoked.

(2) That the ordinance is unreasonable, and is unconstitutional, in this:

(a) That the conducting of theaters and places of amusement on Sundays is authorized by Act 18 of 1886.

(b) That no authority is conferred on the city of Bogalusa by its charter to prohibit the conducting of such places upon that day.

(c) That the penalizing of the same deprives defendant of his property without due process of law and denies him the equal protection of the laws.

The trial court gave judgment "sustaining the motion to quash and declaring the ordinance \* \* \* unconstitutional, null and void, in so far as it attempts to prohibit the operation of moving picture theaters on Sunday," and the city has appealed.

**Opinion.**

Act No. 18 of 1886, known as the "Sunday Law," reads in part as follows:

"Section 1. \* \* \* From and after the 31st day of December, A. D., 1886, all stores, shops, saloons, and all places of public business, which are or may be licensed \* \* \* and all plantation stores, are hereby required to be closed at twelve o'clock on Saturday nights, and to remain closed continuously for twenty-four hours. \* \* \*

"Sec. 2. \* \* \* Provisions of this act shall not apply to news dealers, keepers of soda fountains, places of resort for recreation and health, watering places and public parks, nor prevent the sale of ice.

"Sec. 3. \* \* \* That the provisions of this act shall not apply to newspaper offices, printing offices, book stores, drug stores, apothecary shops, undertaker shops, public and private markets, bakeries, dairies, livery stables, railroads, whether steam or horse, hotels, boarding houses, steamboats and other vessels, warehouses for receiving and forwarding freights, restaurants, telegraph offices and theaters, or



any place of amusement, providing no intoxicating liquors are sold in the premises: Provided, that stores may be opened for the purpose of selling anything necessary in sickness and for burial purposes."

And there are other provisos which need not be here considered.

In 1898 the General Assembly enacted a statute providing for the creation and government of municipal corporations throughout the state, etc., and conferred upon the corporations to be created under its authority the power:

"Sec. 15. \* \* \* To enact ordinances for the purposes hereinafter named, and such as are not repugnant to the laws of the state. \* \* \*

"Twenty-Fourth.—To regulate, suppress, and impose a privilege tax on all circuses, shows, theaters, billiard tables, bowling alleys, concerts, itinerant sellers of medicine, corn doctors, pet bear exhibitions, exhibitions for pay, fortune tellers, cane or knife racks, and like devices, gift enterprises, lung testers, museums, menageries, feather renovators, muscle testers or developers, peddlers, flying jennies, pistol or shooting galleries, theatrical exhibitions, ten pin alleys (without regard to the number of pins used) skating rinks, roller coasters and other like things. \* \* \*

"Twenty-Sixth.—To prohibit and suppress tippling shops, saloons, dram shops, clubrooms; to restrain, prohibit, and suppress slaughter houses, houses of prostitution, disreputable houses, games, and gambling houses and rooms, dance houses and rooms, keno rooms, desecration of the Sabbath day and all kinds of indecency and other disorderly practices, disturbance of the peace, and to provide for the punishment of the persons engaged therein."

Act 136 of 1898, §§ 15, 24, 26, p. 231.

In 1912, by Act 111 of that year, the General Assembly amended and re-enacted section 15 of the act of 1898, but made no change in the paragraphs above quoted.

The city of Bogalusa was incorporated by Act 14 of 1914 (being a special act) which confers upon its "commission council" the following, with other, powers, to wit:

"Sec. 8. \* \* \* All executive, legislative and administrative powers, duties and functions specified in this act, or now had, possessed and exercised by the municipal authorities and officers under the general municipal incorporation laws of the state, or under act No. 207 of \* \* \* 1912, unless otherwise provided in this act. \* \* \*

"Sec. 4. \* \* \* (16) To regulate the police of theater, \* \* \* balls, dance houses, concert saloons, taverns, hotels and houses of public entertainment. \* \* \* 25. To pass all ordinances within the powers granted in this charter and to enforce the same by fine not to exceed \$100 or imprisonment not exceeding 30 days, or both."

[1] It will be seen from the foregoing that the "Sunday Law" of 1886 requires the closing of "all stores, shops, saloons and all places of public business, which are or may be, licensed," but that it expressly excepts "theaters, or any place of amusement" from that requirement; that the general incorporation act of 1898 confers upon the corporations created under its authority the power "to regulate, suppress, and impose a privilege tax on all circuses, shows, theaters, billiard tables, \* \* \* exhibitions for pay, \* \* \* gift enterprises, \* \* \* theatri-

cal exhibitions \* \* \* and other like things; \* \* \* to prohibit and suppress tippling shops, saloons, dram shops, clubrooms; to restrain, prohibit, and suppress slaughterhouses, houses of prostitution, disreputable houses, \* \* \* gambling houses and rooms, dance houses and rooms, \* \* \* desecration of the Sabbath day and all kinds of indecency," etc.; that the grant so made in 1898 is reaffirmed by Act 111 of 1912; and that the legislative charter conferred on the city of Bogalusa in 1914 in express terms grants to that corporation all the powers which had thus been conferred upon the corporations created under the authority of the general laws, "unless otherwise provided" in said charter, and (by special provision) the power "to regulate the police of theaters, \* \* \* balls, dance houses, concert saloons, taverns, hotels and houses of public entertainment."

Pretermittting the question of constitutionality, it is clear that the act of 1898 is as much the law as the act of 1898, and somewhat more so, since it is a later expression of legislative will, and that the act of 1914 is as much and more the law as and than the other two, and equally clear that, if it was competent for the General Assembly in 1898 to require ordinary places of business to be closed on Sunday and to except theaters from that requirement it was also competent for it in 1898 and 1912 to withdraw that exception by authorizing the various municipal corporations to require theaters, as well as ordinary places of business, to be so closed, and in 1914 by conferring that authority on the city of Bogalusa. It will be observed that in one paragraph, the acts of 1898 and 1912 confer the power to "regulate, suppress and impose a privilege tax on," and in another the power to "prohibit and suppress," and to "restrain, prohibit and suppress," and that, after conferring those powers on the city of Bogalusa by section 3 of its charter, it proceeds in section 4 to confer the power "to regulate the police of theater \* \* \* balls, dance houses, concert saloons, taverns, hotels and houses of public entertainment"; and the question naturally suggests itself, whether by these varying forms of expression it was intended to withdraw or nullify the grant of authority to "suppress" which is contained in all of them. Having considered that question, our conclusion is that it should be answered in the negative. The power to "regulate, suppress and impose a privilege tax on" cannot be exercised at one and the same time, since a "circus, \* \* \* exhibition for pay, \* \* \* fortune teller," etc., cannot, if suppressed, be either taxed or regulated, and we conclude that it is the intention of the law to confer the power to regulate, to suppress, to impose the privilege tax on, and to leave it to the municipal authorities to adopt either of those measures, or combine them

so far as they may be combined and as the circumstances of the particular case may require.

The power is conferred to "prohibit and suppress tippling shops, saloons, clubrooms," etc., and to "restrain, prohibit and suppress" houses of prostitution, desecration of the Sabbath day and all kinds of indecency, and other disorderly practices, disturbance of the peace," from which it is evident that the word "restrain" was used, not with the intention of withdrawing the power to "prohibit and suppress," but merely to afford an alternative. And the same thing may be said of the grant of power "to regulate the police of theater, \* \* \* balls, dance houses, concert saloons," etc., as construed with that to "regulate, suppress and impose a privilege tax on," to prohibit and suppress, "to restrain, prohibit and suppress."

We are not here concerned, however, with the question of the possession *vel non* by the city of Bogalusa of the power wholly to suppress a theater or other business, and it is unnecessary that we should determine that question it being sufficient for the purposes of this case that we find that the General Assembly in its latest enactment on the subject has assumed to confer upon that city the power to regulate and suppress theaters, theatrical exhibitions, exhibitions for pay, etc., and that, even though the power to suppress, as thus conferred, should be regarded as subject to limitations, that power, together with the power to regulate, is sufficient authority for an ordinance requiring theaters to be closed on Sundays.

[2, 3] It has been held by this court that the Sunday law here in question (meaning the act of 1886) does not contravene the constitutional provision which guarantees due process of law and equal protection of the laws. *State ex rel. Walker & Mertz v. Judge*, 39 La. Ann. 132, 1 South. 437. And similar statutes have been enacted and sustained in practically all of the other states. 8 Cyc. 885. If, then, a law which requires the closing of ordinary business establishments on Sundays, and excepts theaters from that requirement, is constitutional, equally so is a law which does not contain that exception; and, if it is competent for the General Assembly to require theaters to close on Sundays, it is equally competent for it to confer that power upon the political corporations within the limits of which the theaters are conducted, since the operation of a theater is more especially a matter of local concern, and it is for the regulation and control of such matters that political corporations are established and vested with governmental authority.

"Theatrical entertainments and performances on Sunday (say many of the authorities) cause agitation and disturbance, contrary to law, and are generally expressly prohibited by statute or ordinance. The statutes and ordinances have been held to forbid all performances in theaters or other places of public amusement and enter-

tainment on Sunday, and to cover moving picture shows or exhibitions." 37 Cyc. 551, citing authorities.

See, also, *State v. Garibaldi*, 44 La. Ann. 809, 11 South. 36; *City of New Orleans v. Collins*, 52 La. Ann. 973, 27 South. 532; *Town of Eros v. Powell*, 137 La. 350, 68 South. 632; *No. O. Waterworks Co. v. City of N. O.*, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1-9, 19 Sup. Ct. 77, 43 L. Ed. 345; *McQuillin's Mun. Corp.* vol. 3, § 973, p. 2127; 8 Cyc. 885.

The ordinance here in question follows pretty closely the Sunday law, and includes among the exceptions to its requirements "places of resort for recreation and health," but excludes from such exceptions "theaters, or any place of amusement"; and our learned brother of the city court, after citing certain authorities, says in his well-considered opinion:

"If we are to follow these cases, it would seem that this charge does not set out a violation of Ordinance No. 37 of the city, as the operation of defendant's moving picture show would come within the exception in section 2 under the exception of 'places of resort for recreation and health.'"

It is, however, quite evident, as we think, that the framers of the ordinance considered, as did the framers of the Sunday law, that a place of resort for recreation and health is a place which may subserve one purpose—i. e., recreation, and health—without prejudice to good order and morals, whilst a theater is intended rather to amuse, but may be prejudicial in other respects, and we concur in that view.

For the reasons thus assigned, we conclude that there was error in the judgment appealed from, and it is therefore ordered that the same be annulled, and that this case be remanded, to be proceeded with according to law and to the view hereinabove expressed.

LAND, J., dissents for reasons assigned. SOMMERVILLE, J., takes no part.

LAND, J. (dissenting). Act No. 136 of 1898, p. 224, passed for the creation and government of municipal corporations throughout the state, and defining their powers and duties, etc., vested in the mayor and board of aldermen of every municipality the power to enact ordinances for the purposes specified in the act, "and such as are not repugnant to the laws of the state." See section 15.

Act No. 14 of 1914, p. 15, to incorporate the city of Bogalusa, etc., among other powers, conferred on the commission council those "possessed and exercised by the municipal authorities and officers under the general \* \* \* incorporation laws of the state" or under Act No. 207 of 1912.

Act No. 18 of 1886, known as the "Sunday Law," was not enacted to compel the observance of Sunday as a religious institution, because it is the Christian Sabbath, but as a

day of rest and recreation for the community at large. State ex rel. Walker & Mere v. Judge, 39 La. Ann. 136, 1 South. 437. The lawmaker exempted theaters and other places of public amusement from the operation of the statute.

Under Act 136 of 1898 the city is prohibited from enacting any ordinance repugnant to the laws of the state. I find no provision in the charter of 1914 which empowers the city of Bogalusa to repeal Act No. 18 of 1898; and such power cannot be reasonably inferred from the power to regulate theaters, and other places of amusement. Defendant has the right to keep his theater open on Sundays under the state law, and it is inconceivable to me that the lawmaker could have intended to empower municipalities to modify, amend, or repeal any provision of the state Sunday law. This case presents a direct conflict between a state law and a city ordinance on the same subject-matter, and in my opinion the former should prevail. I therefore respectfully dissent from the majority opinion and decree.

(141 La. 41)

No. 22107.

**SHREVEPORT MUT. BLDG. ASS'N v.  
WHITTINGTON et al.**

(Supreme Court of Louisiana. Oct. 6, 1916.  
On Rehearing, March 12, 1917.)

(Syllabus by the Court.)

**1. MECHANICS' LIENS §315—MECHANICS' PRIVILEGES—CONTRACTOR'S BOND—RECOVERY AGAINST SURETY.**

Question certified by Court of Appeal, Second District: "Was it necessary for said defendants, materialmen, to file sworn statements of their accounts with the owner of the building as a condition precedent to recovery of the amounts of such accounts as against the surety in case of the default of the contractor?" Answer: "No."

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 658.]

**2. MECHANICS' LIENS §315—MECHANICS' PRIVILEGES—CONTRACTOR'S SURETY BOND—NOTICE TO OWNER—STATUTES.**

The surety sustained no loss by reason of the alleged failure to give notice to the owner. See section 1, Act No. 221 of 1914, pp. 418-420.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 658.]

Case Certified from Court of Appeal, Second Circuit.

Suit or concursus proceeding by the Shreveport Mutual Building Association against J. C. Whittington, contractor, his surety, and four materialmen. Judgment for the materialmen against the contractor, and question certified by Court of Appeal, Second Circuit, applying for instructions. Question answered in the negative.

Thatcher & Welsh and Elias Goldstein, all of Shreveport, for appellants O. C. Hard-

man Co., Friend Hardware Co., and Shreveport Long Leaf Lumber Co. J. S. Atkinson, of Shreveport, and J. Zach Sparring, of New Orleans, for appellee U. S. Fidelity & Guaranty Co. Grant & Grant, of New Orleans, amici curiæ.

LAND, J. The judges of the Court of Appeal of said circuit have presented for our consideration and instructions a question of law arising in the above-entitled cause, before them on appeal from the First judicial district court in and for the parish of Caddo.

The said judges state, in substance, that the suit is a concursus proceeding instituted under the provisions of Act 221 of 1914, by the plaintiff, owner of a building constructed by one J. C. Whittington, under the usual building contract, against said contractor, and his surety, and four certain furnishers of material who had caused their respective claims to be recorded, for the purpose of having said claims adjudicated, as between said defendants; that plaintiff deposited in the registry of the district court the sum of \$412.50, balance due by the plaintiff to the contractor at the time the claims were filed; and that the surety company excepted on the grounds:

That three of said firms failed to file sworn statements of their claims with the plaintiff as provided by the statute, and therefore had no right to record the same against said owner; and that the fourth firm failed to file either a sworn statement of its claim with the owner, or to record such statement as provided by the statute.

That this exception was overruled by Hon. John R. Land of the district court, holding that the filing of such statements with the owner was not necessary to enable the materialmen to recover against the surety company.

That the case went to trial on its merits before Hon. R. D. Webb, one of the three judges of the same district, and resulted in a judgment sustaining the exception of the surety company; the judge holding that under the provisions of said Act 221 of 1914, the filing of a sworn statement of the account of the materialmen with the owner of the building was a condition precedent to recovery against the surety on the bond of the contractor.

Judgment, however, was rendered in favor of the materialmen against the contractor, and the fund in the registry of the court was ordered distributed pro rata among them.

[1] The judges of the Court of Appeal, annexing copies of the conflicting opinions of the two district judges to their statement, inquire:

"Was it necessary for the said defendants (materialmen) to file sworn statements of their accounts with the owner of the building as a condition precedent to recovery of the amounts of

such accounts as against the surety in case of default of the contractor."

This case presents no dispute or controversy whatever between the building association and the four furnishers of material; but the respective claims of the latter are urged solely against the contractor and the surety on his bond conditioned for "the payment of all subcontractors, workmen, laborers, mechanics and furnishers of materials by the undertaker, contractor," etc., and "made in favor of the owner, subcontractor, workmen, laborer, mechanics and furnishers of materials jointly as their interest may occur." Section 1, Act 221 of 1914.

In the same section we find the following declarations:

"The surety herein shall be limited to such defenses on only as the principal of the bond can make \* \* \* and said surety \* \* \* is to stand in the place of a defaulting undertaker, contractor, master mechanic or engineer."

The first sentence of the same section provides that the recordation of the building contract shall create a lien and privilege on the building and grounds or other work "in favor of the said undertaker, contractor, master mechanic, engineer, subcontractor, workman, laborer, mechanic or furnisher of materials as their interest may occur."

Act 221 of 1914 amends and re-enacts section 1 of Act 167 of 1912, entitled:

"An act relative to building contracts in this state; providing for the bond to be given therein, for the protection of the owner; subcontractor; workman; laborer; mechanic and furnishers of materials, for the recordation of the same, and the proceedings to be had thereunder."

What is obscure in the provisions of Act 221 of 1914 should be read in the light of the intent to protect the workman, laborer, mechanic, and the materialman, by lien, privileges, and surety, which shines forth in the title and body of the statute.

After setting forth the particular provisions on which the surety company relies, the same section limits the defense of the surety to only such as the principal on the bond (contractor) can make.

Such provisions read as follows:

"Every person having a claim against the undertaker, contractor, master mechanic or engineer shall, after the date of the completion of the said work by, or the date of default of the undertaker, contractor, master mechanic or engineer, file a sworn statement thereof with the owner and record a sworn statement thereof, or his contract if it has been reduced to writing in the office of the recorder of mortgages for the parish in which said work has been done, within thirty days after the registry of notice with the recorder of mortgages where the work is done, by the owner of his acceptance of the work, until which time the delay to file privileges will not run.

"If at the expiration of the said thirty days there are no such recorded claims filed, the recorder of mortgages shall, upon written demand of any party interested, cancel and erase from the books of his office all inscriptions resulting from the recordation of said contract or bond.

"If at the expiration of said thirty days there are such recorded claims filed, the owner shall

file a petition in a court of competent jurisdiction citing said claimants, the undertaker, contractor \* \* \* against whom said claims are filed and the surety of said bond, and the owner shall assert whatever claim he has against any or all of them in said petition, and require said claimants to assert their claims, and all of said claims shall be tried in concursus. \* \* \*

"If no objections are made by any of the said claimants to the sufficiency or solvency of said bond within ten days after the filing of said concursus, the clerk of the court shall give to any party interested a certificate to that effect and on presentation of said certificate to the recorder of mortgages he shall cancel and erase all inscriptions created by the recordation of said contract, bond or said claims."

The section next provides for the trial of objections to the sufficiency or solvency of the surety, or that the owner had failed to exact bond, or cause the same to be recorded, as required by the act, and in such cases makes the owner liable to the same extent as the surety would have been, and declares that all subcontractors, workmen, laborers, mechanics, and furnishers of materials shall have a first privilege on said building or improvement to secure the amount due them when their claims are recorded as herein provided.

"The surety herein shall be limited to such defenses on only as the principal on the bond can make."

In the case at bar the owner had complied with all the requirements of the statute as to the building contract and bond, and had deposited the balance due by it in the registry of the court, to be litigated over by the materialmen and the contractor and his surety. The contractor and his surety were bound by formal covenant to pay the claims of the furnishers of materials.

Under the express terms of the statute, the surety is limited to only such defenses as the contractor can make.

Three of the materialmen recorded their sworn statements within the 30 days required by the statute. The fourth recorded his sworn statement 4 days after the expiration of the legal delay.

This concursus suit was brought more than a month after the last recordation, and the owner cited the four furnishers of material as claimants of record.

Having no claims in personam against the owner, the only claim that the furnishers of materials could have urged against the plaintiff was one of privilege against the building and grounds.

The service of a sworn statement of each claim on the owner served only the purpose of notice, which was waived by the association.

This question of notice vel non to the building association does not concern the contractor or his surety, who under the statute are not entitled to previous personal notice by service of sworn statements of claims for material and labor.

It is manifest that, if the claims for material are justly due by the contractor, the

surety is interested in their payment pro tanto out of the fund in court.

The fallacy in the reasoning of counsel for the surety company consists in the assumption that the service of a sworn account on the owner was necessary to preserve the contract claim of furnisher of material against the contractor and his surety.

We cannot perceive on what legal or equitable principle such failure can release the contractor and his surety from their obligation to pay for materials purchased and used in the construction of the building.

[2] At most, the surety would be entitled to a credit for any loss occasioned by such failure. But in instant case no damage has resulted to the surety, as the failure to serve sworn copies of the statements on the owner has not prevented the materialmen from recovering the balance due by the owner to the contractor.

The question before the court is *res nova*, and no useful purpose would be subserved by reviewing cases not in point, though perhaps analogous.

We therefore answer the question propounded by our learned Brothers of the Court of Appeal in the negative.

PROVOSTY, J. (concurring). Judging from the decree and the syllabus in the case of *Carre v. Weir*, 133 La. 22, 62 South. 219, this court there decided that the surety on a building contractor's bond given under the provisions of Act 134, p. 223, of 1906, is, like the owner, released from liability to the furnisher of materials by the failure of the latter to file with the owner of the building and duly record a statement of his account timely. But that question was not submitted for decision in that case and was not considered. The sole question submitted and considered was as to the finality of the certificate of the supervising architect in regard to the date of the completion of the building.

#### On Rehearing.

PROVOSTY, J. The mistake which the learned counsel for the surety company make is in not distinguishing between the owner, between whom and the materialman there is no contractual relation, on whose part there is no liability except that created by law against, or without, his consent, and the surety company who has voluntarily entered into a contract to pay the materialmen in case the contractor does not, and has received a consideration for thus engaging itself.

In not one decision of this court has it ever been held that the surety was released by nonservice of an account upon the owner; and this court could not possibly so hold unless prepared to hold that the contractor also is released, for the statute in express terms provides that:

"The surety herein shall be limited to such defenses only as the principal on the bond can make."

This express provision cannot be ignored; and, surely, no one would say that the contractor was released from paying the materialmen by the failure of the latter to serve an account upon the owner.

The learned counsel of the surety company seem to think that this statute was enacted in the interest of the surety on the contractor's bond, whereas the statute expressly declares that the purpose has been simply to require that the bond be given.

Why the law should be solicitous for the protection of surety companies, the learned counsel would, we imagine, be embarrassed to suggest any reason.

The decree heretofore handed down herein is reinstated and made the final judgment of this court.

SOMMERVILLE, J., concurs.

(73 Fla. 530)

#### GROSS v. STATE.

(Supreme Court of Florida. March 1, 1917.)

#### (Syllabus by the Court.)

#### 1. INDICTMENT AND INFORMATION $\S$ 189(3)—INCLUDED OFFENSES—AGGRAVATED ASSAULT.

An indictment charging one with the crime of assault with intent to commit murder and alleging that the assault was committed with a deadly weapon embraces the charge of aggravated assault.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 586.]

#### 2. CRIMINAL LAW $\S$ 824(1)—TRIAL—REQUEST FOR INSTRUCTIONS.

The rule is settled in this state that, if a party wishes to avail himself of the omission of the court to charge the jury on any point in his case, he must request the court to give the instruction desired.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996, 2004.]

#### 3. CRIMINAL LAW $\S$ 824(3)—INSTRUCTIONS—LOWER DEGREE OF CRIME—NECESSITY OF REQUEST.

Upon a trial of one charged with the crime of assault with intent to commit murder, and the evidence is sufficient to support a verdict of assault with intent to commit murder in the second degree, the failure of the court to charge the jury "mero motu" upon a lower grade of crime is not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1997.]

#### 4. CRIMINAL LAW $\S$ 829(12)—GIVEN INSTRUCTIONS—REQUESTED INSTRUCTIONS.

In the trial of one charged with assault with intent to murder a requested instruction in the following words is held to be correctly refused, where there is a full instruction upon the subject of a reasonable doubt, viz.: "If from the testimony given in the trial of this case you should find that there are two equally reasonable and credible theories, one consistent with the defendant's guilt, and the other consistent with the defendant's innocence, it will be your duty as jurors to accept that construction of

such testimony consistent with the defendant's innocence."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

**5. HOMICIDE § 257(1) — ASSAULT WITH INTENT TO MURDER IN SECOND DEGREE—EVIDENCE.**

Evidence examined, and found sufficient to support verdict.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 543, 544, 552.]

**Error to Circuit Court, Pinellas County; O. K. Reeves, Judge.**

Sylvia Cross was convicted of assault with intent to murder in the second degree, and she brings error. Affirmed.

Macfarlane & Chancey, of Tampa, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

**ELLIS, J.** The plaintiff in error was indicted in the circuit court for Pinellas county for assault with intent to murder Annie Hart, and was convicted of assault with intent to murder in the second degree.

This case is not different from many others of like character which come to this court for review on writ of error, in that the evidence is conflicting, and the jury, whose sole province it is to pass judgment upon the credibility of the witnesses and the weight of the evidence, have found the facts to be sufficient to warrant a verdict of conviction.

[1] The court in his charge to the jury omitted an instruction upon the law of aggravated assault, which under our statute is defined to be an assault upon another with a deadly weapon, not having a premeditated design to effect the death of the person assaulted. Section 3228, General Statutes of Florida 1906, Florida Compiled Laws 1914. This offense is embraced in the charge of assault with intent to commit a felony, which is alleged to have been committed with a deadly weapon, for which the plaintiff in error was indicted. *Williams v. State*, 41 Fla. 295, 26 South. 184; *Lindsey v. State*, 53 Fla. 56, 43 South. 87; *Pittman v. State*, 25 Fla. 648, 6 South. 487; *Winburn v. State*, 28 Fla. 339, 9 South. 694.

[2] In view of the fact that the crime denounced by section 3228 of the General Statutes of Florida was included in the indictment charging the defendant with an assault to commit murder, it would not have been improper for the court to have charged the jury upon the law of aggravated assault. The rule in this state has been settled by a long line of decisions that:

"If a party wishes to avail himself of the omission of the court to charge the jury on any point in the case, he must ask the court to give the instruction desired; otherwise he will not be permitted to assign the omission as error."

See *Duggan v. State*, 9 Fla. 516; *Cato v. State*, 9 Fla. 163; *Long v. State*, 11 Fla. 295; *Irvin v. State*, 19 Fla. 872; *Reed v. State*,

16 Fla. 564; *Hicks v. State*, 25 Fla. 535, 6 South. 441; *Blount v. State*, 30 Fla. 287, 11 South. 547; *Rawlins v. State*, 40 Fla. 155, 24 South. 65; *Carr v. State*, 45 Fla. 11, 34 South. 892; *Lindsey v. State*, 53 Fla. 56, 43 South. 87; *Pugh v. State*, 55 Fla. 150, 45 South. 1023.

[3] In *Johnson v. State*, 53 Fla. 45, 43 South. 779, the court, speaking through Mr. Justice Cockrell, used language indicating that there may be cases in which a duty is imposed on the court *mero motu* to instruct the jury as to what constitutes an aggravated assault. But, in so far as it is contended that a failure to do so in such cases is reversible error, we think the above case is not authority, and does not so hold. In the case of *Griffin v. State*, 72 South. 474, this court held, as stated in the first headnote, that:

"Under an indictment for an assault with intent to commit murder, the defendant may be convicted of an assault with intent to commit manslaughter, and when the evidence adduced is sufficient to support such verdict, it is not reversible error for the trial court to refuse requested instructions based upon section 3229 of the General Statutes of 1906, which relates to punishment for culpable negligence."

The court also said that, even if the jury under the indictment could have found the defendant guilty of culpable negligence, the evidence being sufficient to support a verdict for the crime of an assault with intent to commit manslaughter, the refusal of the requested instruction would not constitute reversible error.

[4, 5] It would be of no service whatever to discuss the evidence in this case. It merely shows that two negro women became enemies of each other through jealousy of a negro man who was so imprudent as to make a meeting between them possible. They met in his kitchen. One of them had a pistol, or very soon after the meeting procured it from a shelf where she had formerly placed it for purposes of "self-defense," to use her own language, and proceeded to use it on the other, who seemed not to have been armed with even so much as a just cause. The testimony is variant and contradictory, but amply justifies the jury's finding. We find nothing in the evidence to show that the jury were influenced by any improper considerations in arriving at their verdict, and therefore there is no authority for disturbing it.

In the brief of counsel for plaintiff in error it is stated that at the conclusion of the charge to the jury the state attorney called the court's attention to the fact that no charge had been given upon the law of aggravated assault, to which the court replied in the jury's presence that he did not consider it necessary, and further that the defendant had not requested such a charge. We deem it proper to call counsel's attention to the fact that the bill of exceptions does not show that such an incident occurred. It is

referred to in the twenty-first ground of the motion for a new trial, but motions are not evidence of the facts recited in them. This disposes of the first, second, eighth, thirteenth, and fourteenth assignments of error.

The seventh assignment of error is based upon the court's refusal to give charge numbered 3, as requested by the defendant. The requested instruction is as follows:

"If from the testimony given in the trial of this case you should find that there are two equally reasonable and credible theories, one consistent with the defendant's guilt, and the other consistent with the defendant's innocence, it will be your duty as jurors to accept that construction of such testimony consistent with the defendant's innocence."

It is announced that the above-quoted language enunciates a sound proposition of law, but counsel do not favor us with a single case, nor a line from any text-writer in support of the propriety of such a charge in a case where the evidence is all direct. Even if it were just as reasonable to suppose that a witness or several of them are untruthful as to suppose that they are truthful, under our system the jury must at last determine which witness or set of witnesses have told the truth, and render their verdict accordingly. The requested instruction appears to be mere specious than sound, and we cannot perceive what benefit it could have been to the jury in aiding them to a correct discharge of their duties. The charge of the court was full and correct on the subject of a reasonable doubt. There was no error in the refusal of the requested instruction.

The judgment of the court is affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and WHITFIELD, JJ., concur.

(73 Fla. 609)

ATLANTIC COAST LINE R. CO. et al. v. STATE.

(Supreme Court of Florida. March 12, 1917.  
Rehearing Denied March 17, 1917.)

(Syllabus by the Court.)

1. EVIDENCE  $\S$  29—STATUTES  $\S$  279—JUDICIAL NOTICE—PLEADING.

The general rule is that courts will take judicial notice of all general or public domestic statutes, and they need not be specially pleaded, and, where a public statute is applicable to a case, it is sufficient that the pleading of the party who seeks to rely upon the statute shall set forth the facts which bring the case within it; and it is not necessary to recite the title of the act or otherwise designate or even refer to it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig.  $\S$  36, 37, 39, 43-46, 48; Statutes, Cent. Dig.  $\S$  378.]

2. PENALTIES  $\S$  32 — PENAL STATUTE — PLEADING.

As a general rule, if the allegations of the declaration bring the case within the provisions of the statute, it is not necessary either to plead the statute or to count on it; but, where

the action is for a penalty, it is necessary, under the common-law system of pleading, both to plead the statute and to declare upon it.

[Ed. Note.—For other cases, see Penalties, Cent. Dig.  $\S$  28-30.]

3. PENALTIES  $\S$  32—ACTION—DECLARATION.

A common-law declaration upon a statute in an action for the recovery of a penalty, imposed under the statute, is bad upon demurrer if it does not in the same count state the circumstances necessary to support the action, and expressly refer to the provision counted on.

[Ed. Note.—For other cases, see Penalties, Cent. Dig.  $\S$  28-30.]

4. STATUTES  $\S$  279—"PLEADING THE STATUTE"—"COUNTING ON THE STATUTE."

"Pleading the statute" is stating the facts which bring the case within it, and "counting" on it is making express reference to it by apt terms to show the source of right relied on.

[Ed. Note.—For other cases, see Statutes, Cent. Dig.  $\S$  878.

For other definitions, see Words and Phrases, Counting on a Statute; Pleading the Statute.]

5. PENALTIES  $\S$  32 — PLEADING  $\S$  1 — COMMON-LAW ACTION.

The common-law system of pleading is in force in Florida, except where the same has been changed or modified by statute or rule of court. The common-law doctrine as to actions for the recovery of penalties, prior to the adoption of section 12 of chapter 6527 of the Laws of Florida (vol. 1, Acts of 1913, p. 412 [Comp. Laws 1914,  $\S$  2908]), had not been changed either by statute or rule, but remained in force, though requiring private acts or statutes to be specifically pleaded was abrogated by statute at an early date.

[Ed. Note.—For other cases, see Penalties, Cent. Dig.  $\S$  28-30; Pleading, Cent. Dig.  $\S$  1, 2.]

6. STATUTES  $\S$  241(2) — CONSTRUCTION — PENAL STATUTE.

In determining whether a statute is penal in the strict and primary sense, a test is whether the injury sought to be redressed affects the public. If the redress is remedial to an individual and the public is indirectly affected thereby, the statute is not regarded as solely and strictly penal in its nature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig.  $\S$  823.]

7. STATUTES  $\S$  241(2)—"PENAL LAWS."

Penal laws, strictly and properly, are those imposing a pecuniary or personal punishment for an offense against the state, and which are subject to the pardon power (citing Words and Phrases, Penal Laws).

[Ed. Note.—For other cases, see Statutes, Cent. Dig.  $\S$  823.]

8. RAILROADS  $\S$  6 — "PENAL STATUTE" — PENALTY IMPOSED BY RAILROAD COMMISSIONERS.

Section 2908 of the General Statutes of 1906 expressly provides that any fine or penalty imposed by the railroad commissioners under the provisions of such chapter, "if not promptly paid to the State Treasurer, shall be recovered with interest thereon by an action brought by said commissioners in the name of the state of Florida." Section 12 of article 4 of the state Constitution, as amended, empowers and authorizes the Governor and other designated state officers constituting the board of pardons to "remit fines and forfeitures, commute punishment," etc. This language is sufficiently comprehensive to embrace fines imposed by the rail-

road commissioners; therefore section 2908 of the General Statutes of 1906 is a penal statute.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 7.]

For other definitions, see Words and Phrases, First and Second Series, Penal Laws.]

**9. STATUTES §=241(1) — CONSTRUCTION — PENAL STATUTE.**

A penal law must be construed strictly and according to its letter. Nothing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not manifestly intended by the Legislature. And where a penal statute contains such an ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of life or liberty is to be preferred.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 322.]

**10. STATUTES §=181(1), 206—CONSTRUCTION — INTENTION OF LEGISLATURE—EFFECT TO EVERY PART.**

In construing legislative enactments, whether penal or remedial, the vital intention of the lawmakers, as gathered from the language and purpose of the acts, is the guiding star; and every portion of an act should be given its proper effect.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 283.]

**11. STATUTES §=239, 241(1)—CONSTRUCTION—STATUTES IN DEBOGATION OF COMMON LAW —PENAL STATUTES.**

Statutes in derogation of the common law and penal statutes are not to be construed so strictly as to defeat the obvious intention of the Legislature as found in the language actually used according to its true and obvious meaning.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 320, 322.]

**12. RAILROADS §=9(1) — RAILROAD COMMISSIONERS — STATUTORY POWERS — CONSTRUCTION.**

The railroad commissioners are statutory officers whose powers are special and limited. They can exercise only such authority as is legally conferred by express provisions of law, or such as is by fair implication and intent incident to and included in the authority expressly conferred for the purpose of carrying out and accomplishing the purpose for which the offices were established. Any reasonable doubt of the existence in said commissioners of any particular power should be resolved against their exercise of such power.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-16.]

**13. RAILROADS §=9(1) — REGULATION — CONSTRUCTION OF STATUTE—"RULE"—"REGULATION"—"ORDER."**

While the words "rule," "regulation," and "order" are frequently used as synonyms, they do not always mean the same thing and are not interchangeable at will. In determining their exact meaning when used in a statute, much depends upon the context.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-16.]

For other definitions, see Words and Phrases, First and Second Series, Order; Regulation; Rule.]

**14. RAILROADS §=58 — RAILROAD COMMISSIONERS—STATUTORY POWERS—PENALTY.**

Section 2908 of the General Statutes of 1906, which authorizes the imposition of a penalty by the railroad commissioners upon "any railroad, railroad company or other common

carrier doing business in this state," for "a violation or disregard of any rate, schedule, rule or regulation provided or prescribed by said commission," does not authorize the commissioners to impose a penalty upon railroad companies for failure to comply with an order for the erection of a union depot, on or by a fixed date.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 130, 131, 133, 135, 136.]

Error to Circuit Court, Hillsborough County; F. M. Robles, Judge.

Action by the Railroad Commissioners, in the name of the State of Florida, against the Atlantic Coast Line Railroad Company and others. Judgment for plaintiff, and defendants bring error. Reversed.

Sparkman & Carter and Knight, Thompson & Turner, all of Tampa, for plaintiffs in error. D. C. McMullen, of Tallahassee, for the State.

SHACKLEFORD, J. In November, 1911, an action at law was brought in the circuit court in and for Hillsborough county by the special counsel for the railroad commissioners in the name of the state of Florida against the Atlantic Coast Line Railroad Company, a corporation, the Seaboard Air Line Railway, a corporation, and the Tampa Northern Railroad Company, a corporation, to recover the amount of a fine or penalty imposed by the railroad commissioners upon the defendants for the violation of an order of such railroad commissioners. The declaration filed in the case is as follows:

"The state of Florida, by F. M. Hudson, special counsel for the railroad commissioners of the said state, by them directed to sue in this behalf, sues the Atlantic Coast Line Railroad Company, a corporation under the laws of Virginia, the Seaboard Air Line Railway, a corporation under the laws of Virginia, and the Tampa Northern Railroad Company, a corporation under the laws of Florida.

"For that the defendants are and were prior to the institution of this action and have been since, to wit, on the 12th day of November, 1909, railroad companies and common carriers operating their respective lines of railroad wholly or partly within the state of Florida for the transportation of goods and passengers for hire and running into and doing business in Hillsborough county aforesaid, and having each of them stations or depots in the city of Tampa in said county.

"On, to wit, the 30th day of November, 1909, the railroad commissioners of the state of Florida did hold in the courthouse in the city of Tampa in the said state a meeting for the purpose of hearing and considering whether or not the said commissioners ought to require the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railway, the Tampa Northern Railroad Company, and the Florida & West Coast Railroad Company to erect, operate, and maintain a union passenger depot in the said city, and at said meeting the said four companies, having had more than ten days' notice in writing of the said meeting, were present by their agents and counsel and were fully heard in the premises.

"And thereafter, on, to wit, the 21st day of December, 1909, the said railroad commissioners did make and enter an order, hereinafter called



order No. 282, in words and figures following, to wit:

"Order No. 282. Before the Railroad Commissioners of the State of Florida.

"In the Matter of the Erection, Operation and Maintenance of a Union Passenger Depot in the City of Tampa.

"This matter came on for hearing in the courthouse in the city of Tampa on November 30, 1909, at 10 o'clock a. m., after due notice of the time and place of such meeting given in writing to both the petitioners and the railroad companies hereinafter named; when and where the petitioners appeared, that is to say: The mayor and the city council of the city of Tampa, by W. R. Rowland, city attorney, and the Board of Trade of Tampa, the Chamber of Commerce of Tampa and the board of county commissioners of Hillsborough county, by their counsel, Robert W. Davis, F. M. Simonton, D. C. McMullen, M. B. Macfarlane, H. C. Gordon, H. S. Hampton and Robert McNamee; and the Atlantic Coast Line Railroad Company appeared by W. A. Carter, its division counsel, the Seaboard Air Line Railway by George P. Raney, its division counsel, the Tampa Northern Railroad Company by W. B. Denham, its general superintendent, and the Florida & West Coast Railroad Company by C. H. Brown, its president. And on the said November 30, and on December 1, 1909, the said parties, both petitioners and respondents, were fully heard in the premises by production of evidence and otherwise, when it appeared that the Florida & West Coast Railroad Company was not a railroad entering the city of Tampa, and the commissioners then announced, without objection, that this proceeding as to it would be dismissed, and the rest of the matters involved in this proceeding were taken under advisement.

"Now therefore, we the railroad commissioners of the state of Florida being fully advised in the premises, do find and adjudge:

"1. That the Atlantic Coast Line Railroad, the Seaboard Air Line Railway and the Tampa Northern Railroad are all the railroads entering the city of Tampa, and that each of them is engaged in transporting passengers from and to the said city of Tampa to and from other points in the state and that such transportation is wholly within the limits of this state.

"2. That the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railway and the Tampa Northern Railroad Company ought in view of the conditions shown at the hearing to be required to erect, operate and maintain a union passenger depot in the city of Tampa, and that the location hereinafter described is the most feasible location because of its proximity to the center of the city; the convergence of the main tracks of the said three railroad companies and their ownership of the land at that point.

"It is therefore ordered that the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railway and the Tampa Northern Railroad Company shall erect, operate and maintain a union passenger depot in the city of Tampa, the floor dimensions of which shall be not less than fourteen thousand square feet, exclusive of sheds, platforms and baggage rooms; that there shall be separate waiting rooms for the white and the black races according to law, with toilet rooms for each waiting room, separating also the sexes; that suitable sheds, platforms and baggage rooms shall be provided at the said depot, including suitable sheds and platforms along and between the tracks leading into the same; and that the said union passenger depot shall be located on ground bounded on the north and northwest by the main line track of the Atlantic Coast Line Railroad Company on Factory avenue, on the east by the main line track of the Seaboard Air Line Railway on Tangent avenue, on the south by the main line track of the Tampa Northern Rail-

road Company, and on the west by Nebraska avenue.

"It is further ordered that the three railroad companies last aforesaid shall submit to us, on or before March 1, 1910, plans showing the dimensions and arrangement of said depot, and of the waiting rooms, baggage room, sheds, platforms and of the tracks leading into the same, in order that we may determine the sufficiency and suitability thereof; and that the said union passenger depot shall be completed within six months after the entry of our order approving a plan for the construction of the same.

"And it is further ordered that this proceeding be dismissed as to the Florida & West Coast Railroad Company.

"Ordered in open session of our board in session at the city of Jacksonville, Florida, this 21st day of December, A. D. 1909.

"R. Hudson Burr,  
"Chairman of the Board of Railroad Commissioners of the State of Florida."

"And thereafter on, to wit, the 23d day of February, 1910, upon application of the Seaboard Air Line Railway for an extension of time in which to file blueprints, it was ordered by the said railroad commissioners in their order hereinafter called order No. 290, that the time for filing said blueprints be extended to the 1st day of April, 1910.

"And thereafter on, to wit, the 27th day of June, 1910, it was ordered by the said railroad commissioners, in and by their order hereinafter called order No. 297, that the plans submitted by the said Atlantic Coast Line Railroad Company, the Seaboard Air Line Railway, and the Tampa Northern Railroad Company be approved, and that the time for the completion of the said union depot at Tampa be fixed for January 1, 1911, and that order No. 282 be modified to that extent only.

"And thereafter the said Atlantic Coast Line Railroad Company, the Seaboard Air Line Railway, and the Tampa Northern Railroad Company were charged before the said commissioners with having violated or disregarded said order No. 282 entered on December 21, 1909, as modified by the said order No. 290, entered on the 23d day of February, 1910, and as modified by said order No. 297 entered on June 27, 1910.

"In this, that the said railroad companies did not complete the said union passenger depot at the said city of Tampa, a station on each of their lines of railway in the state of Florida, on or before the 1st day of January, 1911, and had not completed the same on the 15th day of April, 1911, and, after ten days' notice of the said charge of the violation or disregard of the said order as above modified as above set forth, the said defendants had an opportunity to be heard and were heard by the railroad commissioners aforesaid on the said charges.

"And afterwards, to wit, on the 1st day of May, 1911, the said railroad commissioners, having in accordance with law duly tried the said defendants on the said charge by their order duly entered, adjudged the said defendants guilty of violating the said order No. 282 as modified as hereinbefore set forth, and in accordance with law the said commissioners duly fixed and imposed upon the said defendants a penalty for the said offense in the sum of \$3,000, a copy of which judgment and order is hereto attached and made a part hereof.

"And the plaintiff alleges that, by reason of the premises and according to the form of the statutes in such cases made and provided, the said defendants became liable to pay to the State Treasurer of the state of Florida the said sum of \$3,000 with interest thereon from the 1st day of May, 1911, yet the defendants have not paid the same nor any part thereof, but neglect and refuse so to do to the damage of the plaintiff.

"And the plaintiff claims \$5,000.

"F. M. Hudson, Attorney for Plaintiff."

The copy of the order or judgment referred to in the declaration as being attached thereto and made a part thereof is as follows:

"Order No. 332.

"File No. 2896-B.

"Before the Railroad Commissioners of the State of Florida.

"In the Matter of the Violation by the Atlantic Coast Line Railroad Company, Seaboard Air Line Railway, and the Tampa Northern Railroad Company of Orders Relating to Union Passenger Depot at Tampa.

"Whereas, charges were made against the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railway and the Tampa Northern Railroad Company of having violated or disregarded our order No. 282, entered on December 21, 1909, as modified by our order No. 290, entered on February 23, 1910, and as further modified by our order No. 297, entered on June 27, 1910, of all of which orders the said railroad companies had notice, in this:

"That by our said order No. 282 the said railroad companies were required to erect a union passenger depot in the city of Tampa, and were further required to submit to us on or before March 1, 1910, plans for the same, and were further required to complete the said union passenger depot within six months after the entry of our said order approving a plan for the same; and that by our said order No. 290 we afterwards extended the time for filing said plans until April 1, 1910; and that by our said order No. 297 it was recited that we had agreed on April 1, 1910, with the said railroad companies that the time for filing the plans should be June 1st, and that the time for further completion of the said depot should be January 1, 1911, and also that the said plans had been filed on the date of the order, namely, June 27, 1910, whereupon in and by our said order No. 297 we approved the said plans and ordered that the time for the completion of the said union depot should be fixed for January 1, 1911, and that our previous order No. 282 should be modified to that extent only.

"Yet, notwithstanding the premises aforesaid, the said railroad companies did not complete the said union passenger depot at the city of Tampa, a station on each of their lines of railway in this state and that the same was not then completed nor approaching completion, and whereas ten days' written notice of the said charges and of the time and place of hearing the same was given to each of the said railroad companies by written notice dated April 15, 1911.

"And whereas, in accordance with the said notice we held a hearing at our office in the city of Tallahassee on April 28, 1911, at 10 o'clock a. m., to hear and consider the said charges and to determine the truth thereof, and also to hear and consider what penalty should be imposed upon the said railroad companies for disregarding or violating our said orders, in case they should be found guilty of the said charges; at which said meeting the said railroad companies appeared and were duly heard and the matter was taken under advisement.

"Now therefore, we, the railroad commissioners of the state of Florida, being fully advised in the premises, do find and adjudge that the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railway and the Tampa Northern Railroad Company are guilty of violating or disregarding our said orders as charged and have thereby incurred a penalty which is hereby fixed and imposed in the sum of three thousand dollars (\$3,000.00), which they are required to pay promptly to the State Treasurer with interest as provided by law.

"Ordered in open session of our board at our

office in the city of Tallahassee this 1st day of May, A. D. 1911.

"R. Hudson Burr, Chairman.

"State of Florida, County of Leon.

"I, R. Hudson Burr, chairman of the board of railroad commissioners of the state of Florida, do hereby certify that the foregoing is a true copy of the entry in the minute book of the said commissioners of the order fixing and imposing the penalty in the matter of charges therein referred to against the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railway and the Tampa Northern Railroad Company.

"Witness my hand as chairman aforesaid at the office of the said railroad commissioners in the city of Tallahassee, Florida, this 9th day of September, A. D. 1911.

"R. Hudson Burr,  
"Chairman of the Board of Railroad Commissioners of the State of Florida."

To this declaration each of the defendants interposed a demurrer on like grounds, and by the agreement of the counsel for the respective parties only the pleadings of the Tampa Northern Railroad Company need be considered by us upon this writ of error. The demurrer interposed by the Tampa Northern Railroad Company is as follows:

"Now comes the Tampa Northern Railroad Company, a corporation, one of the defendants in the above-entitled cause, by its attorney, Peter O. Knight, and demurs to the declaration filed by the plaintiff herein, and says that the same is bad in substance and not sufficient in law to be answered unto for the following reasons, to wit:

"First. Because said declaration does not state a cause of action.

"Second. Because said declaration does not set out or refer to the statute of the state authorizing the imposition of the penalty sued for.

"Third. Because said railroad commissioners, under the laws of Florida, had no power to impose the said penalty against the defendants, either jointly or individually.

"Fourth. Because the said declaration on its face shows that judgment of the railroad commissioners was beyond their power and void, in this, that there is no statute authorizing the imposition of a penalty under the circumstances set out in the said declaration.

"Fifth. Because the said declaration shows that the order passed by the railroad commissioners is void for the reason that the said commissioners attempted to impose a penalty upon the defendants jointly and not severally.

"Sixth. Because the said declaration shows on its face that the imposition of the penalty or judgment by the railroad commissioners under the circumstances set out violates the Constitution of the state of Florida.

"Seventh. Because the said declaration shows on its face that the imposition of the penalty or judgment by the railroad commissioners under the circumstances set out violates the Constitution of the United States, and particularly the Fourteenth Amendment of the Constitution of the United States, in that said judgment constitutes the taking of the property of the defendants without due process of law.

"Eighth. Because the only law of Florida authorizing penalties to be imposed by the railroad commission is section 2906 of the General Statutes of 1906, and the said declaration shows on its face that the penalty imposed upon the defendants in this case was not for any of the causes set out in said section.

"Ninth. Because the said declaration shows on its face that the imposition of the penalty, fine, or judgment by the railroad commissioners under the circumstances and facts set out in the declaration, is in violation of the Constitu-

tion of the United States, and particularly the Fourteenth Amendment to the same, in that the imposition of said judgment, fine, or penalty denies to this defendant the equal protection of the law.

"Tenth. Because the declaration shows on its face that the imposition of said penalty, fine, or judgment is a violation of the Constitution of the United States, in that the judgment, fine, or penalty imposed by the said railroad commission is a direct and material burden upon interstate commerce.

"Eleventh. Because, even if the said railroad commission had the authority to impose said penalty, fine, or judgment, the judgment shows upon its face that the same is arbitrary, unjust, and unreasonable, and is in law a deprivation of the property of this defendant without due process of law, in violation of the Constitution of the United States."

The demurrers interposed by the three defendants were all overruled, and such ruling forms the basis for the first three assignments of error. Various and sundry pleas were filed by the three defendants, all of which went out either on demurrer or motion to strike, and, the defendants declining to plead further, final judgment was rendered and entered against the defendants, which judgment they have brought here for review.

We take up for consideration the overruling of the demurrer to the declaration, the second ground of which is that:

"Because said declaration does not set out or refer to the statute of the state authorizing the imposition of the penalty sued for."

The statute in force in 1911, when the action was brought, was section 2908 of the General Statutes of 1906, which reads as follows:

"If any railroad, railroad company or other common carrier doing business in this state, shall by any officer, agent or employé be guilty of a violation or disregard of any rate, schedule, rule or regulation, provided or prescribed by said commission, or shall fail to make any report required to be made under the provisions of this chapter, or shall otherwise violate any provision of this chapter, such company or common carrier shall thereby incur a penalty for each such offense of not more than five thousand dollars, to be fixed and imposed by said commissioners after not less than ten days' notice of the charge of such violation or disregard of rate, schedule, rule or regulation, or failure to make report, or other violation of the provisions of this chapter, and upon which charge such company or common carrier shall have had an opportunity to be heard by said commissioners, which fine or penalty in the amount so fixed and imposed, if not promptly paid to the State Treasurer, shall be recovered with interest thereon by an action brought by said commissioners in the name of the state of Florida, in any county in the state where such action or violation has occurred, or in any other county in the state through or in which such company or common carrier runs or does business. The fact of the fixing and imposing of such fine by the commissioners, shall constitute prima facie evidence of everything necessary to create the liability or require the payment of the fine or penalty as fixed and imposed, and to authorize a recovery thereon in any action or proceeding brought by the commissioners, and a copy of the entry in the minute book of the commissioners of the order fixing and imposing such fine or penalty, certified by the chairman of the board of railroad commissioners, shall constitute

prima facie evidence of the fact that such fine or penalty was fixed and imposed by the commission."

[1] It is undoubtedly true, as is stated in 36 Cyc. 1236, which is the only authority cited to us upon this point by the defendant in error, that:

"Courts will take judicial notice of all general or public domestic statutes, and they need not be specially pleaded."

It is further true, as is stated on page 1237 of the work cited, that:

"Where a public statute is applicable to a case, it is sufficient that the pleading of the party who seeks to rely upon the statute shall set forth the facts which bring the case within it; and it is not necessary to recite the title of the act or otherwise designate or even refer to it."

[2, 3] As is stated in note 49 to this section, after discussing the distinction between "pleading" and "counting" on statute:

"As a general rule, if the allegations of the complaint bring the case within the provisions of the statute, it is not necessary either to plead the statute or to count on it; \* \* \* but, where the action is for a penalty, it has been held necessary, under the common-law system of pleading, both to plead the statute and to declare on it."

[4] *Howser v. Melcher*, 40 Mich. 185, is cited in support of this statement, which is an interesting and instructive case and cites a number of authorities. As is held therein:

"A common-law declaration upon a statute is bad if it does not in the same count state the circumstances necessary to support the action, and expressly refer to the provision counted on.

"Pleading the statute' is stating the facts which bring the case within it, and 'counting' on it is making express reference to it by apt terms to show the source of right relied on."

Also, see 16 Ency. of Pl. & Pr. 270-276; 2 Saunders, Pl. & Ev. pt. 2, 1024-1027; 1 Chitty, Pl. (16th Amer. Ed.) 385-388; Gould's Pl. (Hamilton's Ed.) 60.

[5] The common-law system of pleading is in force in this state, except where the same has been modified by statute or rule of court. As is stated on page 275 of 16 Ency. of Pl. & Pr. in discussing actions upon penal statutes and the modern doctrine, the change which has taken place "is due in a large measure to the Code." In this state the common-law doctrine as to actions for the recovery of penalties has not been changed either by statute or rule, therefore remains in force, though requiring private acts or statutes to be specifically pleaded was abrogated by statute at an early date. See section 1431 of the General Statutes of 1906, which was referred to and relied on in *City of Tallahassee v. Fortune*, 3 Fla. 19, 52 Am. Dec. 358. Evidently, the railroad commissioners recognized the necessity for further legislation upon the subject, and chapter 2908 was amended by section 12 of chapter 6527 of the Laws of Florida (1 Acts of 1913, p. 412 [Comp. Laws 1914, § 2908]), so that such section now reads as follows:

"If any railroad, railroad company, or other common carrier doing business in this state

shall by any officer, agent or employé be guilty of a violation or disregard of any rate, schedule, rule or regulation provided or prescribed by said commission, or shall fail to make any report required to be made under the provisions of this chapter, or shall otherwise violate any provision of this chapter, such company or common carrier shall thereby incur a penalty for each such offense of not more than five thousand dollars, to be fixed and imposed by said commissioners after not less than ten days' notice of the charge of such violation or disregard of rate, schedule, rule or regulation or failure to make report or other violation or disregard of the provisions of this chapter, and upon which charge such company or common carrier shall have had an opportunity to be heard by said commissioners.

"The common carrier charged shall file its defense or defenses in writing under oath, specifically setting forth each particular defense. The commissioners may permit amendments to charges and defenses upon such terms and conditions, and with such postponements of hearing, if any, as in their opinion the ends of justice may require. They may also adopt rules to regulate the proceedings before them.

"The said penalty in the amount so imposed, if not promptly paid to the State Treasurer, shall be recovered with interest thereon from the date of the order, in a civil action brought by the said commissioners in the name of the state of Florida in any county in the state where such violation has occurred, or in any other county through or in which such common carrier runs or does business.

"The declaration shall be deemed sufficient if it recites fully or sets forth the said order in which suit is brought, with an averment that the defendant is indebted to the plaintiff thereon in the amount of the penalty imposed with interest as aforesaid. In such cases there shall be no general issues, but the plea or pleas shall specifically set forth the particular defense or defenses to the action; and no defense which existed prior to the day of hearing before the commissioners, and which was not made before them, shall be permitted in the action. The fact of the fixing and imposing of such fine by the commissioners shall constitute prima facie evidence of everything necessary to create the liability or require the payment of the fine or penalty as fixed and imposed, and to authorize a recovery thereon in any actions or proceedings brought by the commissioners, and a copy of the entry in the minute book of the commissioners of the order fixing and imposing such fine or penalty, certified by the chairman of the board of railroad commissioners, shall constitute prima facie evidence of the fact that such fine or penalty was fixed and imposed by the commission.

"Every fine when imposed by the commissioners shall be a lien upon the railroad, equipment, boats and real property of the common carrier on which it is imposed except such real property as is not used in the business of transportation."

We next take up for consideration the fourth and eighth grounds of the demurrer, which are as follows:

"Fourth. Because the said declaration on its face shows that judgment of the railroad commissioners was beyond their power and void, in this, that there is no statute authorizing the imposition of a penalty under the circumstances set out in the said declaration."

"Eighth. Because the only law of Florida authorizing penalties to be imposed by the railroad commission is section 2908 of the General Statutes of 1906, and the said declaration shows on its face that the penalty imposed upon the defendants in this case was not for any of the causes set out in said section."

[6] That section 2908 of the General Statutes of 1906, which we have copied above, is a penal statute, there can be no question. As we said in *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, text 650, 47 South. 969, 980 (32 L. R. A. [N. S.] 639):

"In determining whether a statute is penal in the strict and primary sense, a test is whether the injury sought to be redressed affects the public. If the redress is remedial to an individual and the public is indirectly affected thereby, the statute is not regarded as solely and strictly penal in its nature."

[7] As we also stated in this same opinion:

"'Penal laws,' strictly and properly, are those imposing a pecuniary or personal punishment for an offense against the state, and which are subject to the pardon power."

Also, see to the same effect *Huntington v. Attrill*, 148 U. S. 657, text 667, 13 Sup. Ct. 224, 227, 38 L. Ed. 1123. Numerous other authorities may be found under the term "Penal Laws," on page 5369 of 6 Words and Phrases, and page 943 of 3 Words and Phrases, Second Series.

[8] Section 2908 of the General Statutes of 1906, then in force, expressly provides that any fine or penalty imposed by the railroad commissioners under the provisions of such chapter, "if not promptly paid to the State Treasurer, shall be recovered with interest thereon by an action brought by said commissioners in the name of the state of Florida." Section 12 of article 4 of the state Constitution, as amended, reads as follows:

"The Governor, Secretary of State, Comptroller, Attorney General and Commissioner of Agriculture, or a major part of them, of whom the Governor shall be one, may, upon such conditions and with such limitations and restrictions as they may deem proper, remit fines and forfeitures, commute punishment, and grant pardon after conviction, in all cases except treason and impeachment, subject to such regulations as may be prescribed by law relative to the manner of applying for pardons."

For a discussion of this section and the construction thereof, see *Singleton v. State*, 38 Fla. 297, 21 South. 21, 34 L. R. A. 25, 56 Am. St. Rep. 117.

[9] We think that the language of this section is sufficiently comprehensive to embrace fines imposed by the railroad commissioners. Being a penal statute, it necessarily follows that section 2908 of the General Statutes must be strictly construed. We held in *Ex parte Bailey*, 39 Fla. 734, 23 South. 552, that:

"A penal law must be construed strictly and according to its letter. Nothing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not clearly and intelligibly described in its very words, as well as manifestly intended by the Legislature. And where a penal statute contains such an ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of life or liberty is to be preferred."

Also, see *Ex parte Knight*, 52 Fla. 144, text 149, 41 South. 788, 120 Am. St. Rep. 191. In

Snowden v. Brown, 60 Fla. 212, 53 South. 548, we held that:

"Statutes prescribing punishments and penalties should not be extended further than their terms reasonably justify."

[10] It is also true, as we said in *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, text 630, 47 South. 969, 974 (32 L. E. A. [N. S.] 639):

"In construing legislative enactments, whether penal or remedial, the vital intention of the lawmakers, as gathered from the language and purpose of the acts, is the guiding star; and every portion of an act should be given its proper effect."

[11] Among other authorities in support of this proposition, we cited *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, wherein it was held that:

"Statutes in derogation of the common law and penal statutes are not to be construed so strictly as to defeat the obvious intention of Congress as found in the language actually used according to its true and obvious meaning."

In accordance with this holding, we would say that statutes in derogation of the common law and penal statutes are not to be construed so strictly as to defeat the obvious intention of the Legislature as found in the language actually used according to its true and obvious meaning.

[12] In *State v. Louisville & Nashville R. Co.*, 57 Fla. 526, 49 South. 39, we held:

"The railroad commissioners are statutory officers whose powers are special and limited. They can exercise only such authority as is legally conferred by express provisions of law, or such as is by fair implication and intentment incident to and included in the authority expressly conferred for the purpose of carrying out and accomplishing the purposes for which the offices were established. Any reasonable doubt of the existence in said commissioners of any particular power should be resolved against their exercise of such power."

We had previously held in *State v. Atlantic Coast Line R. Co.*, supra:

"The railroad commissioners are statutory officers whose powers are special and limited. They can exercise only such authority as is legally conferred by express provisions of law or such as is by fair implication and intentment incident to and included in the authority expressly conferred for the purpose of carrying out and accomplishing the purposes for which the offices were established."

Also, see *State v. Atlantic Coast Line R. Co.*, 60 Fla. 465, 54 South. 394; *State v. Southern Telephone & Construction Co.*, 65 Fla. 270, 61 South. 506; *State v. Jacksonville Terminal Co.*, 71 Fla. 296, 71 South. 474.

[13, 14] There would seem to be no occasion to discuss whether or not the railroad commissioners had the power and authority to make the order, requiring the three specified railroads running into the city of Tampa to erect a union passenger station in such city, which is set out in the declaration in the instant case and which we have copied above. It is sufficient to say that under the reasoning and the authorities cited in *State v. Atlantic Coast Line R. Co.*, 67 Fla. 441, 458, 63 South. 729, 65 South. 654, and *State v. Jack-*

*sonville Terminal Co.*, supra, it would seem that the commissioners had such power and authority. The point which we are required to determine is whether or not the commissioners were given the authority to impose the fine or penalty upon the three railroads for the recovery of which this action is brought. In order to decide this question, we must examine section 2908 of the General Statutes of 1906, which we have copied above, in the light of the authorities which we have cited and from some of which we have quoted. It will be observed that the declaration alleges that the penalty imposed upon the three railroads was for the violation of what is designated as "order No. 282," which is set out and which required such railroads to erect and complete a union depot at Tampa within a certain specified time. If the commissioners had the authority to make such order, it necessarily follows that they could enforce a compliance with the same by appropriate proceedings in the courts; but it does not necessarily follow that they had the power and authority to penalize the roads for a failure to comply therewith. That is a different matter. Section 2908 of the General Statutes of 1906, which originally formed section 12 of chapter 4700 of the Laws of Florida (Acts of 1899, p. 86), expressly authorizes the imposition of a penalty by the commissioners upon "any railroad, railroad company or other common carrier doing business in this state," for "a violation or disregard of any rate, schedule, rule or regulation, provided or prescribed by said commission," or for failure "to make any report required to be made under the provisions of this chapter," or for the violation of "any provision of this chapter." It will be observed that the word "order" is not mentioned in such section. Are the other words used therein sufficiently comprehensive to embrace an order made by the commissioners, such as the one now under consideration? It could not successfully be contended, nor is such contention attempted, that this order is covered by or embraced within the words "rate," "schedule," or "any report." Therefore we may dismiss these terms from our consideration and direct our attention to the words "rule or regulation." As is frankly stated in the brief filed by the defendant in error:

"It is admitted that an order for the erection of a depot is not a 'rate' or 'schedule,' and, if it is not a 'rule' or 'regulation,' then there is no power in the commissioners to enforce it by the imposition of a penalty."

It is earnestly insisted that the words "rule or regulation" are sufficiently comprehensive to embrace such an order and to authorize the penalty imposed, and in support of this contention the following authorities are cited: *Black's Law Dictionary*, defining "regulation" and "order"; *Rapalje & Lawrence's Law Dictionary*, defining "rule"; *Abbott's Law Dictionary*, defining "rule"; *Bouvier's Law Dictionary*, defining "order" and "rule

of court"; Webster's New International Dictionary, defining "regulation"; *Curry v. Marvin*, 2 Fla. 411, text 415; *In re Leasing of State Lands*, 18 Colo. 359, 32 Pac. 986; *Betts v. Commissioners of the Land Office*, 27 Okl. 64, 110 Pac. 766; *Carter v. Louisiana Purchase Exposition Co.*, 124 Mo. App. 530, 102 S. W. 6, text 9; 34 Cyc. 1031. We have examined all of these authorities, as well as those cited by the plaintiffs in error and a number of others, but shall not undertake an analysis and discussion of all of them. While it is undoubtedly true that the words, "rule," "regulation," and "order" are frequently used as synonyms, as the dictionaries, both English and law, and the dictionaries of synonyms, such as Soule's, show, it does not follow that these words always mean the same thing or are interchangeable at will. It is well known that the same word used in different contexts may mean a different thing by virtue of the coloring which the word takes on both from what precedes it in the context and what follows after. Thus in discussing the proper constructions to be placed upon the words "restrictions and regulations" as used in the Constitution of this state, then in force, chapter 4, § 2, No. 1, of Thompson's Digest, p. 50, this court, in *Curry v. Marvin*, 2 Fla. 411, text 415, which case is cited to us and relied upon by both the parties litigant, makes the following statement:

"The word 'restriction' is defined by the best lexicographers to mean 'limitation, confinement within bounds,' and would seem, as used in the Constitution, to apply to the amount and to the time within which an appeal might be taken, or a writ of error sued out. The word 'regulation' has a different signification; it means method, and is defined by Webster in his Dictionary, folio 3rd, page 929, to be 'a rule or order prescribed by a superior for the management of some business, or for the government of a company or society.' This more properly perhaps applies to the mode and form of proceeding in taking and prosecuting appeals and writs of error. By the use of both of those terms, we think that something more was intended than merely regulating the mode and form of proceedings in such cases."

Thus, in *Carter v. Louisiana Purchase Exposition Co.*, 124 Mo. App. 530, text 538, 102 S. W. 6, text 9, it is said:

"The definition of a 'rule' or 'order,' which are synonymous terms, include commands to lower courts or court officials, to do ministerial acts."

In support of this proposition is cited 24 Amer. & Eng. Ency. of Law, 1016, which is evidently an erroneous citation, whether the first or second edition is meant. See the definition of "regulate" and "rule," 24 Amer. & Eng. Ency. of Law (2d Ed.) pp. 243-246, and 1010, and it will be seen that the two words are not always synonymous, much necessarily depending upon the context and the sense in which the words are used. Also, see the discussion of the word "regulation" in 34 Cyc. 1031. We would call especial attention to *Morris v. Board of Pilot Com'rs*, 7 Del. Ch. 136, 160, 80 Atl. 667, text 669, wherein the following statement is made by the court:

"The words 'rule' and 'order,' when used in a statute, have a definite significance. They are different in their nature and extent. A 'rule,' to be valid, must be general in its scope, and undiscriminating in its application; an 'order' is specific and not limited in its application. The function of an order relates more particularly to the execution or enforcement of a rule previously made."

Also, see 7 Words and Phrases 6271 and 6272, and 4 Words and Phrases (2d Ser.) 419, 420. As was held in *City of Los Angeles v. Gager*, 10 Cal. App. 378, 102 Pac. 17:

"The meaning of the word 'rules' is of wide and varied significance, depending upon the context; in a legal sense, it is synonymous with 'laws.'"

If section 2908 had contained the word "order," or had authorized the commissioners to impose a penalty for the violation of any order made by them, there would be no room for construction. The Georgia statute, Acts of 1905, p. 120, generally known as the "Steed Bill," entitled "An act to further extend the powers of the railroad commission of this state, and to confer upon the commission the power to regulate the time and manner within which the several railroads in this state shall receive, receipt for, forward and deliver to its destination all freights of every character, which may be tendered or received by them for transportation; to provide a penalty for noncompliance with any and all reasonable rules, regulations and orders prescribed by the said commission in the execution of these powers, and for other purposes"—expressly authorized the railroad commissioners "to provide a penalty for noncompliance with any and all reasonable rules, regulations and orders prescribed by the said commission." See *Pennington v. Douglass, A. & G. Ry. Co.*, 3 Ga. App. 665, 60 S. E. 485, which we cited with approval in *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, text 651, 47 South. 969, 32 L. R. A. (N. S.) 639. Under the reasoning in the cited authorities, especially *State v. Atlantic Coast Line R. Co.*, supra, and *Morris v. Board of Pilot Commissioners*, we are constrained to hold that the fourth and eighth grounds of the demurrer are well founded, and that the railroad commissioners were not empowered or authorized to impose a penalty upon the three railroads for failure to comply with the order for the erection of a union depot.

Having reached this conclusion, there is no necessity for discussing the other grounds of the demurrer.

As we have frequently held, where there is no sufficient declaration in a case, and a demurrer should have been sustained thereto, the other questions in the record are not open for the consideration of the appellate court. *Atlantic Coast Line R. Co. v. Holliday*, 74 South. 479, decided here at the present term.

The judgment must be reversed.

BROWNE, C. J., and TAYLOR, WHITEFIELD, and ELLIS, JJ., concur.

(78 Fla. 558)

**CITY OF WEST PALM BEACH v. RYDER et al.**

(Supreme Court of Florida. March 5, 1917.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR §1078(3) — ASSIGNMENTS OF ERROR—RULING ON DEMURRER.**

In passing upon an assignment based upon the overruling of a demurrer to a bill in equity, an appellate court will consider only such grounds of the demurrer as are argued before it, treating the other grounds as having been abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4253.]

**2. EQUITY §239—PLEADING—PRESUMPTION—DEMURRER—ADMISSION.**

In passing upon a demurrer to the whole bill in a suit in equity, every presumption is against the bill, but it is also true that such a demurrer operates as an admission that all the allegations in the bill which are well pleaded are true, and a demurrer to the whole bill should be overruled if the bill makes any case for equitable relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 494.]

**3. EQUITY §219 — BILL — DEMURRER — GROUNDS—MATTER DEHORS RECORD.**

Matters dehors the bill cannot be raised by way of demurrer, but must be raised by way of plea or answer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 496, 498-500.]

**4. EQUITY §232—PLEADING—DEMURRER.**

A demurrer to the whole bill should be overruled, if the bill makes any case for equitable relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 508.]

**5. EQUITY §232—PLEADING—GENERAL DEMURRER.**

Though the allegations of a bill of complaint be abstract and general and largely in the nature of asserted conclusions, yet if under the allegations a case entitling the complainant to relief as prayed can be made by appropriate and sufficient evidence, a general demurrer to the bill of complaint should be overruled.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 508.]

**6. APPEAL AND ERROR §900 — BURDEN OF SHOWING ERROR.**

Every presumption is in favor of the correctness of an order or decree rendered by a circuit judge, and the burden rests upon one appealing from such order or decree to overcome this presumption of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3667-3669.]

Appeal from Circuit Court, Palm Beach County; H. Pierre Branning, Judge.

Bill by J. W. Ryder and others against City of West Palm Beach. From an interlocutory order overruling its demurrer to the bill, the city appeals. Order affirmed.

H. L. Bussey, of West Palm Beach, for appellant. Atkinson & Burdine, of Miami, for appellees.

SHACKLEFORD, J. J. W. Ryder and other citizens and taxpayers filed their bill in chancery against the city of West Palm Beach, a municipal corporation, wherein it is alleged that the defendant municipality had—

“created and established liens upon all the property and against all of the lots on Clematis avenue from right of way of Florida East Coast Railway to Narcissus street, including the several properties of your orators and are now threatening to collect the same by legal process in the manner provided by the charter and ordinances of the city of West Palm Beach.”

The bill and the exhibits attached thereto and made a part thereof cover about 37 typewritten pages. We do not deem it necessary for a proper disposition of the case to attempt to give even a synopsis of the many allegations. The relief sought is that the defendant municipality—

“may be enjoined and restrained from instituting any suit or suits against your orators, or either of them, or other persons owning property abutting on Clematis avenue, for the enforcement of any lien or liens created by reason of the repaving of Clematis avenue with concrete pursuant to the resolution of the city council, Exhibit E to the bill.”

Other relief is also prayed, including a mandatory injunction. Exhibit E above referred to is quite lengthy, the caption thereof being as follows:

“Resolution of the city council determining the necessity of paving Clematis avenue from sidewalk to sidewalk between the right of way of the Florida East Coast Railway on the West and Narcissus street on the east, in the city of West Palm Beach, Florida; fixing and determining the cost of such paving and improvement; fixing and determining the amounts of benefits and damages to private property abutting upon said avenue caused by such paving and improvement; assessing against such private property and to the owners thereof a portion of the expense and cost of such paving and improvement; providing when the same shall be due and payable; and fixing the time and place for hearing remonstrances or protests against the same by such owners of private property.”

As to the provisions thereof it is sufficient to state that after reciting the necessity for paving Clematis avenue between the right of way of the Florida East Coast Railway on the west and Narcissus street on the east, it proceeds to prescribe the paving material to be used, fixes the total cost of such paving at the sum of \$13,523.10, apportiones the amounts to be paid by the respective abutting property owners, and contains the following two sections, among others:

“6. That one-third of said assessments respectively shall be due and payable by said owners respectively on November 1, A. D. 1915, and one-third of said assessment shall be due and payable by said owners respectively on November 1, A. D. 1916, and one-third of said assessment shall be due and payable by said owners respectively on November 1st, A. D. 1917, and said second and third installments of said assessment shall bear interest from November 1, A. D. 1915, at the rate of 6 per cent. per annum: Provided, however, that said owners, or any of them, may pay the whole of his, her or its assessment at any time on or after November 1, A. D. 1915, and thereby avoid the payment of such interest.”

“8. That Monday, the 4th day of October, A. D. 1915, at 7:30 o'clock p. m., at the city council chamber in said city of West Palm Beach, Florida, are hereby fixed and designated as the time and place at which the city council will hear and pass upon remonstrances or protests



of the above-mentioned property owners against the reasonableness and justice of the amounts of the aforesaid assessments respectively."

The bill further alleges that a number of such abutting property owners, including the complainants, constituting a majority of such owners, filed a protest against being assessed for two-thirds of the cost of such paving on grounds which are therein set forth, a copy of such protest being attached to the bill, marked Exhibit F, and made a part thereof, which protest was duly presented to the city council of West Palm Beach, which body adopted a resolution, rejecting such protest and adopting and confirming the assessment set forth in the resolution above referred to as Exhibit E.

To this bill the defendant municipality interposed a demurrer on eight grounds, which was overruled, and from which interlocutory order the municipality has entered its appeal.

[1] In passing upon the assignment of error based upon this order, we confine ourselves to such grounds of the demurrer as are argued before us, treating the other grounds as having been abandoned. *Atlantic Coast Line R. R. Co. v. Holliday*, 74 Fla. 479, decided here at the present term. This applies to the overruling of a demurrer to any pleading, whether in an action at law or suit in equity. *Cooney-Eckstein Co. v. King*, 69 Fla. 246, 67 South. 918.

[2-5] The first ground of the demurrer is expressly abandoned. The ground thereof especially insisted upon and urged is the eighth, which simply recites that the city of West Palm Beach was incorporated by and under chapter 6411 of the Laws of Florida (Acts 1911, p. 877), and then proceeds to copy in full section 69 of such chapter, covering nearly three typewritten pages, and closes with the statement:

"And it appears therefrom that the said defendant had ample and complete authority to make the assessments complained of by the complainants."

As we have frequently held:

"In passing upon a demurrer to an alternative writ of mandamus, matters dehors the writ cannot be considered, but only such matters as appear upon the face of the writ.

"It is not the province of a demurrer to set out the facts; it involves only such facts as are alleged in the pleading demurred to, and raises only questions of law as to the sufficiency of the pleadings which arise on the face thereof." *State ex rel. Railroad Commissioners v. Atlantic Coast Line R. Co.*, 67 Fla. 441, 63 South. 729; *Lindsley v. McIver*, 51 Fla. 463, 40 South. 619; *Seeba v. Wolf Brothers Shoe Co.*, 74 South. 204, decided here at the present term.

This eighth ground is not a proper ground of demurrer, although the same has been elaborately argued before us by each of the parties litigant, evidently upon the theory that it presents the question as to whether or not the city had the "authority to make

such improvement and to assess the cost thereof against the abutting property owners, as was undertaken," as the appellant's brief states it. We do not think that this question is presented; therefore we shall not discuss it.

The other grounds of the demurrer are grouped together and discussed in a general way. As we have repeatedly held:

"A demurrer to the whole bill should be overruled, if the bill makes any case for equitable relief." *Futch v. Adams*, 47 Fla. 257, 36 South. 575.

As we held in *Johns v. Bowden*, 68 Fla. 32, 66 South. 155:

"Though the allegations of a bill of complaint be abstract and general and largely in the nature of asserted conclusions, yet if under the allegations a case entitling the complainant to relief as prayed can be made by appropriate and sufficient evidence, a general demurrer to the bill of complaint should be overruled."

Also see our discussion in *Phifer v. Abbott*, 74 South. 488, decided here at the present term.

[6] As we have also frequently held:

"Every presumption is in favor of the correctness of an order or decree rendered by a circuit judge, and the burden rests upon one appealing from such order or decree to overcome this presumption of law." *Stewart v. De Land-Lake Helen S. R. and B. Dist.*, 71 Fla. 158, 71 South. 42.

In the instant case this presumption has not been overcome, and the burden has not been met by the appellant; therefore the interlocutory order appealed from must be affirmed.

BROWNE, C. J., and TAYLOR, WHITFIELD, and ELLIS, JJ., concur.

#### ALABAMA MILL & LAND CO. v. BUSH et al.

(Supreme Court of Florida. Feb. 4, 1916.)

Appeal from Circuit Court, Holmes County.

Will H. Price, of Marianna, for appellant. Smith & Davis, of Marianna, and J. Henry Buttram, of Bonifay, for appellees.

PER CURIAM. Appeal dismissed on precept of counsel for appellant.

#### AMERICAN SECURITIES CO. v. GOLDSBERRY et al.

(Supreme Court of Florida. January Term, 1916.)

Appeal from Circuit Court, Duval County.

Francis B. McGarry, of Jacksonville, for appellant. Axtell & Rinehart, of Jacksonville, for appellees.

PER CURIAM. Dismissed, on motion of counsel for appellee Samuel S. Goldsberry, appeal having been entered September 15, 1915, at costs of appellant.



**AMERICAN SECURITIES CO. v. GOLDSBERRY et al.**

(Supreme Court of Florida. January Term, 1916.)

Appeal from Circuit Court, Duval County.

Francis B. McGarry, of Jacksonville, for appellant. Axtell &amp; Rinehart, of Jacksonville, for appellees.

PER CURIAM. Appeal, entered December 14, 1915, dismissed, on motion of counsel for appellee Samuel S. Goldsberry, at costs of appellant.

**ANDERSON v. ROBERTSON.**

(Supreme Court of Florida. June Term, 1916.)

Appeal from Circuit Court, Marion County.

Hocker &amp; Martin, of Ocala, for appellee.

PER CURIAM. Appeal dismissed, on motion of counsel for appellee, at cost of appellant.

**ANDREWS v. STATE.**

(Supreme Court of Florida. January Term, 1916.)

Error to Circuit Court, Bradford County.

Floyd Green, of New River, for plaintiff in error. T. F. West, Atty. Gen., for the State.

PER CURIAM. Dismissed, on motion of counsel for plaintiff in error, at costs of county of Bradford.

**BREVARD NAVAL STORES CO. et al. v. ST. JOHNS RIVER TERMINAL CO.**

(Supreme Court of Florida. January Term, 1916.)

Error to Circuit Court, Duval County.

D. M. Gornto, of Jacksonville, for plaintiffs in error. John C. Cooper &amp; Son, of Jacksonville, for defendant in error.

PER CURIAM. Writ of error dismissed, on motion of counsel for defendant in error, at costs of plaintiffs in error.

**OASTAING v. PINELLAS COUNTY.**

(Supreme Court of Florida. January Term, 1916.)

Appeal from Circuit Court, Pinellas County.

A. C. Brooks, of Tarpon Springs, and Chas. J. Maurer, Wilson &amp; Mack, and King &amp; Spear, all of St. Petersburg, for appellant. Davis, Pierce &amp; Sellers, of St. Petersburg, and John P. Wall and K. I. McKay, both of Tampa, for appellee.

PER CURIAM. Appeal dismissed, on motion of counsel for appellee, at costs of appellant.

**CHEATHAM v. ADAIR et al.**

(Supreme Court of Florida. June Term, 1916.)

Appeal from Circuit Court, Duval County.

A. H. King and Roswell King, both of Jacksonville, for appellant.

PER CURIAM. Appeal dismissed, on motion of counsel for appellant, at cost of appellant.

**COBB et al. v. TRAMMELL, Governor.**

(Supreme Court of Florida. January Term, 1916.)

Error to Circuit Court, Dade County.

Philip Clarkson, of Miami, for plaintiffs in error. Price &amp; Eyles, of Miami, T. F. West, Atty. Gen., and John C. Gramling, State Atty., of Miami, for defendant in error.

PER CURIAM. Writ of error dismissed, on motion of counsel for plaintiffs in error, at costs of plaintiffs in error.

**FINANOE & GUARANTY CO. v. CRYSTAL RIVER ROCK CO.**

(Supreme Court of Florida. January Term, 1916.)

Appeal from Circuit Court, Hillsborough County.

J. W. Frazier and William Hunter, both of Tampa, for appellant. J. T. Watson, Jr., of Tampa, for appellee.

PER CURIAM. Appeal dismissed, on motion of counsel for appellee, at costs of appellants.

**FINANOE & GUARANTY CO. v. CRYSTAL RIVER ROCK CO.**

(Supreme Court of Florida. January Term, 1916.)

Appeal from Circuit Court, Hillsborough County.

J. W. Frazier and William Hunter, both of Tampa, for appellant. J. T. Watson, Jr., of Tampa, for appellee.

PER CURIAM. Appeal made returnable to March 1, 1916; dismissed on motion, of counsel for appellant, at costs of appellant.

**FINANCE & GUARANTY CO. v. AULICK, BATES & HUDNALL.**

(Supreme Court of Florida. June Term, 1916.)

Appeal from Circuit Court, Hillsborough County.

William Hunter, of Tampa, and Frazier &amp; Hilburn, for appellant.

PER CURIAM. Appeal dismissed on præcipe of appellant.

**FLORIDA EAST COAST RY. CO. v. ALBURY.**

(Supreme Court of Florida. Feb. 28, 1916.)

Error to Circuit Court, Monroe County.

Armstead Brown, of Jacksonville, W. Hunt Harris, of Key West, and E. Bly and A. V. S. Smith, both of Jacksonville, for plaintiff in error. J. F. Busto, Lancelot Lester, and H. H. Taylor, all of Key West, for defendant in error.

PER CURIAM. Dismissed on præcipe of counsel for plaintiff in error.

**HARDIE et al. v. ROMFEL**

(Supreme Court of Florida. June Term, 1916.)

Error to Circuit Court, Dade County.

Shutts, Smith & Bowen, of Miami, for plaintiffs in error. A. J. Rose, of Miami, for defendant in error.

PER CURIAM. Writ of error dismissed, on motion of counsel for plaintiffs in error, at cost of plaintiffs in error.

**HARTMAN v. MANEELEY.**

(Supreme Court of Florida. June Term, 1916.)

Appeal from Circuit Court, Escambia County.

Watson & Pasco, of Pensacola, for appellant. Blount & Blount & Carter, of Pensacola, for appellee.

PER CURIAM. Appeal dismissed, on motion of counsel for appellant, at cost of appellee.

**HOWARD et al. v. SHEFFIELD.**

(Supreme Court of Florida. June Term, 1916.)

Appeal from Circuit Court, Alachua County.

Fred Cubberly, of Gainesville, for appellants.

PER CURIAM. Appeal dismissed, on motion of counsel for appellant, at cost of appellants.

**LEWIS v. O'BRIEN.**

(Supreme Court of Florida. June Term, 1916.)

Error to Circuit Court, Lake County.

Dickenson & Dickenson, of Tampa, for plaintiff in error. J. B. Gaines, of Leesburg, for defendant in error.

PER CURIAM. Writ of error dismissed, on motion of counsel for defendant in error at cost of plaintiff in error.

**LOUISVILLE & N. R. CO. v. ALLEN.**

(Supreme Court of Florida. June Term, 1916.)

Error to Circuit Court, Escambia County.

Blount & Blount & Carter, of Pensacola, for plaintiff in error. John P. Stokes and R. P. Reese, both of Pensacola, for defendant in error.

PER CURIAM. Writ of error dismissed, on motion of counsel for plaintiff in error, at cost of plaintiff in error.

**LOUISVILLE & N. R. CO. v. CLOPTON.**

(Supreme Court of Florida. June Term, 1916.)

Error to Circuit Court, Escambia County.

Blount & Blount & Carter, of Pensacola, for plaintiff in error. John P. Stokes and R. P. Reese, both of Pensacola, for defendant in error.

PER CURIAM. Writ of error dismissed, on motion of counsel for plaintiff in error, at cost of plaintiff in error.

**LOUISVILLE & N. R. CO. v. OTIS.**

(Supreme Court of Florida. January Term, 1916.)

Error to Circuit Court, Santa Rosa County.

Blount & Blount & Carter, of Pensacola, for plaintiff in error. Watson & Pasco, of Pensacola, for defendant in error.

PER CURIAM. Writ of error dismissed, on motion of counsel for plaintiff in error, at costs of plaintiff in error.

**McKINNON v. LEWIS et al.**

(Supreme Court of Florida. June Term, 1916.)

Error to Circuit Court, Jackson County.

D. L. McKinnon, of Marianna, for plaintiff in error.

PER CURIAM. Writ of error dismissed, by order of the court, at cost of plaintiff in error. See, also, 72 South. 370.

**MASON et al. v. DOTY.**

(Supreme Court of Florida. June Term, 1916.)

Error to Circuit Court, Duval County.

Odom, Crawford & Butler, of Jacksonville, for plaintiffs in error. Frank L. Dancy, of Jacksonville, for defendant in error.

PER CURIAM. Writ of error dismissed, upon motion of counsel for defendant in error, at cost of plaintiffs in error.

**MEEKER v. MEEKER.**

(Supreme Court of Florida. June Term, 1916.)

Appeal from Circuit Court, Duval County.

R. B. Moseley, of Jacksonville, for appellant.

PER CURIAM. Appeal dismissed, on motion of counsel for appellant, at cost of appellant.

**MOONEYHAM v. STATE.**

(Supreme Court of Florida. January Term, 1916.)

Error to Circuit Court, Jackson County.

T. F. West, Atty. Gen., for the State.

PER CURIAM. Writ of error dismissed, on motion of Attorney General, at costs of Jackson county.

**MOONEY et al. v. HARVELL et al.**

(Supreme Court of Florida. June Term, 1916.)

Error to Circuit Court, Walton County.

PER CURIAM. Writ of error dismissed, on motion of counsel for defendants in error.

**NORWICH UNION FIRE INS. SOC. v. OHANDLER.**

(Supreme Court of Florida. January Term, 1916.)

Error to Circuit Court, Alachua County.

Cockrell & Cockrell, of Jacksonville, for plaintiff in error. Thomas W. Fielding, of Gainesville, for defendant in error.

PER CURIAM. Writ of error dismissed, on motion of counsel for plaintiff in error, at costs of plaintiff in error.

**PARISH v. STATE.**

(Supreme Court of Florida. June Term, 1916.)  
Error to Circuit Court, Duval County.

Dewell & Triplett, of Jacksonville, for plaintiff in error. T. F. West, Atty. Gen., for the State.

**PER CURIAM.** Writ of error dismissed, on motion of counsel for plaintiff in error, at the cost of Duval county.

**PELLETT et al. v. VIDAL.**

(Supreme Court of Florida. June Term, 1916.)  
Appeal from Circuit Court, Alachua County.

T. B. Ellis, Jr., of Gainesville, for appellee.

**PER CURIAM.** Appeal dismissed, on motion of counsel for appellants, at cost of appellants.

**PREVATT et al. v. MORGAN.**

(Supreme Court of Florida. June Term, 1916.)  
Appeal from Circuit Court, Bradford County.

T. G. Futch, of Leesburg, for appellants. A. V. Long, of Starke, for appellee.

**PER CURIAM.** Appeal dismissed, on motion of counsel for appellee, at cost of appellants.

**SATTERFIELD et al. v. BARNES.**

(Supreme Court of Florida. June Term, 1916.)  
Error to Circuit Court, Duval County.

Reynolds & Rogers, of Jacksonville, for plaintiffs in error. John O. Cooper & Son, of Jacksonville, for defendant in error.

**PER CURIAM.** Writ of error dismissed, on motion of counsel for plaintiffs in error, at cost of plaintiffs in error.

**SEEBE v. KUKOWSKY et al.**

(Supreme Court of Florida. May 29, 1916.)  
Appeal from Circuit Court, St. Johns County.

Alex. St. Clair-Abrams, of Jacksonville, for appellant.

**PER CURIAM.** Appeal dismissed, on præcipe of counsel for appellant.

**SEYMOUR v. BRICKELL et al.**

(Supreme Court of Florida. June Term, 1916.)  
Appeal from Circuit Court, Dade County.

A. J. Rose and Simon Pierre Robineau, both of Miami, for appellant. Atkinson & Burdine, of Miami, for appellees.

**PER CURIAM.** Appeal dismissed, on motion of counsel for appellees at the cost of appellant.

**SMITH v. STATE.**

(Supreme Court of Florida. June Term, 1916.)  
Error to Circuit Court, Jackson County.

Moses Guyton, of Marianna, for plaintiff in error. T. F. West, Atty. Gen., for the State.

**PER CURIAM.** Writ of error dismissed, on motion of counsel for plaintiffs in error, at the cost of Jackson county.

**SOUTHERN COLONIZATION CO. v. DERFLER.**

(Supreme Court of Florida. January Term, 1916.)

Appeal from Circuit Court, Osceola County. Crawford & Jarrell, of Kissimmee, for appellant.

**PER CURIAM.** Appeal dismissed, on motion of counsel for appellant, at costs of appellant.

**SOUTHERN EXPRESS CO. v. STOVALL.**

(Supreme Court of Florida. June Term, 1916.)  
Error to Circuit Court, Franklin County.

Myers & Myers, of Tallahassee, for plaintiff in error.

**PER CURIAM.** Writ of error dismissed, on motion of counsel for plaintiff in error, at cost of plaintiff in error. See, also, 70 South. 939.

**SOUTHERN INVESTMENT & AMUSEMENT CO. et al. v. WILSON et al.**

(Supreme Court of Florida. June Term, 1916.)  
Appeal from Circuit Court, Duval County.

George C. Bedell and J. N. Morris, both of Jacksonville, for appellants.

**PER CURIAM.** Appeal dismissed, on motion of counsel for appellants, at cost of appellants.

**STATE ex rel. BURR et al., Railroad Com'rs, v. FLORIDA EAST COAST RY. CO.**

In re AGENCY AT OJUS.

(Supreme Court of Florida. January Term, 1916.)

D. C. McMullen, of Tallahassee, for relators. Alex. St. Clair-Abrams, of Jacksonville, for respondent.

**PER CURIAM.** Cause dismissed, on motion of counsel for relators, at costs of relators.

**STATE ex rel. BURR et al., Railroad Com'rs, v. FLORIDA EAST COAST RY. CO.**

In re AGENCY AT LARKINS.

(Supreme Court of Florida. January Term, 1916.)

D. C. McMullen, of Tallahassee, for relators. Alex. St. Clair-Abrams, of Jacksonville, for respondent.

**PER CURIAM.** Cause dismissed, upon motion of counsel for relators, the order of the railroad commissioners having been complied with, at costs of relators.

**STATE ex rel. BURR et al., Railroad Com'rs, v. FLORIDA EAST COAST RY. CO.**

In re AGENCY AT MIMS.

(Supreme Court of Florida. January Term, 1916.)

D. C. McMullen, of Tallahassee, for relators. Alex. St. Clair-Abrams, of Jacksonville, for respondent.

**PER CURIAM.** Cause dismissed, upon motion of counsel for relators, the order of the railroad commissioners having been complied with, at costs of relators.

**STATE ex rel. CATTS v. MASON et al.**  
(Supreme Court of Florida. June Term, 1916.)

W. W. Flournoy, of De Funiak Springs, for relator. D. M. Buie, of Milltown, and Thomas W. Fielding, of Gainesville, for respondents.

**PER CURIAM.** Alternative writ dismissed, on motion of counsel for relator, at cost of relator. See, also, 73 South. 587.

**STATE ex rel. RAILROAD COM'RS v. FLORIDA EAST COAST RY. CO.**  
(Supreme Court of Florida. June Term, 1916.)

D. C. McMullen, of Tallahassee, for relators. W. A. Blount, of Pensacola, for respondent.

**PER CURIAM.** Alternative writ of mandamus dismissed, on motion of counsel for relators, at cost of relators.

**TOEES v. STATE.**  
(Supreme Court of Florida. January Term, 1916.)

Error to Circuit Court, Duval County.

T. F. West, Atty. Gen., for the State.

**PER CURIAM.** Writ of error dismissed, on motion of Attorney General, at costs of Duval county.

**WARNELL LUMBER & VENEER CO. v. HILL.**

(Supreme Court of Florida. June Term, 1916.)

Error to Circuit Court, Hillsborough County.

H. C. Gordon and Victor H. Knight, both of Tampa, for plaintiff in error. Mabry & Carlton, of Tampa, and J. E. Cassels, of Plant City, for defendant in error.

**PER CURIAM.** Writ of error dismissed, on motion of counsel for defendant in error, at cost of plaintiff in error.

**WARRINGTON et ux. v. RUFF (two cases).**  
(Supreme Court of Florida. January Term, 1916.)

Appeals from Circuit Court, Duval County.

Carl Noble, of Jacksonville, for appellants. Maynard Ramsey, of Jacksonville, for appellee.

**PER CURIAM.** Appeals dismissed, on motion of counsel for appellants, at costs of appellants.

**WARRINGTON et al. v. RUFF (two cases).**  
(Supreme Court of Florida. June Term, 1916.)

Appeal from Circuit Court, Duval County.

Carl Noble, of Jacksonville, for appellants. Maynard Ramsey, of Jacksonville, for appellee.

**PER CURIAM.** Appeals dismissed, on motion of counsel for appellee, at cost of appellants.

**WATKINS v. ZEWADSKI.**

(Supreme Court of Florida. June Term, 1916.)

Error to Circuit Court, Marion County.

Anderson & Anderson, of Ocala, for plaintiff in error. W. K. Zewadski, of Ocala, for defendant in error.

**PER CURIAM.** Writ of error dismissed, on motion of counsel for defendant in error, at cost of plaintiff in error.

**YON et al. v. McCLELLAN.**

(Supreme Court of Florida. January Term, 1916.)

Appeal from Circuit Court, Calhoun County.

Will H. Price, of Marianna, for appellants. Paul Carter and John H. Carter, both of Marianna, for appellee.

**PER CURIAM.** Appeal dismissed, on motion of counsel for appellee, at costs of appellants.

**YOUNG v. BOOTH et al.**

(Supreme Court of Florida. January Term, 1916.)

Appeal from Circuit Court, Polk County.

Rogers & Spencer, of Lakeland, for appellees.

**PER CURIAM.** Appeal dismissed, on motion of counsel for appellees, at costs of appellant.

(113 Miss. 644)

SMITHSON v. SMITHSON. (No. 18805.)

(Supreme Court of Mississippi, Division B.  
April 2, 1917.)**1. DIVORCE — 287 — ALIMONY — TEMPORARY ALIMONY.**

In a husband's suit for a divorce there was a decree in his favor, but the defendant wife was awarded alimony. On her direct appeal the decree of divorce was reversed, and on the husband's cross-appeal the decree as to alimony was reversed and remanded. The decree of the trial court required the husband to pay the wife \$65 per month temporary alimony for her support and maintenance, it appearing that the husband voluntarily paid that amount to his wife. *Held*, that as the reversal of the decree for alimony left the wife without any provision for her support and maintenance pending determination of the court below, the decree on appeal should be modified so as to continue in force the provision for payment of alimony until action by the trial court.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 771.]

**2. DIVORCE — 288 — ALIMONY — PAYMENT OF COSTS.**

In such case, as action by the trial court could not be had until issuance of the mandate and it was to the wife's interest that the matter should be promptly disposed of, it is proper that the decree on appeal should require prompt payment of costs.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 772.]

Appeal from Chancery Court, Hinds County; O. B. Taylor, Chancellor.

On motion for allowance of temporary alimony and on suggestion of error. Suggestion of error overruled, but judgment modified. For former opinion, see 74 South. 149.

L. Brame, of Jackson, for appellant. G. G. Lyell and Mayes, Wells, May & Sanders, all of Jackson, for appellee.

STEVENS, J. Counsel for appellant has presented a motion for the allowance of temporary alimony for herself and her son, in which it is represented that:

"The court having reversed the decree of the court below and having directed the cause to be remanded for proceedings in the court below as to alimony and support, now comes the appellant, Meta M. Smithson, and shows that she is left without any decree for alimony or support or any provision in reference to the support of her child, Claude Taylor Smithson."

[1] The prayer of the motion is that an order be entered by this court, directing appellee forthwith to pay the appeal costs, in order that the mandate may be promptly issued remanding the cause for further proceedings in the court below, and that, in the meantime, the court will provide appellant with temporary alimony for herself and child until the chancellor can, upon rehearing, award alimony under the changed conditions brought about by the reversal of this case. That paragraph of the final decree appealed from, which fixes the monthly allowance to be paid to Mrs. Smithson, is as follows:

"The complainant having paid defendant \$65 per month for her support and maintenance, he

will hereafter and from this date pay her permanent alimony for her support and maintenance a like sum each and every month while she is unmarried."

Counsel for appellee, in defending the motion here made, contend that Dr. Smithson has surrendered his official position as superintendent of the Insane Hospital, and consequently that there has been a material reduction in his earning capacity for the present and until he again establishes a general medical practice, and for this reason requests the court to allow testimony to be taken in this court, with the view of determining what would be a reasonable allowance. It appears from the final decree itself that Dr. Smithson was voluntarily paying his wife \$65 per month at the time the chancellor fixed the amount of permanent alimony, and the decree of the chancellor fixing permanent alimony stipulates that appellant is to continue to pay each month the same amount which he had been voluntarily paying, to wit, \$65. If, therefore, any allowance whatever is to be made by this court, we think we are entirely warranted in directing that paragraph 2 of the final decree appealed from, fixing the monthly allowance for support and maintenance of Mrs. Smithson, shall not be disturbed, and that that portion of the decree should not be reversed or altered until the chancellor says otherwise. The final decree of the chancellor was rendered July 22, 1915, and the directions of that decree as to allowance seems to have been complied with until this court reversed the decree of divorce. It is true that the reversal of the case changes the status of the parties and now brings a condition which the chancellor did not contemplate when he fixed the amount of alimony. The chancellor awarded alimony on the theory that the parties thereafter would be strangers one to the other, and not husband and wife. The reversal of the case now fixes the status of the parties as that of man and wife; and, under such circumstances, the decree of the chancellor, awarding Mrs. Smithson the home place and in providing life insurance, would become impractical. Upon rehearing, the chancellor will likely alter his decree in several particulars.

The fact that Dr. Smithson voluntarily allowed his wife \$65 per month for her individual support, together with the finding of the chancellor that this is a reasonable monthly allowance, is sufficient to justify an order by us that the payment of this amount be continued until changed by the trial court.

There is a suggestion of error in the case, and the consideration of the motion suggests the propriety of altering the judgment heretofore entered in this case by this court, to the extent of ordering that appellant continue to pay the monthly allowance, as directed in paragraph 2 of the final decree rendered by the chancellor, until an order of the chancery court of Hinds county is rendered,

modifying or changing this portion of the decree, and also of directing that that part of the final decree appealed from, awarding Mrs. Smithson the custody of her son, and directing that Dr. Smithson shall pay for his support and education, shall be affirmed, and shall in no wise be disturbed by the decree of reversal herein rendered.

[2] We also think that appellant is vitally interested in having appellee promptly to pay the appeal costs, to the end that there may be a prompt issuance of the mandate. The learned trial court will not take cognizance of this case again until the mandate reaches the clerk of the court below. In the meantime, she continues to be the wife, and is entitled to a prompt adjudication of her rights as to support and a prompt rehearing by the trial court. Her right to a prompt payment of the appeal costs is identical with her right to alimony. We think this court has jurisdiction to order the prompt payment of the appeal costs, as a part of the order safeguarding appellant in her alimony rights. The appeal costs have been incurred by Mrs. Smithson in prosecuting this appeal, and if she is required to advance the appeal costs in order, under the rules of the court, to obtain the mandate and a remand of this case, then she will be required in so doing probably to appropriate her individual moneys needed for her temporary support and maintenance.

On the suggestion of error proper, the court has nothing further to add to the opinion heretofore written.

It is our opinion, and we so direct, that paragraphs 2, 6, and 7 of the final decree rendered by the chancellor shall be affirmed, and the directions contained therein shall be complied with by Dr. Smithson now, as heretofore, without prejudice, however, to the right of the chancellor to change or modify the allowance, either to Mrs. Smithson or her child, upon rehearing of the whole case in the light of the views expressed by this court.

Suggestion of error overruled, but judgment heretofore entered will be modified as indicated.

(113 Miss. 649)

**THORN & MAGINNIS et al. v. WALLACE.**  
(No. 19028.)

(Supreme Court of Mississippi, Division B.  
April 2, 1917.)

**1. GAMING — 37—EMBEZZLED FUNDS—RECOVERY BY BANK.**

A bank has no statutory right to recover losses sustained by its cashier in gambling on futures with embezzled funds from the cashier's brokers.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 74.]

**2. GAMING — 48(1)—RECOVERY OF FUNDS LOST—SUFFICIENCY OF PETITION.**

Allegations in petition by bank's receiver that defendant brokers received embezzled funds from bank's cashier for future gambling, with

utmost bad faith and reason to know his limited financial resources, held not to state a cause of action.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 96.]

Appeal from Chancery Court, Wilkinson County; R. W. Cutrer, Chancellor.

Suit by D. H. Wallace, receiver, against Thorn & Maginnis and others. From a decree overruling a demurrer to the bill, defendants appeal. Reversed and remanded.

Mayes, Wells, May & Sanders, of Jackson, for appellants. Ackland H. Jones, of Woodville, and J. McC. Martin, of Port Gibson, for appellee.

STEVENS, J. Appellants were made defendants to a bill exhibited by appellee as receiver of the Citizens' Bank of Wilkinson County, the estate of which is being administered by the chancery court. They prosecute this appeal from a decree overruling their demurrer to the bill. The bill of complaint charges that Thorn & Maginnis is a partnership composed of C. D. Thorn and W. T. Maginnis, nonresidents of the state of Mississippi, domiciled in the city of New Orleans and there engaged in the general business of buying and selling cotton futures; that the defendant S. Blumenthal is a resident citizen of Wilkinson county and is the agent or employé of said partnership, and as such accepts orders or contracts for futures and represents generally the interests of Thorn and Maginnis in said county of Wilkinson. The complainant charges that one G. C. MacLeod, during the years 1910, 1911, and 1912, was the cashier of the said Citizens' Bank, and while such cashier unlawfully abstracted the funds of the bank to the amount of \$6,500, and invested the money so abstracted in cotton futures; that the individual members of said cotton brokerage firm, as well as their agent Blumenthal, induced and permitted MacLeod to speculate at cotton futures, and received from MacLeod the money unlawfully abstracted from the funds of the bank; that this money was received in the buying and selling of futures; that it was received with knowledge that MacLeod, the cashier, was a man without visible property, of limited means, and dependent upon his salary for a livelihood. The bill further charges that the said sum of \$6,500 was received in various amounts and at various times, shown by a schedule to be filed later as an exhibit to the bill. The schedule referred to does not appear in the record of the appeal. The strongest allegation in the bill as to the knowledge which the defendants had of the cashier's peculations is as follows:

"That the said sum of \$6,500 was paid to and received by said defendants through the felony of the said MacLeod after they had every reason to know and be informed of his inability to pay said sums of his own means and money, and

was actually received by the said Thorn & Maginnis and the members thereof with the utmost bad faith."

One D. W. Huff is made a party defendant on the theory that he was a customer of the said partnership of Thorn & Maginnis, and that he is indebted to the said firm on account of his dealings in futures. L. H. Dinkins and Mrs. E. J. Blumenthall were made parties defendant, on the theory that they hold the legal title to certain real estate in said county as trustees of Thorn and Maginnis and their agent Blumenthall. The prayer of the bill is for a decree against Thorn & Maginnis and their agent, S. Blumenthall, for the total amount of moneys received by them from G. C. MacLeod, and for an attachment in chancery, to be levied upon their said real estate in Mississippi. A general demurrer was filed by all of the defendants, and also the separate demurrer of Thorn and Maginnis and D. W. Huff.

[1, 2] While it is true that the receiver succeeds to the right and title of the Citizens' Bank, no statute of our state gives to the bank the right to sue for and recover losses sustained by its cashier, MacLeod, in gambling on "futures." Neither MacLeod nor the members of his family are parties to this litigation. In fact, it is frankly conceded by counsel for appellee that this bill cannot be maintained upon the theory that the bank has a right to recover any money lost in gambling and in the buying of futures. It is contended, however, that the receiver has the right to recover moneys unlawfully embezzled or abstracted by the cashier and received by Thorn & Maginnis with knowledge that the moneys were stolen. The only question now before us is a question of pleading. Does the bill of complaint state a cause of action? We think not. The bill does not charge that either Thorn & Maginnis or their agent, Blumenthall, had actual knowledge that any of the moneys received by them from MacLeod was the money of the Citizens' Bank, or that it had been stolen from the bank. The bill does charge that the defendants had every reason to believe that MacLeod was unable to repay the said sums of money out of his own moneys, and it does charge that the money was "received with the utmost bad faith." The bill does not state definitely and with precision that the defendants had actual knowledge of MacLeod's felony, and averments of this character, in our judgment, are necessary before the complainant has presented a good bill. It is to be noted that the complainant does not particularize as to the dates or circumstances under which the moneys were received. It does not show whether MacLeod paid these moneys directly to Blumenthall or transmitted them to Thorn & Maginnis at New Orleans. It does not charge wheth-

er the moneys were paid in legal tender, by cashier's checks, or by exchange. It does not present a case where the cashier has undertaken to pay his individual debts with the bank's paper, or in such way as to disclose upon its face the bank's ownership. It does not even charge that the defendants had actual knowledge that any of the moneys were stolen. We do not consider it our duty to point out or decide just what averments will be necessary. All we need to decide now is that the complainant has not presented a good bill. Certain it is that no right to recover is shown unless the bill expressly charges that the money was received with knowledge that it was stolen.

The fact that the defendants are general dealers in cotton futures is a mere incident, and can have little direct bearing upon this case. This fact may be a circumstance tending to prove bad faith on the part of MacLeod as well as the defendants themselves. But the bill of complaint should not be bottomed upon mere suspicion or circumstances that would create a suspicion. There should be clear and positive averments of knowledge and bad faith; notice by implication is not sufficient. Money passes by delivery, and any one trading with MacLeod had the right to accept his money without an inquiry as to whether it was borrowed or stolen. A fair discussion of this exact question will be found in *First National Bank v. Gibert*, 123 La. 845, 49 South. 593, 25 L. R. A. (N. S.) 631, 131 Am. St. Rep. 382, and especially the case note in L. R. A.

The decree of the learned chancellor will be reversed, the general demurrer sustained, and the cause remanded, with leave to appellee to amend generally the bill of complaint within 30 days after receipt of mandate by the clerk of the court below.

(113 Miss. 729)

HOYLE et al. v. SMITH et al. (No. 18979.)  
(Supreme Court of Mississippi, Division B.  
April 2, 1917.)

1. EXECUTORS AND ADMINISTRATORS §205(1)  
—CLAIMS AGAINST ESTATE—CONTRACT.

To authorize the allowance of claims against an estate for personal services, there must be a contract, express or implied.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 732.]

2. EXECUTORS AND ADMINISTRATORS §221(5)  
—CLAIM FOR SERVICES—EVIDENCE.

On claim for services rendered decedent for nursing and care for several years, claimant and decedent being sisters, evidence held not to establish a contract enforceable against the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 903½, 1874, 1876.]

Appeal from Chancery Court, Itawamba County; T. L. Lamb, Chancellor.

In the matter of the allowance of certain claims probated by Mrs. Elminah Smith

against the estate of her deceased sister. From a decree awarding partial relief, H. B. Hoyle and others appeal, and Mrs. Smith prosecutes a cross-appeal. Reversed and remanded.

W. D. & J. R. Anderson, of Tupelo, for appellants. W. H. Clifton, of Aberdeen, for appellee.

STEVENS, J. Appellants prosecute this appeal from a decree allowing a portion of certain claims probated by Mrs. Elminah Smith against the estate of her deceased sister, Miss M. E. Hoyle. In the course of the administration of the Hoyle estate, Mrs. Smith probated one claim for \$930, \$900 of which was for nursing, care, and attention given the decedent during the last three years of her life, and \$30 was for burial expenses. There was another account probated for \$100, represented to be the amount which the decedent was due W. G. Orr on a joint obligation of Mrs. Smith and her sister, the decedent. Appellee Mrs. Smith also claims allowance for certain taxes paid on the joint property of Mrs. Smith and the decedent, but neither of the probated accounts presented any item for taxes. It appears that there was first a partition suit seeking to have sold for division of proceeds about 65 acres of land owned by Mrs. Smith and the decedent as tenants in common. The one-half undivided interest of the decedent in these lands descended to Mrs. Smith, another sister, Mrs. Johnson, and a number of nephews and nieces. A contest over the partition of this land reflects another branch of litigation recently disposed of by this court. The two claims as probated are as follows:

"Miss M. Hoyle, deceased, in account with Mrs. Elminah Smith: Oct. 7th, 1906, for services rendered to deceased in the way of caring for an invalid, including the duties and attention of nurse caring for and supporting her, procuring and preparing and serving food to her, procuring and preparing for use clothing, beginning Oct. 7th, 1906, for 3 yrs. or 36 months at \$25.00 per month, \$900.00. October 8th for burial expenses, \$30.00. Total, \$930.00."

"Estate of M. E. Hoyle, in account with Elminah Smith to amount paid W. G. Orr on deed of trust to relieve decedent's interest in land from deed of trust so far as W. G. Orr's claim or lien on land relate to whose right Elminah Smith should be subrogated, \$100.00."

The testimony offered on behalf of the claimant, briefly stated, shows that, for a number of years prior to her death, Miss Hoyle was a confirmed invalid; that for many years the decedent lived with her sister Mrs. Smith, and during the lifetime of Mrs. Smith's husband; that the husband of Mrs. Smith died a year or two before the death of Miss Hoyle; that each of the two sisters were near 70 years of age and owned jointly a farm of some 60 or 65 acres; that for several years they lived in the town of Fulton and there took boarders in their home, but, this venture not being successful, they moved to the farm, where they lived

during the three years next preceding the death of Miss Hoyle; that Mrs. Smith had no children; that the two sisters occupied the farm premises and got their meager support therefrom; that Mrs. Smith attended to the joint business, made the purchases, and collected the rents; and that she personally nursed and cared for her invalid sister for many years. The evidence further shows that the two borrowed from W. G. Orr originally the sum of \$115 and executed a deed of trust upon their farm to secure the same.

The testimony shows that there was no express contract whereby the decedent ever agreed to pay, or ever in her lifetime paid, her sister anything for nursing or support. The only evidence from which a contract could be implied is the evidence of one or two witnesses who testify to certain statements made by Miss Hoyle in her lifetime to the effect that she appreciated the attention which her sister had given her and expected at her death Mrs. Smith would have whatever property the decedent left. There was no effort, however, to execute a deed or will, and the undivided interest of Miss Hoyle in the real estate mentioned descended to her heirs in accordance with the law of descent and distribution. The chancellor allowed the sum of \$266.12, "being the full amount allowed by the court of all accounts and claims filed by said Mrs. Smith against the estate of Miss M. E. Hoyle, deceased, the remainder of said account being disallowed by the court." It is impossible to determine from the language of the decree just how the chancellor arrived at the amount allowed. Appellants challenge the propriety of any allowance whatever for taking care of the decedent, while appellee, Mrs. Smith, prosecutes a cross-appeal complaining at the refusal of the chancellor to allow the full amount. Appellants raise the question of statute of limitations, but in the disposition of this appeal it will be unnecessary to rule on this question.

[1, 2] The claim of Mrs. Smith might naturally arouse one's sympathy and appeal to one's sense of justice. But there can be no obligation on the part of the estate here proceeded against in the absence at least of an implied obligation or contract. The proof shows without dispute that the two old sisters, Mrs. Smith and Miss Hoyle, lived together upon their joint property as members of the same household, and that the attention and care which Mrs. Smith lavished upon her invalid sister was prompted by feelings of natural love and affection, and that her services as caretaker were not rendered in pursuance of any contract whatever or with any expectation of compensation. During the many years prior to the death of Miss Hoyle, Mrs. Smith rendered no bill for services or support, and this claim is now presented for the first time long after Miss Hoyle's death. If Miss Hoyle intended for Mrs. Smith to have her property, she could have



easily executed a deed or will. Our court, in *Bell v. Oates*, 97 Miss. 790, 53 South. 491, in speaking of this character of claim, said:

"Claims of the character of the one here involved, brought up for the first time after the death of the decedent, are looked upon by the courts with disfavor." In order to establish one, "the evidence must clearly establish a contract, express or implied, between the claimant and decedent, providing therefor."

To the same effect is the text in *Cyc.* vol. 18, pp. 409, 412.

There is no evidence that Mrs. Smith ever expected remuneration. The situation of the parties, their relationship one to the other, and the circumstances under which they lived as members of the same household, raise the presumption that the services were intended to be gratuitous. Evidence to overcome this presumption should be clear and positive. If this rule is not strictly enforced, then a wide avenue is opened up for the presentation of padded and fraudulent claims against the estates of decedents brought forward by relatives for the first time after the death of the party whose estate is sought to be charged. Such after-death, quantum meruit, open account claims should be viewed with suspicion. Conceding, then, the good faith of Mrs. Smith in the instant case, the proof is insufficient to establish her account of \$900; and the same, in our judgment, should be disallowed in toto. We do not understand that appellants challenge the allowance of \$30 for burial expenses, and little is said by counsel for appellants as to the \$100 claim. We think the decree of the chancery court should be reversed, and the cause remanded, with directions that the chancellor allow, if he deems proper, the burial expenses and the correct proportion of the decedent's obligation to W. G. Orr.

Reversed and remanded.

(118 Miss. 559)

# LONG v. GRIFFITH. (No. 19006.)

(Supreme Court of Mississippi, Division B.  
April 2, 1917.)

## 1. EVIDENCE §317(2)—HEARSAY—ADMISSIBILITY.

In an action by a broker for commission on a sale of land, statements made by the buyer regarding transaction, not made in presence of broker, are inadmissible, being in the nature of hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1175.]

## 2. DEPOSITIONS §56(2)—NOTICE TO ADVERSE PARTY—ADMISSIBILITY IN EVIDENCE.

Depositions taken without notice to the adverse party are inadmissible in evidence.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 92-94.]

## 3. BROKERS §63(1)—COMPENSATION—COMPLETION OF TRANSACTION—FAULT OF OWNER.

Where the owner without consent of broker rescinded the sale and the buyer would have carried out agreement if the owner had not released him, the broker was entitled to commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94-96.]

Appeal from Circuit Court, Clay County; T. B. Carroll, Judge.

Action by J. C. Long against T. J. Griffith. Judgment for defendant, and plaintiff appeals. Reversed, and judgment entered for plaintiff.

Roberds & Beckett, of West Point, for appellant. Gates T. Ivy, of West Point, for appellee.

ETHRIDGE, J. T. J. Griffith owned certain lands near West Point, Miss., containing about 680 acres. J. C. Long was a real estate man in West Point, Miss., and Long approached Griffith with a proposition of making a sale of Griffith's place. Griffith agreed that Long should sell the place if he could get \$15 per acre plus \$500 for the place and also that any excess of that amount was to go to Long as compensation for his services in the matter. Long secured one Taylor from New Dover, Ohio, to buy the premises in question. A contract was drawn up between Griffith and Long which reads as follows:

"This contract made and entered into this day by and between Tom Griffith and J. C. Long witnesses: The said Tom Griffith has appointed and constituted the said J. C. Long his agent with full power to sell his (Griffith's) place, consisting of about 680 acres located about four miles west of Muldon, Mississippi, in Clay county, said state, provided the said J. C. Long shall pay to the said Tom J. Griffith \$15 per acre for said land, and in addition to said price \$500, and provided the sale is made by August 1, 1914; any amount realized by said J. C. Long from the sale of said land over and above the said \$15 per acre, and the additional \$500 is to belong to the said J. C. Long as his profits for the sale of said land."

This contract is signed by both parties. On the 1st day of August, Long got Griffith and Taylor together and consummated a sale of the premises in question for the sum of \$13,000. Contract was signed by both Taylor and Griffith, and by its terms Taylor paid \$1,000 in cash and was to pay \$4,000 on the 15th day of September and the balance on the 1st day of January, 1915. This contract was executed in duplicate, \$1,000 paid over, of which \$250 was paid to J. C. Long. Thereupon Taylor returned to his home in Ohio, and about the 5th day of August wrote Griffith that on returning home he found that the German and French war had broken out and that the banker who had promised to let him have the money with which to finance the transaction was reluctant to carry out the contract, and Taylor asked Griffith how he (Griffith) was situated to carry the deferred payments or a part of them; that under the condition as then existing it would be difficult to sell Taylor's property, and he would like to hear from him about the matter. Thereupon Griffith wrote Taylor telling him that in view of the situation he would release him from his contract if Taylor so desired. After-

wards, Griffith wrote Taylor that he would make the deed in accordance with the contract, and Taylor came to West Point, reaching there on the 16th day of September, being detained or delayed in reaching there by train, by which he came in on by way of Birmingham, having stopped at Columbus the night before. Taylor then sought Griffith and wanted him to carry him out to his place that he had bargained for, he having his wife with him at the time, who desired to see the place. Griffith did not have the conveyance to carry him to the premises, and Taylor then went to Long, who agreed to carry him out the following morning. In the meantime, on the 16th, Taylor went to another real estate man who had a Ford car, and procured this gentleman to carry him and his wife to the premises, and asked this agent as to the law of days of grace on contracts in Mississippi. On the following day, Taylor went to Griffith and approached him about the amount of commissions due Long, which were stated to him by Griffith. Taylor then proposed that they rescind the transaction and divide Long's commissions. In other words, that they make a new deal by which Long would be eliminated and the amount of his commission divided between the contracting parties, which Griffith declined to do. On the 18th, Taylor went to Griffith and tendered him a letter declining to carry out the trade and requesting a return of the \$1,000 paid as initial payment. This \$1,000 payment under the terms of the contract originally entered was to be forfeited if Taylor failed to carry out his contract. Griffith agreed to return the \$1,000, and Taylor left, and he (Griffith) returned the \$1,000 about a week thereafter.

[1-3] Long was not consulted by either Taylor or Griffith in the rescission of this contract and, learning of the rescission of the trade, filed this suit. During the term at which the trial took place, a motion was made by Long to continue the case for the purpose of taking Taylor's deposition. During the hearing on this motion, Griffith agreed that Taylor would swear what was stated in the affidavit for a continuance what they expected to prove by him; that is to say, that he (Taylor) would have carried out his contract had Griffith not released him. There is no proof that Taylor could not have carried out the contract had Griffith held him to the contract. There was much incompetent evidence in the nature of hearsay, being statements made by Taylor and Taylor's wife bearing on the matter not made in the presence of Long, which was objected to and the objection overruled. There were also some questions and answers filed in the court by an attorney in Ohio to whom questions were sent by Long's attorneys, as they say, for the purpose of eliciting what Taylor would testify to for the

purpose of taking his deposition. The attorney in Ohio, instead of furnishing the information to Long's attorneys, proceeded without authority and without notice being served on Griffith to take the questions and answers of Taylor in the form of deposition and filed them in court without sending them to the attorneys of Long. The court permitted this alleged deposition to be introduced by the defendant over the objection of the plaintiff. Of course, the statements made by Taylor to Griffith and to the real estate agent, Mr. Stanley, and the alleged questions and answers of Taylor taken without notice, constitute error. However, in our opinion on the record in this case there was no defense made by the defendant to Long's suit. The defendant himself testifies as to the terms of the contract and to the effect that he rescinded the contract without the consent or knowledge of Long, and we think on his testimony, and the admitted statement of Taylor, Long was clearly entitled to recover for the amount sued for, to wit, \$2,050. Accordingly, the case is reversed, and judgment entered here for the appellant for said amount and all costs.

Reversed and judgment here.

(113 Miss. 670)

#### MURF v. MAUPIN. (No. 19005.)

(Supreme Court of Mississippi, Division B.  
April 2, 1917.)

#### 1. FORCIBLE ENTRY AND DETAINER $\S$ 38(3)—JUDGMENT—DEFECTIVE DESCRIPTION.

Where, in an unlawful entry and detainer suit, the judgment failed to describe the property so that it could be located and varied from the description in the affidavit, it was insufficient to support the cause of action.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 164.]

#### 2. FORCIBLE ENTRY AND DETAINER $\S$ 29(1)—POSSESSION—BURDEN OF PROOF.

Where, in an unlawful entry and detainer suit, defendant denied possession, it was plaintiff's duty to point out what property he claimed defendant was in possession of.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 134.]

#### 3. FORCIBLE ENTRY AND DETAINER $\S$ 47—DISCLAIMER—JUDGMENT.

If defendant in an unlawful entry and detainer suit pleads that he is not in possession, the judgment will be for costs against plaintiff, or if issue joined, the only issue involved will be as to whom the costs would be taxed.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 188, 189.]

#### 4. FORCIBLE ENTRY AND DETAINER $\S$ 29(3)—ADMISSIBILITY OF EVIDENCE—TITLE DEED.

If controversy as to possession in unlawful entry and detainer suit turned upon title deeds as showing right of possession, or if title deeds were offered to show right of possession, such deeds would be admissible, not to prove title, but right of possession.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 140.]

Appeal from Circuit Court, Clay County;  
T. B. Carroll, Judge.

Suit by R. L. Maupin against S. N. Murf. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Kimbrough & Valentine, of West Point, for appellant. Robertis & Beckett, of West Point, for appellee.

ETHRIDGE, J. R. L. Maupin filed an unlawful entry and detainer suit against S. N. Murf at West Point, Clay county, Miss., for the possession of a 30-foot strip of land on some lot in the city of West Point. The property is described in the amended affidavit in the circuit court as follows:

"Certain land described as being a parcel of land in the city of West Point, Clay county, said state, commencing at a point on the southern boundary of Center street in ward one of said city 251½ feet from the center of the Mobile & Ohio Railroad track where said street crosses said track, running thence south along the east side of said street 80 feet, thence south 100 feet, thence west 23 feet, thence in a northerly direction to point of beginning."

There was a trial on this affidavit, in which the parties dealt with the matter as though the location was understood, but there was nowhere in the evidence any description of the premises to illuminate the description of the affidavit or if it could be made certain by evidence it was not done in the record. There was much proof on each side tending to show that each of the parties had been in possession of some kind, at some time, during the time preceding the suit. It appears that Maupin had bought the land which he claimed to embrace the land in controversy, and that a short while before the controversy arose he had fences rebuilt which had for some years been in decay, and after Maupin had built these fences Murf went upon the premises, tore loose the fences constructed by Maupin so far as 30 feet on the end of the lot was concerned. Murf offered title deeds and the survey of the premises in evidence, but the court excluded it. There was no written plea by Murf in the case, but it appears from the rulings of the court that his plea was that he was not in possession of the property at the time the suit was brought. Under that state of the case the court ruled that the title deed and survey were incompetent and irrelevant. Murf claims that he had leased this property to a tenant prior to the bringing of the suit, and that the tenant was then in possession of the premises, and that he (Murf) was not in possession of it, and his tenant was introduced and testified to the same effect. Mr. Maupin was asked while on the stand as a witness who was in possession of it, and claimed that he considered that he was himself. There was testimony tending to show that Murf had exercised physical dominion over the property subsequent to the filing of

the suit, and the court's instructions indicate that the issue was fought out on whether Murf was in possession or not. The jury found for Maupin in general terms, and thereupon the court entered a judgment. Following the recital of the verdict we quote as follows:

"Now, therefore, it is ordered and adjudged by the court, that it appearing that the defendant is now in possession of the premises, it is ordered that the plaintiff R. L. Maupin have and recover of the defendant S. N. Murf the possession of the premises in controversy, to wit, a certain lot of land in the city of West Point, state of Mississippi, commencing at a point on the southern boundary of a certain street, in ward one of said city 251½ feet from the center of Mobile & Ohio Railroad track, where said street crosses said track, running thence east along the south side of said street 30 feet, thence south 100 feet, thence 33 feet, thence in a northerly direction to point of beginning. It is further ordered by the court that the said R. L. Maupin recover of the said defendant S. M. Murf all cost of this suit."

[1-4] It will be noted that this description furnishes no guide by which the property may be located; also that it varies from the description contained in the amended affidavit. It is due the trial judge to state that this description was not demurred to or otherwise called to the attention of the court, so far as the record shows. But it is wholly insufficient to support the cause of action. There was a request for a peremptory instruction for the defendant, and, as the defendant had denied possession, it devolved on the plaintiff to point out what property he was in possession of, which neither the affidavit nor the judgment does in this case. The record is in such state that it is hard to decide whether the rulings of the trial judge were proper or not on the title deeds being admitted in evidence. If the defendant's plea was that he was not in possession, then the only judgment rendered would be one for costs against the plaintiff reciting that defendant disclaimed possession; or, if issue joined, would involve only the issue as to whom should be taxed the cost. The action of unlawful entry and detainer is strictly one to obtain possession of property, and no person can be put out of possession who is not in possession. If, however, the purpose of Murf was to contest the right of the possession with Maupin, and if the controversy turned upon the title deeds as showing the right of possession, or if the title deeds were offered to show the right of possession, then in that event the title deeds would be admissible, not to prove title which is not involved in this suit, but to prove the right of possession. Right of possession frequently is determined by the title. The judgment is reversed and remanded.

Reversed and remanded.

(113 Miss. 678)

ILLINOIS CENT. R. CO. v. WM. ATKIN-  
SON & McDONALD CO.  
(No. 18739.)

(Supreme Court of Mississippi, Division B.  
April 2, 1917.)

1. CARRIERS ⇨218(10)—INJURY TO LIVE  
STOCK—NOTICE—SUFFICIENCY.

A carrier's bill of lading provision, requiring verified notices of injury to live stock, is complied with by an unverified letter, especially where the railroad company did not insist upon its verification within the time prescribed for giving notice.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696.]

2. CARRIERS ⇨228(5)—INJURY TO LIVE STOCK  
—SUFFICIENCY OF EVIDENCE.

Evidence that cattle were in good condition when received by defendant railroad and damaged when delivered, and that the injury may have occurred while standing in a railroad yard some five hours, is insufficient to establish defendant's negligence, where it showed the car was side-tracked where none of its employes had the right to move it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960.]

3. CARRIERS ⇨215(2)—INJURY TO LIVE  
STOCK—EXTENT OF DUTY.

A railroad is not required to watch a car of live stock side-tracked in a railroad yard to see that it is not injured and moved.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 959.]

4. CARRIERS ⇨228(5)—INJURY TO LIVE STOCK  
—SUFFICIENCY OF EVIDENCE.

Where live stock is damaged while side-tracked in a railroad yard, defendant carrier may establish its freedom from negligence by proving the customary course of business in the yard, and need not produce each employé to testify that he did not damage the stock.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960.]

Appeal from Circuit Court, Copiah County;  
J. B. Holden, Judge.

Action by Wm. Atkinson & McDonald Company against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed, and judgment rendered for defendant.

Mayes, Wells, May & Sanders, of Jackson, for appellant. McNeill & Loeb, of Hazlehurst, for appellee.

ETHRIDGE, J. The appellee sued the appellant in the circuit court of Copiah county for injuries to cattle shipped by the appellee over the road of appellant. The cattle were loaded into the cars by the plaintiff at Wesson, Miss., and were carried by one engineer from Wesson to McComb, Miss., and by another to Harrahan, La., where the car containing the cattle was placed upon a side track about 11:30 at night, and switched to the stockyards at New Orleans by another engineer of the appellant. When the cattle were unloaded, one was dead in the car and another injured. The injured one was taken in charge by the United States government authorities and held for a period of 21 days,

and was then released and sold by the consignee for the account of the consignor. The bill of lading for shipment placed the valuation upon the cows at \$30 per head, and this amount is sued for in the declaration, credited with the amount the injured cow brought. Joseph McDonald, a son of the McDonald interested in appellee company, accompanied the shipment from Wesson, Miss., to Harrahan, La., arriving at that point about 11:30 at night. He rode in the caboose of the freight, and when he got down to where the car which contained the cattle had stopped, which, while in the train, was near the engine, it had been switched on to the yards or side track, and he did not see the cattle that night. The cattle were moved from the yard at Harrahan about 4:20 the next morning to the stockyards at New Orleans and there unloaded. Joseph McDonald testified there was no rough handling in transit to Harrahan, La., and testified as to the condition of the cattle when he saw them the next morning, and said that the one that was dead did not appear to be trampled on; that its head was near the end of the car, and he thought possibly its neck was broken, though he made no examination and could not tell as to that, but that there were no sores on the cattle; that the shipment of cattle were horned cattle; that he did not see any signs of violence on the cattle to show they had been trampled. The engineers having charge of each section of the distance between Wesson and Harrahan testified that their train was properly equipped, and that there was no rough handling of the cars in transit between Wesson and Harrahan. The conductor who was in charge of the train when it reached Harrahan testified that he moved the cattle car upon the main line to the side track on the yards, and that there was no rough handling, and the cattle were in good condition when they were placed on the side track in the yards. Mr. Telotte testified that he handled the car from Harrahan, La., to the stockyards in New Orleans, and that the car was properly handled; that there was no rough handling, and that he was the only person authorized to take charge of this car on the track in the yards at Harrahan; and that while he did not see the car during all the time that intervened between 11:30 p. m. and 4:20 a. m., he knows no other engineer of the company on the yards ran into this car of cattle. The cattle were loaded on September 11, 1913, and on the 13th the plaintiff notified the claim agent of the railroad company at New Orleans that there was one dead cow in the car, one badly bruised and detained by order of the government inspector for 21 days, and one cow damaged, but no particulars given, and that this letter was to give notice that claim would be filed for damage. The bill of lading of the company contained the following stipulation.

"(6) It is further agreed by the shipper that no claim for loss or damage to stock shall be valid against said railroad company, unless it shall be made in writing, verified by affidavit, and delivered to the general freight agent, or freight claim agent, of the railroad company, or to the agent of the company at the station from which the stock is shipped, or to the agent of the company at the point of destination, within ten days from the time said stock is removed from said cars."

The receipt of the above-mentioned letter was acknowledged by the general freight agent at New Orleans, on September 18th, in which acknowledgment it was stated the letter had been referred to B. D. Bristol, freight claim agent, Chicago, Ill., and if the claim was made for damage to the car of cattle referred to, to please send the claim to Mr. Bristol at Chicago. On November 24th, the appellees sent formal claim to Mr. Bristol, freight claim agent, which, on December 12th, was acknowledged, but the letter of December 12th, called attention to the stipulation of clause 6 in the bill of lading, quoted above, claiming that the claim was not filed, and verified by affidavit within the ten days, and declined to pay the claim or make allowance for the cattle. There was judgment in the court below for the appellee, who was plaintiff there.

The questions presented for decision are: First, whether the plaintiff was barred by failure strictly to observe clause 6 of the bill of lading by not presenting claim, verified by affidavit, within ten days; and, second, whether the railroad company was guilty of negligence, and had complied with the law in showing proper handling of the cattle accepted by them for shipment.

[1] As regards the first proposition, we think, under the facts of this case, that the rule requiring the notice to be filed, verified by affidavit, within ten days after the injuries occurred, that there was a substantial compliance with it by the letter written, especially since the railroad company did not, on receipt of that letter, insist on the claim being verified before the expiration of the ten days. The notice given by appellee put the company upon notice of the claim, and it could ascertain all available facts, and, if it desired to insist upon the claim being verified by affidavit, should have given notice of its insistence on this requirement. It was held in *Yazoo, etc., R. Co. v. Bell*, 111 Miss. 82, 71 South. 272, that this particular clause was unenforceable, as being without consideration, and the bill of lading in that case contains the same clause as the one in this case.

[2-4] In the *Bell Case*, the court announced the rule on the second proposition, as shown in the first syllabus of the opinion in that case, as follows:

"Where cattle were in good condition when delivered to the carrier, and when received some of the animals were dead and others injured, the carrier has the burden of showing that the injuries were not caused by its negligence, and

to escape liability must account for its handling of the cattle during all the time they were in its charge."

It is insisted by the appellee in the present case that the carrier has not accounted for the handling of the cattle during the period between the arrival of the shipment at Harrahan, about 11:30 p. m., until the following morning about 4:20 a. m. While it is true that the appellant did not have any witness who testified from personal knowledge as to the exact condition of the cattle during this period of time, yet its employé at Harrahan, whose duty it was to handle this car after it was placed upon the yards at Harrahan, testified that under the rules and regulations of the company, no other person had the right to enter upon this particular track and move or deal with this particular car of cattle except himself; that the employés of the company do not handle such cars except when instructed by the company; and that no employé other than himself would have undertaken to move or disturb the car where it was placed. We do not think the law requires a carrier to keep some person present to watch a car to see that it is not injured or moved, nor do we think it requires a large railroad corporation to produce all of its employés who work on the yard to show that each particular employé did not in fact run into this car of cattle with an engine or freight car. The proof produced in this record is all that could be reasonably expected of the company, under the circumstances surrounding this transaction, and if the plaintiff desired to establish facts that would rebut this proof on the part of the railroad company, he could have introduced other evidence tending to overcome or rebut the proof made by the carrier.

The facts in this case are different from the facts of the *Bell Case*, with reference to what was done during the period of time between the movements of the cattle. In that case, there was an absence of any proof as to how the yard force operated, which the proof in this case covers. Under the proof in this case, there is no liability imposed upon the railroad company for the injury to the cattle, and as it does not reasonably appear from the record that there is any other proof available, the judgment is reversed, and judgment entered here for the appellant.

Reversed, and judgment here.

(113 Miss. 687)

CITY OF VICKSBURG et al. v. ROBINSON.  
(No. 19001.)

(Supreme Court of Mississippi, Division B.  
April 2, 1917.)

1. MUNICIPAL CORPORATIONS — §282(4)—CONSTRUCTION OF SIDEWALKS — MATERIALS — "STONE"—"CONCRETE."

Under a city charter conferring power to provide for building of walks with "stone," etc..

walks may be ordered built of "concrete" composed of gravel, Portland cement, and sand, such materials, when hardened, being equal in durability to natural stone, and properly classified as such within meaning of charter.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 752.

For other definitions, see *Words and Phrases*, First and Second Series, Concrete; Second Series, Stone.]

**2. MUNICIPAL CORPORATIONS §281(1)—SIDEWALKS — REQUIRING ABUTTING OWNER TO GRADE.**

A city charter, conferring general powers to provide for construction of sidewalks and providing that before any person shall be required to lay a sidewalk the city shall first establish a proper grade, does not confer the power to require the abutting owner to fill in and raise the street at his own expense to the level of a paved street before laying a sidewalk.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 745.]

**Appeal from Chancery Court, Warren County; E. N. Thomas, Chancellor.**

Bill by B. J. Robinson for an injunction against the City of Vicksburg and another. From a judgment making injunction perpetual and dismissing city's cross-bill, it appeals. **Affirmed.**

Anderson, Voller & Kelly, of Vicksburg, for appellant. Brunini, Hirsch & Griffith, of Vicksburg, for appellee.

ETHRIDGE, J. B. J. Robinson filed a bill in the chancery court of Warren county against the city of Vicksburg and A. Kiersky, tax collector, alleging that complainant was the owner of a certain lot in said city, and that said lot fronts, or abuts, on the west side of Mulberry street in said city; and that the mayor and board of aldermen of the city of Vicksburg paved said Mulberry street, and in so doing changed the grade of said street; that thereafter the city gave notice to the complainant to construct a sidewalk fronting his property along said street from concrete composed of material specified in a notice given the complainant; that article 14 of the charter of Vicksburg, being a special charter, conferred power on the board of mayor and aldermen to provide for the building, renewing, or repair of all sidewalks and gutters with "stone, brick, or wood," and alleging that concrete was neither of these materials, and the city had no power to order a walk built of concrete. It was also alleged: That the charter provided, in the conclusion of the section referred to, that:

"Before any person shall be required to lay a new sidewalk the city shall first establish proper grades of such work"

—and the complainant contends that the city had not established said grade for the laying of said sidewalk in front of his property, either by reducing the street to an actual grade level, or by order entered on the minutes of the board of mayor and aldermen fixing each grade. That the city gave complainant notice to construct said sidewalk and to

fill in and raise the street at his own expense up to the level of the paved street referred to. The complainant failed to comply with the notice and to construct said sidewalk, and to fill in to the required height of the road, and the city proceeded on its own account to raise the said street by filling in to a depth of three or four feet in front of the complainant's property and laying a sidewalk thereon, and then proceeded under its ordinance to advertise the complainant's property to pay for said work. The bill also alleges that when the work was being done by the city the complainant asked that it be deferred until he could build a new building on his property so as to put down a brick wall for the support of said sidewalk, and that he gave notice that the wooden wall was insufficient for that purpose, and would cause the walk to settle and crack and otherwise become out of repair. The bill alleges that, unless restrained, the city would proceed to sell his property to pay for the said expense for which complainant averred he was not liable. The city answered, admitting that it ordered said sidewalk built, and admitted that the surface of said street in front of complainant's property was raised in some places about three feet and admitted that it derived the power to do so from the city charter as alleged in the bill, and admitted serving notice on the complainant as shown in the exhibit to the bill. It admits that under the charter, before any person shall be required to lay a new sidewalk, the city shall first establish the proper grade for such work, but denied that the city had never established the proper grade for the construction for said sidewalk, and alleged that the complainant had full knowledge of the establishment of said grade. It admits that the board of mayor and aldermen of the city of Vicksburg did not have power under its charter as it then existed to compel property owners to construct a sidewalk of any material that its caprice or whim might determine, but denied that it was limited to the materials of stone, brick, or wood, and alleged that the concrete named in the specifications to be used in the construction of the sidewalk in question was in fact stone, and better than brick or wood, and aver that the complainant failed and refused to pay for the building of the sidewalk, and made its answer a cross-bill, and asked for judgment for the cost of the work, \$98.25 damages, and \$27.25 for cost of advertising the sale of the lot, etc., amounting to \$125.50 altogether. The city admitted on the trial that it had never established the grade by any order entered on the minutes of the board of mayor and aldermen, and also admitted that it had not filled in nor brought the street on which the sidewalk was to be laid to the grade level claimed until it itself proceeded to construct the sidewalk. The city contends

that it had the right to compel the owner to construct a sidewalk and make the proper fills at his own expense, and that the notice given the complainant required this to be done within 20 days after the service of the notice, or that in lieu thereof the complainant might permit the mayor and board of aldermen to construct it and pay one-fifth of the cost in cash and balance to be paid in one, two, three, and four notes, with interest at 8 per cent., provided complainant would execute promissory notes and deliver to the city treasurer for the use of the city of Vicksburg. The chancellor made the injunction perpetual and dismissed the cross-bill, from which judgment the city appeals.

The questions presented for decision are: First, as to whether concrete was in fact stone within the meaning of the charter provision existing at the time the notice was served upon the complainant; second, whether the city could require the complainant to fill in or grade down his lot at the expense of the private property owners as a part of the construction of the sidewalks; third, whether or not the grade of the sidewalk must be reduced to writing and entered upon the minutes of the board of mayor and aldermen.

[1] We think that concrete made in accordance with the specifications shown in this record, being composed of gravel, Portland cement, and sand, when laid and dried and hardened become equal in hardness and durability to natural stone, and may properly be classed as stone within the meaning of the original charter amendment.

[2] Under the second proposition we are of the opinion that the charter does not confer upon the mayor and aldermen the power to require grading down of lots or the filling in of low places by the property owner at his own expense, but that this work must be done by the city so as to have the level of the street or sidewalk the same grade practically that the walk must be built upon.

In the case of the City of Little Rock v. Edward Fitzgerald, 59 Ark. 494, 28 S. W. 32, 28 L. R. A. 496, the Supreme Court of Arkansas held that the power to require the laying and construction of sidewalks at the expense of the property owner did not require the landowners to cut down and fill in lots at their own expense. The act in question there under consideration provided that, in order to better provide for the welfare, comfort, and convenience of the inhabitants, power was conferred on the city to regulate the use of sidewalks and all structures and excavations thereunder, and to require the owner or occupant of any premises to keep the sidewalks in front or alongside the same free from obstruction, and to build and maintain a suitable pavement or sidewalk improvements whenever the same may become necessary to the safety or convenience of travel, and to designate the kind of sidewalk im-

provement to be made and kind of material to be used by the owner or occupant and the time within which the improvement is to be completed, etc. The court held that this general power to require the property owner to construct and maintain sidewalks did not carry with it the power to require him to do the filling in and grading to bring the walk to the proper level of the street. Many authorities are cited in this case, and the monograph note appended to the L. R. A. report shows that this doctrine prevails generally, citing many cases. In our view this construction is sound. If the property owner can be required at all to cut down a lot and fill in depressions for the building of a sidewalk, the authority must be specifically conferred, and must not be implied as an incident to a general power. In the present case there was no opportunity for the complainant to build the sidewalk after the necessary fill had been made. The city had not brought the sidewalk to the proper grade levels, and the individual had no opportunity for building the walk after the city had made the necessary fill. The notice called upon him to do this work of filling in the depression himself, and the city cannot now say, after the injunction has been sued out, that it had not included this expense in its bill of costs charged against the complainant. It being true that there was no actual bringing of the street to grade level by the city prior to the giving of the notice, and it being admitted that no grade had been established by order entered on the minutes, it is unnecessary to decide in this suit whether an order establishing the grade must be made and entered on the minutes of the board where the city has brought the grade up to level itself, and we think it a wise rule to refrain from deciding this proposition until it becomes necessary to do so. It would appear that the safer rule is for a city to enter its established grades on its minutes, so there could be no question about what the grade of the street was. It follows from what we have said that the chancellor was right, and the judgment is affirmed.

Affirmed.

(118 Miss. 742)

GILCHRIST-FORDNEY CO. v. KEYES  
et al. (No. 19017.)

(Supreme Court of Mississippi, Division B.  
April 2, 1917.)

1. QUIETING TITLE §10(1) — NECESSITY TO SHOW TITLE.

In suit to confirm title, the plaintiff must plead and prove a perfect title and prevail upon the strength of its own claim.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 86.]

2. COUNTIES §121—BOARD OF SUPERVISORS—TIMBER DEED—SUFFICIENCY.

A timber deed executed by individual members of board of supervisors, unsupported by previous order entered upon the minutes evidenc-

ing the contract, was a nullity, since there must be an affirmative act of the board within the scope of its authority.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 183.]

**3. COUNTIES — 121—BOARD OF SUPERVISORS — CONVEYANCE OF TIMBER ON SCHOOL LANDS.**

Statutory jurisdiction of board of supervisors to sell timber on sixteenth section school lands must be exercised at county meeting, and there must be a contract then executed and evidenced by order entered on the minutes, to make a valid conveyance.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 183.]

Appeal from Chancery Court, Smith County; Sam Whitman, Chancellor.

Suit by the Gilchrist-Fordney Company against E. B. Keyes and others. Decree sustaining demurrer to amended bill of complaint, and complainant appeals. Affirmed.

T. J. Wills, of Raleigh, for appellant. S. L. McLaurin, of Brandon, for appellees.

STEVENS, J. Appellant prosecutes this appeal from a decree of the chancery court of Smith county sustaining a demurrer to an amended bill of complaint exhibited by appellant, as complainant in the court below, against appellees, by which it is sought to reform a deed conveying timber rights on sixteenth section lands, and by which it is further sought to quiet and confirm the alleged title of the complainants in the merchantable timber on the lands described in the bill. It is charged in the amended bill that appellees E. B. Keyes and Homer Currie were tenants in common of the unexpired lease of said land, that on February 16, 1900, appellee Keyes conveyed the timber to one Ainsworth, and that by mesne conveyances appellant acquired Ainsworth's title to the timber. It was further alleged that on February 8, 1911, appellant purchased the merchantable timber from the board of supervisors of Smith county. In deraigning title, the bill shows that there was no order entered upon the minutes of the board of supervisors evidencing any contract by which the board undertook to sell or did sell the merchantable timber, or by which the board undertook to convey the timber on the lands in question. The deed shown in the deraignment of title appears to be a deed executed simply by the individual members of the board of supervisors without a precedent order entered in open and regular meeting. The bill shows that Keyes, in executing a conveyance to the timber, described the property conveyed as being "all falling and lying timber."

Complainant charges that the grantor intended to convey "all standing, falling, and lying timber," and that by mutual mistake the word "standing" was omitted. The record shows that, while the timber deed in question was executed in 1900, no complaint of

this mutual mistake is made until the filing of the amended bill of complaint in February, 1914. The grantee of this right to the "falling and lying timber" appears to have undertaken to purchase the merchantable timber from the board of supervisors. This alleged deed of the board to the merchantable timber was executed in 1911, and, at the time it was executed, appellee Homer Currie owned an undivided interest in the unexpired lease and had not joined in the execution of any timber deed whatever. Homer Currie was not a party to any effort to purchase the merchantable timber, but claims adversely to appellant. The bill seeks to cancel the claim of both Keyes and Currie to the merchantable timber as an alleged cloud upon the title of the complainant.

[1, 2] The amended bill and exhibits thereto show that appellant has no title to the timber. The bill is essentially one to confirm title. To entitle the complainant to the relief sought, it must deraign a good title and prevail upon the strength of its own claim. The bill must present a perfect deraignment of title. In our judgment, the deed executed by the individual members of the board of supervisors, unsupported by a precedent order entered upon the minutes, is a nullity. In *Bridges & Hill v. Board of Sup'rs*, 58 Miss. 817, our court, by Chalmers, C. J., observed:

"It takes an affirmative act of the board within the scope of its authority, evidenced by an entry on its minutes, to bind the county by a contract."

And in *Marion v. Woulard*, 77 Miss. 343, 27 South. 619, there was an effort to recover from the county \$78 for services rendered as a quarantine guard during the yellow fever epidemic, and the court, by Whitfield, J., says, "Nor was there any contract made on the minutes of the board," and cited the *Bridges & Hill Case*.

[3] Under the opinion which we entertain on the one point mentioned, we permit any expression of opinion on the apparent laches of the complainant in waiting 14 years to seek reformation, or upon the statute of limitation. The primary object of this bill is to recover the merchantable timber as against appellees, and, in so doing, to rely upon a title which could only be conveyed by the board of supervisors. In acquiring title to the merchantable timber, a good and valid order of the board would be the sole evidence of the contract, and without a contract there could be no valid conveyance by the members of the board. The statutory jurisdiction of the board to sell merchantable timber on sixteenth section school lands is of far-reaching importance and must be exercised in county meeting, where negotiations may be had and all objections heard, and a safe contract agreed upon. The enforcement of any other rule would permit to



be done secretly that which should be done openly and in the light of the widest publicity.

It further appears that the rights of Homer Currie, as one of the lessees, have been utterly ignored.

The case of *Caston v. Lumber Co.*, 69 South. 668, relied upon by appellant, has little application, and certainly does not control the main point here presented.

Affirmed.

(113 Miss. 696)

**HAUER v. DAVIDSON.** (No. 18963.)  
(Supreme Court of Mississippi, Division A.  
March 26, 1917.)

**1. TRIAL**  $\S$  414—**DIRECTION OF VERDICT—REVIEW.**

Where defendant, after denial of a motion to exclude all the evidence offered by plaintiff when he rested his case in chief, introduced evidence, the correctness of the judgment rendered must be determined by the whole evidence on appeal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 979.]

**2. DESCENT AND DISTRIBUTION**  $\S$  55—**HUSBAND AND WIFE — ESTATE BY CURTESY — STATUTE.**

The estate by curtesy was abolished in 1880, and death of wife subsequent to that date would pass land to husband and children as tenants in common, and a conveyance by husband would vest in grantee an undivided interest.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 172.]

**3. TENANCY IN COMMON**  $\S$  15(10)—**ADVERSE POSSESSION—COTENANTS—PRESUMPTION.**

Unless a contrary showing is made, it will be presumed that possession of one cotenant is not hostile to his cotenants.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 51.]

**4. EJECTMENT**  $\S$  95(1)—**TITLE FROM COMMON SOURCE—EVIDENCE.**

In an action of ejectment, evidence held insufficient to show complete paper title in plaintiff, or that she and defendant claimed from a common source.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 280, 282, 283, 285-294.]

Appeal from Circuit Court, Wilkinson County; R. E. Jackson, Judge.

Ejectment by Mrs. M. M. Davidson against Mrs. Mamie K. Hauer. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Bramlette & Bramlette, of Woodville, for appellant. Ackland H. Jones, of Woodville, for appellee.

SMITH, C. J. This is an action of ejectment, in which appellee was plaintiff and appellant defendant, in the court below, and in which, at the close of the evidence, the jury were peremptorily instructed to find for the plaintiff.

[1] Appellee attempted by her evidence, but failed, to show a complete paper title to the land in controversy. When she rested her case there was nothing in the evidence which indicated that she and the defendant

claimed from a common source. A motion to exclude the evidence was then made by the defendant and erroneously overruled. Appellant, instead of also resting her case, proceeded to introduce evidence, so that the correctness of the judgment rendered must be determined by the whole evidence without reference to the ruling on the motion to exclude. *Hairston v. Montgomery*, 102 Miss. 364, 59 South. 793.

One of the deeds through which appellee claims was executed by D. C. Brannon and several cotenants to his (D. C. Brannon's) wife, Sarah Frances Brannon, conveying to her about 150 acres of land. Sarah Frances Brannon died in 1909, leaving surviving her D. C. Brannon and three daughters, appellee, Mrs. Bessie Lanehart, and Blanch Brannon. D. C. Brannon died on April 22, 1910, and on the 15th day of September, 1914, Mrs. Bessie Lanehart and Blanch Brannon conveyed to appellee certain land, claimed to be that in controversy and embraced within the land conveyed by D. C. Brannon et al. to Sarah Frances Brannon.

Appellant introduced in evidence a deed from D. C. Brannon to T. B. Knight, executed on June 27, 1908, in which the land conveyed was described as "my ginhouse and one acre of land on the north side of the public road in section 43, T. 5, R. 1 W., in the county of Wilkinson, state of Mississippi"; and a deed from T. B. Knight to appellant, executed on the 23d day of December, 1909, in which the land was described as "one acre of land lying north of the public road in section 43, township 5, range 1 west, and being the same land conveyed me by D. C. Brannon by deed dated June 27, 1908, and of record in Book UU, page 200, conveyance records of said county." The land sued for is described in the declaration as follows:

"A tract of land, with the appurtenances, situated in the said county, containing one acre, and being bounded on the east by the lands owned by W. E. Davidson, south by the Natchez and Liberty public road, and west and north by the lands owned by the estate of Mrs. Fannie Brannon, deceased, being the one acre of land on which is situated the ginhouse formerly operated by D. C. Brannon, deceased, and supposed to be in section 8, T. 4, R. 1 W."

Appellee's claim is that when Mrs. Brannon died, her husband, D. C. Brannon, became vested with an estate for life by curtesy, with remainder in her three daughters, appellee, Mrs. Lanehart, and Blanch, so that the deed to her from Mrs. Lanehart and Blanch vested in her the full title. There is no merit in this contention, for the reason that the estate by the curtesy was abolished in 1880, prior to the death of Mrs. Brannon. On her death, her husband and daughters inherited the land as tenants in common, so that a conveyance thereof by Brannon would vest in his grantee an undivided interest therein.

[2, 3] Appellant's claim to the land, accord-

ing to the brief of her counsel, is based, not upon any title which Brannon acquired by inheritance from his wife, but upon a title acquired by adverse possession. This claim, however, is not supported by the evidence, for while it appears that Brannon was in possession of the land, the character thereof does not appear; we must presume, therefore, that it was not hostile to his cotenants.

[4] Conceding that the description of the land in the deeds from Brannon to Knight and from Knight to appellant are valid, as to which we will not now express an opinion, it does not appear therefrom that the land intended to be conveyed thereby is that here in controversy, so that these deeds do not show either ownership in appellant or claim by appellant and appellee from a common source; that is, from Sarah Frances Brannon. Moreover, it nowhere appears in the evidence that the land in controversy is embraced within the calls of the deed from D. C. Brannon et al. to Sarah Frances Brannon, through which appellee claims. The only testimony by which it was attempted to prove this fact was delivered by appellee's husband and by a surveyor named McNeal. In the testimony of appellee's husband appear the following questions and answers:

"Q. You know the land on which the gin known as Dug Brannon's gin is located? A. Yes, sir. Q. Do you know the land that Mrs. Fannie Brannon owned in this county? A. Yes, sir. Q. Within the boundaries of whose land does this gin lie? A. The land formerly owned by Mrs. Fannie Brannon."

That the land in controversy may be within the boundaries of land formerly owned by Mrs. Fannie Brannon falls far short of establishing the fact that it is within the boundaries of that particular land conveyed to her by the deed executed by D. C. Brannon et al., and through which appellee deraigns title. The testimony of the surveyor was as follows:

"Q. Do you know the land of Fannie Brannon, deceased? A. Yes, sir. Q. Where is this gin and acre of land located on the lands of Mrs. Fannie Brannon, deceased? A. It is in the northeast corner of the west one-half of section 8, T. 4, R. 1 W., on what is called the Dug Brannon property. Q. Supposed to be the land of D. C. Brannon? A. Yes, sir. Q. This gin and acre of land on which it is located is in section 8, T. 4, R. 1 W.? A. Yes, sir."

It follows from the foregoing views that the peremptory instruction should not have been given.

Reversed and remanded.

(113 Miss. 706)

**BANK OF PACHUTA et al. v. VOSSBURG LUMBER & NOVELTY CO.** (No. 18941.)  
(Supreme Court of Mississippi, Division B.  
March 19, 1917.)

**1. BANKS AND BANKING —169—COLLECTIONS —CONSIGNMENTS OF GOODS—LIABILITY.**

A bank having agreed to pay 80 per cent. of the invoice on consignments of lumber, the invoices having been assigned to it, and having

collected proceeds of the resales, by the consignee, the bank is liable to the consignor for amount collected on such sales, and could not apply such amounts to its own claims while acting as the consignor's agent.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 587, 590, 591, 593-596.]

**2. BANKS AND BANKING —57—COLLECTIONS —CASHIER—LIABILITY.**

The cashier who acted for the bank and did not personally benefit by the transaction was not liable.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 106-110, 120.]

Appeal from Chancery Court, Clarke County; G. C. Tann, Chancellor.

Suit by the Vossburg Lumber & Novelty Company against the Bank of Pachuta and another. Judgment for plaintiff, and defendants appeal. Judgment affirmed against the bank, but reversed against unnamed defendant, and judgment entered in his favor; costs to be divided equally.

Heidelberg & Heidelberg, of Shubuta, for appellants. R. M. Bourdeaux, of Meridian, for appellee.

**ETHRIDGE, J.** [1] The Vossburg Lumber & Novelty Company filed a suit against the Bank of Pachuta and H. B. Graves for \$1,100, alleging that the lumber company was engaged in the sawmill business and shipping lumber to customers; that among the customers was the Carter Lumber Company of Meridian, Miss.; and that about the 1st of January, 1913, becoming apprehensive of the financial standing of the Carter Lumber Company, it had decided not to ship to said Carter Lumber Company a car of lumber then loaded and billed to it, or other lumber, but that the Bank of Pachuta, with whom the Carter Lumber Company was doing its banking business, agreed to pay 80 per cent. of the invoice on such consignments, and that having made this arrangement with the Bank of Pachuta through H. B. Graves, cashier of the bank, it continued to ship different consignments of lumber to the Carter Lumber Company, and that it assigned to the bank the invoices, and that the Carter Lumber Company had paid the 20 per cent. above the 80 per cent. for which the bank was liable. It is also alleged that the Carter Lumber Company had executed bills of sale to the Bank of Pachuta from time to time for practically all the lumber on the yard or in the possession of the Carter Lumber Company, and that the Carter Lumber Company in selling lumber sold through the Bank of Pachuta by making out its invoices and sending them to the bank, and the bank collecting the proceeds of such sales from the customers of the Carter Lumber Company and applied it to the indebtedness due by the Carter Lumber Company to the Bank of Pachuta, and that the bank, instead of applying any of the sums to the payment of the 80 per cent. for which the bank was liable to com-

plainant, that it applied the entire proceeds of the sales of the Carter Lumber Company to its individual indebtedness; that in May, 1913, the Carter Lumber Company went into bankruptcy, with liabilities amounting to over \$40,000, and with assets of \$400 or \$500, after the lumber claimed by the bank under its bills of sale aforesaid was deducted. After the Carter Lumber Company went into bankruptcy the trustee in bankruptcy, through his attorneys, notified purchasers from the Carter Lumber Company not to pay the Bank of Pachuta on invoices sold until the trustee could first make investigations. Thereupon the Bank of Pachuta paid \$5,000 to the trustee in bankruptcy of the Carter Lumber Company in settlement of its affairs, without being sued therefor.

It was the theory of the bank that it was the mere agent of the Vossburg Lumber & Novelty Company in forwarding the invoices and making collections for the 80 per cent., and that the 80 per cent. payment was placed to the credit of the Vossburg Lumber & Novelty Company as mere advances for which that company was indebted to the bank, and it claimed that the Vossburg Lumber & Novelty Company had overdrawn the funds in the bank to their credit, and was indebted to the bank in the sum of \$532. The chancellor found in favor of the complainants, but deducted the amount the bank claimed against the complainants from the original demand, and gave judgment for the balance against both the bank and H. B. Graves. There was evidence showing the bank, through its cashier, knew the condition of the Carter Lumber Company, and that H. B. Graves had formerly been a stockholder in the Carter Lumber Company, and had aided the Carter Lumber Company, through the bank, after selling his stock in the company. The evidence showed that the bank of Pachuta collected for practically all of the sales made by the Carter Lumber Company, and applied the funds so derived to the reduction of its claims against the Carter Lumber Company, and by this means largely reduced the debt the Carter Lumber Company owed it. The chancellor evidently adopted the theory of the complainant on the evidence, and as to the Bank of Pachuta we are of the opinion that the evidence warrants the judgment, and that it would be contrary to equity to permit the bank to act as agent for the complainant, and by its dealing apply the proceeds of the property sold to the Carter Lumber Company to its individual debt, without paying the purchase price to the complainant, and the case is affirmed as to the bank.

[2] We think, however, the evidence does not warrant a judgment against Graves because throughout the transaction he seems to have been acting for the bank and not to have been personally the beneficiary of the

transaction, except as a stockholder of the bank.

Judgment will be entered here in favor of Graves, and the costs incurred on appeal, divided equally between the appellant and the appellee.

(113 Miss. 715)

GAMBRELL v. HARPER. (No. 18955.)

(Supreme Court of Mississippi, Division A.  
March 26, 1917.)

INFANTS ~~vs.~~ 58(1) — AVOIDANCE OF SALE BY FATHER—CONSENT.

Where the father of a minor with her consent turned over to defendant a mule belonging to her to be applied on the father's debt, the minor could recover the value thereof, since her consent was no more binding upon her than her direct contract of sale would have been.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 149.]

Appeal from Circuit Court, Jones County; Paul B. Johnson, Judge.

Action in justice court by M. L. Gambrell, by next friend, against J. L. Harper. Judgment for plaintiff, and defendant appealed to the circuit court, where a peremptory instruction was granted for defendant, and plaintiff appeals. Reversed and remanded.

Halsell & Welch, of Laurel, for appellant. Deavours & Hilbun, of Laurel, for appellee.

SYKES, J. The plaintiff in the court below, a minor, appellant here, sued the defendant (appellee) in a justice of the peace court of Jones county for \$115, the price and value of a mule. From a judgment in the justice of the peace court an appeal was prosecuted to the circuit court. At the trial in the circuit court the testimony of the appellant showed that she was the owner of the mule, which had been given her by her father; that her father was indebted to the appellee, J. L. Harper, and with her permission turned her mule over to Harper at an agreed value of \$115 to be credited on this indebtedness. The appellee knew nothing about the claim of ownership of the appellant to this mule. A peremptory instruction was given in favor of the appellee at the conclusion of all the testimony. The sole question presented to this court for decision is whether or not the appellant, a minor, can avoid the contract of her father made with her consent for the sale of her mule to the appellee. Had she sold the mule to appellee, she would have had the right to avoid the contract and maintain this suit. Consenting to the sale by her father would not be more binding on her than her own contract. The facts here are very much like those in the case of Upshaw v. Gibson, 53 Miss. 341. As is said in that case:

"It is certain that she could not have contracted a valid sale of the mules or other personal property, and that the rights of third persons had supervened makes no difference. \* \* \*

"Did her silent consent, deduced from her failure to proclaim her rights and object to the

sale, confer any greater right on Humphreys than her contract would have done?"

To which question the court answered "No."

It therefore follows that the circuit court was in error in granting the peremptory instruction for the defendant.

Reversed and remanded.

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**ILLINOIS CENT. R. CO. v. CALHOUN.**  
(No. 18959.)

(Supreme Court of Mississippi. March 26, 1917.)

Appeal from Circuit Court, Carroll County; H. H. Rodgers, Judge.

Action between the Illinois Central Railroad Company and Mrs. Anna Calhoun. Judgment for the latter, and the former appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. A. J. Coleman, of Vaiden, for appellee.

PER CURIAM. Affirmed.

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**WHITE v. STATE.** (No. 19085.)

(Supreme Court of Mississippi. March 26, 1917. Suggestion of Error Overruled April 9, 1917.)

Appeal from Circuit Court, Chickasaw County; J. L. Bates, Judge.

Heyward White was convicted of rape, and he appeals. Affirmed.

Wm. F. Buchanan, of Okolona, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

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**GORDON v. HINDS COUNTY.** (No. 18972.)  
(Supreme Court of Mississippi. March 26, 1917.)

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Action between Lewis Gordon and Hinds County. Judgment for the latter, and the former appeals. Affirmed.

L. M. Burch and Robt. Powell, both of Jackson, for appellant. Ben H. Wells, of Jackson, for appellee.

PER CURIAM. Affirmed.

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**BISHOP et al. v. HUDDLESTON.**  
(No. 18828.)

(Supreme Court of Mississippi. March 26, 1917.)

Appeal from Circuit Court, Tishomingo County; Claude Clayton, Judge.

Action between G. W. Bishop and others and W. H. Huddleston. Judgment for the latter, and the former appeal. Affirmed.

W. B. Ellis, of Iuka, for appellants. Somerville & Somerville, of Cleveland, for appellee.

PER CURIAM. Affirmed.

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**TRENHOLM v. KELLOGG.** (No. 19002.)  
(Supreme Court of Mississippi. April 2, 1917.)

Appeal from Chancery Court, Yazoo County; P. Z. Jones, Chancellor.

Suit between E. L. Trenholm, trustee, and J. M. Kellogg, executor. Decree for the latter, and the former appeals. Affirmed.

Watkins & Watkins, of Jackson, for appellant. E. F. Noel, of Lexington, for appellee.

PER CURIAM. Affirmed.

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**HATTIESBURG HARDWARE CO. v. PITTSBURG STEEL CO.**

(No. 19056.)

(Supreme Court of Mississippi. April 2, 1917.)

Appeal from Circuit Court, Forrest County; Paul B. Johnson, Judge.

Action between the Hattiesburg Hardware Company and the Pittsburg Steel Company. Judgment for the latter, and the former appeals. Appeal dismissed.

Currie & Currie, of Hattiesburg, for appellant. W. S. Welch, of Laurel, for appellee.

PER CURIAM. Appeal dismissed.

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**MIDDLETON v. DAVIS et al.** (No. 18791.)  
(Supreme Court of Mississippi. March 26, 1917.)

Appeal from Chancery Court, Hinds County; O. B. Taylor, Chancellor.

Suit between Ellis S. Middleton, administrator of the estate of Lucinda G. Bellows, deceased, against R. J. and H. B. Davis. Decree for the latter, and the former appeals. Affirmed.

L. Brame, of Jackson, and Marshall & Fraser, of Toledo, Ohio, for appellant. Alexander & Alexander, Watkins & Watkins, and R. H. & J. H. Thompson, all of Jackson, for appellees.

PER CURIAM. Affirmed.

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**TORREY et al. v. TORREY.** (No. 19015.)  
(Supreme Court of Mississippi. April 2, 1917.)

Appeal from Chancery Court, Jefferson County; R. W. Cutrer, Chancellor.

Suit between W. H. Torrey and others and J. E. Torrey, executor. Decree for the latter, and the former appeal. Affirmed.

J. S. Logan, of Fayette, for appellants. J. E. Torrey, of Fayette, for appellee.

PER CURIAM. Affirmed.

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**JOHNSTON, State Revenue Agent, v. HARRY et al.** (No. 18996.)

(Supreme Court of Mississippi. April 2, 1917.)

Appeal from Circuit Court, Harrison County; Jas. H. Neville, Judge.

Action between J. C. Johnston, State Revenue Agent, and Dr. J. J. Harry and others. Judgment for the latter, and the former appeals. Affirmed.

Dodds & Montgomery, of Gulfport, for appellant. White & Ford, of Gulfport, for appellees.

PER CURIAM. Affirmed.

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**BENNETT v. CLAUGHTON.** (No. 19013.)  
(Supreme Court of Mississippi. April 2, 1917.)

Appeal from Circuit Court, Wilkinson County; R. E. Jackson, Judge.

Action between O. L. Bennett and O. P. Claughton. Judgment for the latter, and the former appeals. Affirmed.

Ackland H. Jones, of Woodville, for appellant. Bramlette & Bramlette, of Woodville, for appellee.

PER CURIAM. Affirmed.

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**HARRISON COUNTY UNION WAREHOUSE CO. v. EDWARDS et al.**  
(No. 18971.)

(Supreme Court of Mississippi. March 26, 1917.)

Appeal from Circuit Court, Harrison County; Jas. H. Neville, Judge.

Action between the Harrison County Union Warehouse Company and H. Edwards and others, claimants. Judgment for the latter, and the former appeals. Affirmed.

J. C. Ross and B. E. Eaton, both of Gulfport, for appellant. T. H. Barrett and J. M. Morse, Jr., both of Gulfport, for appellees.

PER CURIAM. Affirmed.

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**CITY OF OXFORD v. LANE.** (No. 18967.)

(Supreme Court of Mississippi. March 26, 1917.)

Appeal from Circuit Court, Lafayette County; H. K. Mahon, Judge.

Action between the City of Oxford and Marion Lane. Judgment for the latter, and the former appeals. Affirmed.

Jas. Stone & Sons, of Oxford, for appellant. J. S. Rhodes, of Jackson, and L. O. Andrews and Edgar Webster, both of Oxford, for appellee.

PER CURIAM. Affirmed.

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**CULVER et al. v. OCEAN SPRINGS STATE BANK.** (No. 18970.)

(Supreme Court of Mississippi. March 26, 1917.)

Appeal from Circuit Court, Harrison County; J. H. Neville, Judge.

Action between Ora M. Culver and others and the Ocean Springs State Bank. Judgment for the latter, and the former appeal. Affirmed.

D. M. Graham, of Gulfport, for appellants. H. B. Everitt, of Pascagoula, for appellee.

PER CURIAM. Affirmed.

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**ANDERSON v. WILLIAMS.** (No. 18954.)

(Supreme Court of Mississippi. March 26, 1917.)

Appeal from Circuit Court, Jones County; Paul B. Johnson, Judge.

Action between S. M. Anderson and N. H. Williams. Judgment for the latter, and the former appeals. Affirmed.

Pack & Collins, of Laurel, for appellant. Montgomery & Kirkland, of Laurel, for appellee.

PER CURIAM. Affirmed.

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**TINSLEY v. WALKER.** (No. 19044.)

(Supreme Court of Mississippi. March 26, 1917.)

Appeal from Circuit Court, Neshoba County, A. J. McLaurin, Judge.

Action between J. T. Tinsley and J. J. Walker. Judgment for the latter, and the former appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.

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**GORDON v. DUCKWORTH et al.**

(No. 18949.)

(Supreme Court of Mississippi. March 26, 1917.)

Appeal from Circuit Court, Jones County; Paul B. Johnson, Judge.

Action between J. G. Gordon and Joe Duckworth and others. Judgment for the latter, and the former appeals. Affirmed.

J. C. Smith, of Laurel, for appellant. J. T. Taylor, of Ellisville, and W. J. Pack, of Laurel, for appellees.

PER CURIAM. Affirmed.

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**HOLIFIELD et al. v. HALSELL et al.**

(No. 18907.)

(Supreme Court of Mississippi. March 26, 1917.)

Appeal from Chancery Court, Jones County; Sam Whitman, Jr., Chancellor.

Suit between Marshall Holifield and others and R. E. Halsell and others. Decree for the latter, and the former appeal. Affirmed.

Goode Montgomery, of Laurel, for appellants. B. E. Eaton, of Gulfport, and Welch & Street, of Laurel, for appellees.

PER CURIAM. Affirmed.

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**ILLINOIS CENT. R. CO. v. PHILLIPS et al.**

(No. 18973.)

(Supreme Court of Mississippi. March 26, 1917.)

Appeal from Circuit Court, Panola County; E. D. Dinkins, Judge.

Action between the Illinois Central Railroad Company and C. B. Phillips and others. Judgment for the latter, and the former appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. J. F. Dean, of Senatobia, for appellees.

PER CURIAM. Affirmed.

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**PAINE v. PEAVEY'S ESTATE.** (No. 18957.)

(Supreme Court of Mississippi. March 26, 1917.)

Appeal from Chancery Court, Monroe County; A. J. McIntyre, Chancellor.

Suit between George C. Paine, executor, and estate of Mrs. M. E. Peavey. Decree for the latter, and the former appeals. Affirmed.

Alexander & Alexander, of Jackson, and Paine & Paine, of Aberdeen, for appellant. Leftwich & Tubb, of Aberdeen, for appellee.

PER CURIAM. Affirmed.

**ILLINOIS CENT. R. CO. v. JOHNSON.**  
(No. 19000.)

(Supreme Court of Mississippi. April 2, 1917.)

Appeal from Circuit Court, Panola County; E. D. Dinkins, Judge.

Action between the Illinois Central Railroad Company and O. D. Johnson. Judgment for the latter, and the former appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. L. L. Pearson, of Sardis, for appellee.

PER CURIAM. Affirmed.

**GIBSON et al. v. SHERARD.** (No. 18823.)  
(Supreme Court of Mississippi. March 26, 1917.)

Appeal from Chancery Court, Coahoma County; M. E. Denton, Chancellor.

Suit between John and Susan Gibson, executors, and J. H. Sherard. Decree for the latter, and the former appeal. Affirmed.

Cutrer & Johnston, of Clarksdale, for appellants. Green & Green, of Jackson, for appellee.

PER CURIAM. Affirmed.

**MEYER v. WOODS.** (No. 18851.)  
(Supreme Court of Mississippi. March 26, 1917.)

Appeal from Circuit Court, Lauderdale County; W. W. Venable, Judge.

Action between Sam Meyer and H. J. Woods. Judgment for the latter, and the former appeals. Affirmed.

McBeath & Miller and Jacobson & Brooks, all of Meridian, for appellant. F. V. Brahan and Brskín & Wilbourn, all of Meridian, for appellee.

PER CURIAM. Affirmed.

**FARIES v. MYERS et al.** (No. 18962.)  
(Supreme Court of Mississippi. March 26, 1917.)

Appeal from Chancery Court, Bolivar County; Joe A. May, Chancellor.

Suit between Charles Faries and Mrs. Florine Hicks Myers and others. Decree for the latter, and the former appeals. Affirmed.

Benj. W. L. Bedford, of Cleveland, and Clayton D. Potter, of Jackson, for appellant. Duncan H. Chamberlain, Jr., of Cleveland, for appellee.

PER CURIAM. Affirmed.

(141 La. 48)

No. 21116.

**MEYER v. FAIVRE.**

(Supreme Court of Louisiana. March 12, 1917.)

(Syllabus by the Court.)

**LIBEL AND SLANDER** §112(1) — ACTION FOR SLANDER—EVIDENCE.

Plaintiff must make his case certain.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 325-328, 330, 331, 341.]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by Louisa Meyer, wife of Louis Meyer, against Dr. George W. Faivre. Judgment for defendant, and plaintiff appeals. Affirmed.

Florence Loeber, of New Orleans, for appellant. Hugh S. Suthon, of New Orleans, for appellee.

**SOMMERVILLE, J.** Petitioner alleges that she was a member of the St. Louis Industrial Insurance and Sick Benefit Association, and that defendant was the regular attendant physician; that defendant slandered her to divers persons and to W. S. Pratt, superintendent of said named association, by telling him that she was a "drug fiend, meaning that she was addicted to the use of morphine or similar drugs"; and that she was damaged thereby.

Defendant admitted that plaintiff was a new member of the association named; that W. S. Pratt was the superintendent; and that he was the regular attendant thereof. He alleges:

"That under the form of policy issued by the said association, the membership of each new member is subject to cancellation during the first six months should the association ascertain that the party was suffering from any chronic disease at the time he made application for membership. That it is the duty of this respondent as the physician of said association, to make report of any chronic condition of any new member coming under his treatment within the said six months, and that such reports are confidential and are privileged communications under the law. Respondent now avers and says that plaintiff was such a new member, and during the first six months of her membership applied to him for treatment, and that in the line of his duty he made a report to the superintendent of said association concerning the physical condition of the plaintiff, which report was both confidential and privileged. He specially denies that in making said report he accused the said plaintiff, directly or indirectly, expressly or by innuendo, of being a drug fiend."

There was judgment for defendant, and plaintiff has appealed.

Plaintiff testified that Mr. Pratt told her, in the presence of Mrs. Wirth, that defendant had said that she was a drug fiend, "not only once, but three times." Mrs. Wirth corroborated plaintiff. Mr. Pratt was called as a witness by plaintiff, and he denied that defendant had told him that plaintiff was a dope or drug fiend, and testified that he had not stated to plaintiff that defendant had.

Plaintiff called two other witnesses who denied that they had ever heard the charge made against her, or that they had ever said to any one that such charge had been made.

Defendant testified that he had never made the charge, or anything like it. He had attended plaintiff as a physician during the first few months of her membership of the St. Louis Industrial Insurance & Sick Benefit Association; and, finding that she had a chronic complaint, had reported such finding to the association, as was his duty, as the at-

tending physician of the association, to do; and he had, in accordance with the rules of said association, recommended that she be dropped from membership.

The plaintiff has entirely failed to make out her case.

Judgment affirmed.

(141 La. 50)

No. 21458.

**BOLNER v. TEXAS & P. RY. CO.**

(Supreme Court of Louisiana. March 12, 1917.)

*(Syllabus by Editorial Staff.)*

**RAILROADS** ¶376(1)—**INJURIES TO PERSONS NEAR TRACK—NEGLIGENCE.**

Where plaintiff crossed the main track of a railroad along which an engine was approaching in order to speak to the fireman in an engine backing a train along a branch track ten feet from the main track, and, after reaching a place of safety between the tracks, stepped back so close to the main track that the engine thereon struck and injured him, and it appeared that when he stepped back the engine, which had sounded its whistle and was ringing its bell, was too close to be stopped before striking him, no negligence on the part of the railway was shown and plaintiff cannot recover.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1275, 1278.]

Appeal from Fourteenth Judicial District Court, Parish of Avoyelles; Adolphe J. Lafargue, Judge.

Action by George H. Bolner against the Texas & Pacific Railway Company. Judgment for the plaintiff, and defendant appeals. Judgment set aside, and suit dismissed.

Howe, Fenner, Spencer & Cocke, of New Orleans, and Wm. H. Peterman, of Marks-ville, for appellant. Cappel & Cappel, of Marks-ville, for appellee.

**PROVOSTY, J.** As plaintiff was on his way to the post office, in the town of Bunkie, to mail a letter, he crossed the track of the Marks-ville branch of the Texas & Pacific Railroad, and then, 30 feet further, the track of the main line of the railroad. He then had before him, 10 feet further, the track of the Eunice branch of the same road. On this last track a long freight train which was backing slowly intercepted his path. Several persons going in the same direction as he had stopped before crossing the main track, because they had seen a locomotive and tender approaching on the track, and hardly more than 100 yards away. One of them called plaintiff's attention to this locomotive, and says that plaintiff looked at it and answered that he saw it. This is testified by several witnesses, but is denied by plaintiff. Be that point as it may, it is not necessary for the decision of the case. Plaintiff's object in crossing the second, or main, track was to come close to the backing train to speak to the fireman. In doing

so he stood in the 10-foot space between the track in front of him, on which this train was backing, and the main track behind him, on which the locomotive and tender were approaching. When this locomotive and tender were about 15 feet from him he stepped back, thus coming within the line of danger, and the beam of the locomotive struck him, and knocked him down. The locomotive stopped within about 25 feet after having struck him. He brings this suit in damages against the defendant company, charging negligence.

We can discover none. He was standing out of the line of danger while the locomotive was approaching, and was seen by the engineer and fireman. When he stepped back into the line of danger, the time had passed when the locomotive could have been stopped before striking him. It is supposed that what caused him thus to step back was the letting out of steam by the locomotive of the backing freight train just after having passed him. The whistle of the locomotive that struck him had been blown shortly before and the bell was duly ringing.

The judgment appealed from is set aside, and the suit is dismissed at plaintiff's cost.

(141 La. 52)

No. 20804.

**STANDARD OIL CO. OF LOUISIANA v. BARLOW et al.**

(Supreme Court of Louisiana. March 12, 1917.)

*(Syllabus by Editorial Staff.)*

**MINES AND MINERALS** ¶80—**OIL AND GAS LEASE—REMOVAL OF MACHINERY—REASONABLE TIME.**

The lessee under an oil lease who drills a well which proves unprofitable may abandon the land, and within a reasonable time may exercise the right conferred by the lease "to remove all machinery, fixtures, and improvements placed thereon at any time" by removing the pipe which had been left in the ground; and eight months after the abandonment is a reasonable time within which to take such action.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 208.]

Appeal from First Judicial District Court, Parish of Caddo; John B. Land, Judge.

Action for injunction by the Standard Oil Company of Louisiana against W. W. Barlow and others. Judgment for plaintiff awarding a certain sum to defendants as damages to land, and defendants appeal. Affirmed.

John B. Files, of Shreveport, for appellants. J. C. Pugh & Son, of Shreveport, for appellee.

Statement of the Case.

**MONROE, C. J.** Plaintiff entered into an oil lease with defendants agreeably to which it drilled a well which proved unprofitable, and was abandoned, plaintiff removing most of its appliances. About eight months later

its representatives appeared upon the scene and were in the act of removing the pipe which had been left in the ground, when they were prevented by defendants. Plaintiff thereupon enjoined defendants from interfering, and defendants answered its petition, alleging that, by reason of the abandonment of the enterprise, as stated, plaintiff had forfeited any right that it may have had to remove the pipe; that it had permitted oil, gas, and salt water to escape from the well and damage their land to the extent of \$500; that pending the injunction it removed the pipe, which was worth \$5,000; and that it should be compelled to pay defendants attorney's fees to the amount of \$500. The judge a quo awarded defendants \$125 for damage done to their land, directed that the costs be divided, and otherwise gave judgment for plaintiff. Defendants alone have appealed.

#### Opinion.

The contract into which the litigants had entered conferred upon the lessee "the right to remove all machinery, fixtures, and improvements placed [on the leased premises] at any time." The learned trial judge says in his well-considered opinion:

"It is incredible that any oil company should intend to present to a lessor \$1,400 worth of pipe, after it had expended \$10,000 or more in drilling a well into salt water."

And so it appears to us. No doubt, if the lessor defers the removal of his pipe for so long a time as to authorize the belief that he has abandoned it, a court would so hold, but counsel for plaintiff quote "Thornton" and "Archer" to the effect that the lessor is entitled to a reasonable time after the expiration of his lease within which to take such action (as also *Perry v. Acme Oil Co.*, 44 Ind. App. 207, 88 N. E. 859), and we approve that doctrine. Plaintiff makes no complaint of the allowance of the \$125, which seems to have been authorized by the contract.

Judgment affirmed.

(141 La. 53)

No. 20852.

FIRST NAT. BANK OF LAKE CHARLES  
v. BELL (POPE, Garnishee).

(Supreme Court of Louisiana. March 12, 1917.)

(Syllabus by Editorial Staff.)

1. CORPORATIONS §123(1) — TRANSFER OF STOCK—NOTICE TO CORPORATION—STATUTE.

Under Act No. 180 of 1904, providing that the delivery of a stock certificate of a corporation to a bona fide purchaser or pledgee for value with a written transfer of the same, or a written power of attorney to sell, assign, and transfer the same signed by the owner of the certificate, shall be a sufficient delivery to transfer the title as against all parties, a pledge of the stock is valid, though the corporation was never notified thereof, since when a thing done is sufficient there can be no necessity for doing anything more.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 507.]

2. STATUTES §113(1)—TITLE—TRANSFER OF CORPORATE STOCK.

The title of an act declaring that it is one relative to the transfer of stock in corporations is sufficient to cover a provision prescribing what shall be sufficient to effect a transfer of the stock.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 141.]

3. CORPORATIONS §123(2)—PLEDGE OF CORPORATE STOCK—FORM—SECURITY FOR NOTE.

A written statement on the back of a note that the note is secured by a certificate for corporate stock, which stock is the property of the payee, to whom all earnings shall belong, and that the note is only given to secure to the payee the right, on demand, to secure payment of the amount on return of the stock, is a pledge not a sale of the stock, especially where the testimony shows that the intention of the parties was to pledge, and not to sell.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 8.]

4. GARNISHMENT §29 — RIGHTS OF PLAINTIFF—OWNERSHIP OF PROPERTY.

In proceedings to garnish corporate stock held by the garnishee, who claimed a pledge therein, plaintiff cannot contend that the transfer of the stock to the garnishee was a sale not a pledge, since he could not ask to subject the stock owned by the garnishee to the payment of defendant's debt.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 47, 50, 74, 98, 100.]

5. LIMITATION OF ACTIONS §145(1)—INTERRUPTION OF PRESCRIPTION.

A pledge of corporate stock securing a note is a constant acknowledgment of the debt which constantly interrupts prescription.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 584, 586, 590, 591.]

6. LIMITATION OF ACTIONS §145(1) — PRESCRIPTION—INTERRUPTION—RIGHTS OF CREDITORS.

The pledge of corporate stock to secure a note interrupts prescription against the note, even as between the pledgee and other creditors of the debtor, though if prescription had accrued the debtor could not renounce the right thereby acquired to the prejudice of his creditors.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 584, 586, 590, 591.]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Alfred M. Barbe, Judge.

Action by the First National Bank of Lake Charles against Louis J. Bell, in which N. D. Pope was summoned as garnishee. From a judgment sustaining the commissioner's claim of pledge of the property of defendant in his possession, plaintiff appeals. Affirmed.

Pujo & Williamson, of Lake Charles, for appellant. McCoy & Moss, of Lake Charles, for garnishee.

PROVOSTY, J. The plaintiff, a judgment creditor of the defendant Bell, caused garnishment process to be issued upon his judgment, and interrogatories to be served upon the garnishee, Pope. The latter answered that he had in his possession 50 shares of stock belonging to the defendant, Bell, but that he held the same in pledge as collateral security for a note of Bell for \$5,000, dated April 29, 1907, payable on demand.



Plaintiff urges that this pledge cannot avail the garnishee: First, because invalid; and, secondly, because, if ever valid, it has lapsed, by reason of the said note having been extinguished by the prescription of five years.

The invalidity is urged on the ground that the corporation whose stock is in question was never notified of the pledge.

To this the garnishee answers that by Act 180, p. 370, of 1904, such notification is dispensed with. This act reads:

"An act to establish a law uniform with the laws of other states relative to the transfer of stock in corporations.

"Be it enacted by the General Assembly of the state of Louisiana, that the delivery of a stock certificate of a corporation to a bona fide purchaser or pledgee, for value, together with a written transfer of the same, or a written power of attorney to sell, assign, and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title as against all parties; but no such transfer shall affect the right of the corporation to pay any dividend due upon the stock, or to treat the holder of record as the holder in fact, until such transfer is recorded upon the books of the corporation, or a new certificate is issued to the person to whom it has been so transferred."

Plaintiff says that this law does not dispense with notice to the corporation, and that if it had that effect it would be unconstitutional as violative of article 31 of the Constitution, requiring the object of an act to be expressed in its title.

[1] This law manifestly has the effect of dispensing with notice to the corporation, since it says that a delivery of the stock to the pledgee together with a written transfer shall be a sufficient delivery to transfer the title as against all parties. When the thing done is "sufficient," there can be no necessity for doing anything more. Whatever more might be done would be mere surplusage.

[2] As to the sufficiency of the title of the act, the declaration that the act is one "relative to the transfer of stock in corporations" appears to us clearly to cover a provision prescribing what shall be sufficient to be done for effecting a transfer of such stock.

[3] The pledge is further impugned on the ground that, as appears by the writings evidencing it, it is in reality not a pledge, but a sale.

These writings are as follows: A promissory note on the back of which appears the following:

"This note is secured by Cert. No. 13 for 50 shares of the capital stock of the Martin Tram Co., Ltd., which are in fact the property of N. D. Pope, and all earnings accrued on these shares of stock from date to belong to the said N. D. Pope, and this note is only given to give the said N. D. Pope the right to at any time, upon demand, to secure payment of the amount of \$5,000.00 upon the return of the attached stock."

The certificate of stock, with the following indorsement:

"For value received . . . . . hereby sell, assign, and transfer unto . . . . . shares of the capital stock represented by the within certificate, and so hereby irrevocably constitute and

appoint . . . . . to transfer the said stock on the books of the within-named corporation with full power of substitution in the premises.

"Dated . . . . ., 190...

"In presence of [Signed] L. J. Bell."

[4] The stock belonged to Bell, and the testimony shows that the intention of these writings was to pledge, and not sell, it. That intention, moreover, is evidenced from the writings as a whole. But if, as plaintiff contends, the stock was sold to Pope and belongs to him, what is there, then, to fight over? Plaintiff certainly would not (even as a mere matter of conscience, let alone law) seek to subject the property of Pope to the payment of a debt of Bell.

[5] As far as prescription is concerned, the pledge was a constant acknowledgment of the debt, constantly interrupting the prescription. *Police Jury v. Duralde*, 22 La. Ann. 110; *Citizens' Bank v. Johnson*, 21 La. Ann. 128; *Bank v. St. Amans*, 23 La. Ann. 294; *Begue v. St. Marc*, 47 La. Ann. 1163, 17 South. 700; *Lafolais v. Citizens' Bank*, 33 La. Ann. 1452.

[6] But the learned counsel of plaintiff say that the principle here announced can have application only as between the debtor and the creditor; not as between the debtor and the other creditors of the debtor.

In the nature of things it is only as between the debtor and the creditor that prescription can be interrupted. Learned counsel confuse here between the interruption of a running prescription and the renunciation of an accrued prescription. By the accruing of the prescription the debtor acquires a certain right, viz. the right to plead prescription. This right he cannot renounce to the prejudice of his creditors for the same reason for which he cannot renounce or otherwise divest himself of any other right which he may have of pecuniary value. But the question of renunciation has absolutely nothing to do with the question of whether the course of prescription is interrupted or not by the constant acknowledgment of the debt resulting from the continued existence of a pledge to secure payment of the debt. The pledge or constant acknowledgment of the debt and consequent constant interruption of the prescription does not operate as the renunciation of the prescription, or of any right, but as an obstacle to the prescription, or to the right to plead it, being acquired.

Judgment affirmed, at the cost of plaintiff.

(141 La. 58)

No. 22427.

STATE v. FELTER et al.

In re FELTER et al.

(Supreme Court of Louisiana. March 12, 1917.)

(Syllabus by the Court.)

STATUTES  $\S$  8 $\frac{1}{2}$ (3)—SPECIAL OR LOCAL STATUTE—NOTICE OF INTENTION TO APPLY FOR PASSAGE—CONSTITUTIONAL PROVISIONS.

The title of a statute is an essential part of the act. Hence, if the recital that notice was

given of the intention to apply for the passage of a local or special law appears in the title of the statute, the requirement of article 50 of the Constitution, that a special or local act must contain a recital that evidence of such notice was given, is complied with.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 6.]

Peter Felter and others were convicted of gambling within four miles of a high school, and they apply for writs of certiorari and prohibition. Relief prayed for denied.

Earl E. Kidd, of Winnfield, for applicants.

O'NIELL, J. The defendants, relators, were convicted of gambling within four miles of the Winnfield High School, and were sentenced to serve 60 days' imprisonment in the parish jail, subject to work on the public roads. The offense is denounced by Act No. 123 of 1908.

The defendants contend that the statute, being a special or local law, violates the provision of article 48 of the Constitution that the General Assembly shall not pass any local or special law concerning any civil or criminal actions; and they contend that the statute is unconstitutional for the further reason that it does not contain the recital that the notice of the intention to apply to the Legislature to enact the law was published, as required by article 50 of the Constitution.

We find no merit whatever in the contention that this local law violates that provision of article 48 of the Constitution that the General Assembly shall not pass any local or special law concerning any civil or criminal actions. That provision of the Constitution means merely that the Legislature shall not pass a local or special law affecting any particular lawsuit, or regulating the trial of lawsuits, civil or criminal, in any particular locality.

Article 50 of the Constitution provides that notice of the intention to apply to the Legislature for the adoption of a local or special law, on any subject not forbidden by article 48 of the Constitution, shall be published in the locality where the matter or thing to be affected by the law is situated; that the evidence that such notice was published shall be exhibited in the General Assembly before the act shall be passed; and that every such act shall contain a recital that such notice has been given. There is no recital in the body of the Act No. 123 of 1908 that notice of the intention to apply for the passage of the act was given. But the recital appears, as a preamble, in the title of the act, viz.:

"Due notice of intention to apply for the passage of this act having been published as required by article 50 of the Constitution."

The title of an act of the Legislature is an essential part of the act. Hence a preamble or recital in the title of a statute is contained in the act. Whether the body of an act

would be a more appropriate place than the title for the recital required by article 50 of the Constitution is a question with which we are not concerned. It cannot be said that the recital contained in the title of the statute is not contained in the act. Hence the statute conforms with the requirements of article 50 of the Constitution.

The relief prayed for by the relators is denied.

(41 La. 60)

No. 21968.

STATE ex rel SEVIER v. SEVIER et al.

(Supreme Court of Louisiana. March 12, 1917.)

(Syllabus by the Court.)

HABEAS CORPUS §99(4) — TUTORSHIP AND POSSESSION—RIGHTS OF MOTHER.

The tutorship and possession of, and authority over, minor children whose father is dead belongs of right to their surviving mother. If the widowed mother is physically and mentally able, and morally fit, to take care of her children, no one better able to care for them can question her right to have them in her custody.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84.]

Appeal from Ninth Judicial District Court, Parish of Madison; F. X. Ransdell, Judge.

Habeas corpus proceeding by the State of Louisiana, on relation of Mrs. Frankie T. Sevier, against William P. Sevier and wife and Albert Nichols and wife. Judgment for defendants, and relator appeals. Judgment annulled and reversed, and ordered that relator have possession of her two children.

T. H. McGregor, of Shreveport, for appellant. Jeff B. Snyder and George Spencer, both of Tallulah, for appellees.

O'NIELL, J. This is a habeas corpus proceeding whereby the relator is seeking to regain possession of two of her children, a daughter 16 and a son 13 years of age.

The children are in the custody of two of the defendants, Albert R. Nichols and his wife, she being a sister of the deceased father of the children.

In their answer to the suit the respondents alleged that the relator was insane, had no home, nor means with which to support the children, and that their physical and mental welfare would be seriously endangered by an association with their mother.

The district judge, being of the opinion that the relator was not of sound mind, rejected her demand; and she has appealed.

The evidence of her industry and sufficient earning capacity to support herself and her children was so convincing that the learned counsel for the appellees concede now that the only question to be decided by this court is whether the relator is of such composed mind as to be entitled to the possession and care of her children.

The record reveals a pathetic story. The

relator has two other little girls, Katie, 10 years of age, and Helen, 8 years of age. Soon after her marriage she and her husband moved to Atlanta, Ga., and established their residence there. He fell sick in the latter part of 1911 or early part of 1912, and was an invalid several months, during which time she had to nurse him, and had great trouble maintaining the family. He became so despondent that in May, 1912, he committed suicide, leaving the widow and children almost penniless. By hard work and close economy she managed to support herself and her children until December, 1912, when her grief and responsibilities had so preyed upon her mind that she became demented. On the petition of her sister's husband she was adjudged insane by the court of ordinary of Fulton county, Ga., and was committed to the state sanitarium for the insane at Milledgeville, in that state, on the 27th of December, 1912. There is evidence to the effect that her ailment was only melancholia; but the commitment declared merely that she was a person of unsound mind and should be committed to the Georgia state sanitarium until restored to her right reason and sound mind. The two younger children, Katie and Helen, were taken by a sister of their deceased father to Washington county, Miss., and were given a comfortable home there. The other two children, Rebecca and John, were brought by the respondents to the home of Mr. and Mrs. Nichols, on a farm about five miles from Tallulah, in Madison parish, where they have a comfortable and happy home.

After ten months' treatment in the sanitarium at Milledgeville the relator was pronounced cured, restored to her right reason and sound judgment, and was discharged from the institution by the authorities in charge. She immediately resumed the work in which she had been engaged, selling religious literature. She found employment as a nurse at times, and was for a few months employed as a teacher in a private school. Her great desire was to regain possession of her children and re-establish her home; but the relations who had charge of them doubted that she had recovered entirely from the insanity or that she was financially capable of taking care of the children, and they declined to give them up. She saved her earnings, employed an attorney, and in October, 1915, succeeded in having the two younger children, Katie and Helen, returned to her, by habeas corpus proceedings, in Washington county, Miss. Thereafter, she went to Madison parish, La., and attempted to get possession of the other two children, Rebecca and John. On one occasion she telephoned from Tallulah to the farm where the children were living for them to come to town and see her, and, with the aid of friends whom she had brought to assist her, she attempted to take the children forcibly to the train to take them home with her. The

children rebelled, and the mayor of the town, with other citizens, came to their rescue, took them from their mother, and returned them to their home on the farm.

In June, 1914, proceedings were instituted in the district court of Madison parish to have the relator interdicted and confined in the state insane asylum at Jackson, La. In accordance with the provisions of Act No. 253 of 1910, the district judge appointed the coroner of the parish and another physician to serve with the judge as a commission to inquire into the question of her sanity or insanity. On the same day on which the commission was appointed the defendant in the interdiction proceedings, the present relator, filed a plea to the jurisdiction of the district court of Madison parish alleging that she was not a resident of that parish nor a citizen of the state of Louisiana, but that she was a citizen and resident of the state of Georgia. The plea to the jurisdiction was overruled, the suit for interdiction was tried, and judgment was rendered against the defendant pronouncing her insane and ordering her committed to the East Louisiana Hospital for the Insane at Jackson, La. She appealed from the judgment; and on appeal the judgment of interdiction was annulled, on the ground that the defendant in the suit was a citizen and resident of the state of Georgia, of whom the district court of Madison parish, La., had not jurisdiction to render a judgment of interdiction. See *State v. Sevier*, 136 La. 45, 66 South. 392.

The present habeas corpus suit was filed in the district court of Madison parish in March, 1916. During the preceding three years the relator had been very industrious, and had earned enough money to maintain herself and her two younger children comfortably. She had corresponded regularly with the other two children, sending them numerous articles of clothing and other presents.

There was no testimony of an alienist or specialist on diseases of the mind offered in evidence in this case, or in the interdiction suit. The only physicians who testified in either case were the coroner of the parish of Madison and the other physician who had, with the judge, constituted the commission who had examined into the question of sanity in the interdiction suit. The two doctors admitted in their testimony in this case that they did not consider themselves specialists or experts on diseases of the mind, although the coroner had had occasion to examine a number of persons charged with insanity during the 15 years of his service as coroner. Both physicians expressed the opinion that the relator was insane at the time of the trial of the present suit. The coroner admitted that he had not seen her from the day of the trial of the interdiction suit until he saw her testifying in the present suit, that is, during a period of nearly two years, except that he saw her for a little while on the

occasion when he prevented her taking her children home, and in the scuffle in which he forcibly took the child from her she struck him with a stick. He characterized the form of insanity as "moral or emotional insanity," but admitted that he had never treated a case of moral or emotional insanity, and he gave no reason for his opinion that the relator had that ailment. The other physician characterized the relator's alleged mental trouble as a "moral delusional type," which he said was only another term for moral or emotional insanity. He admitted that he had never seen the relator from the time of the trial of the interdiction suit until he saw her on the witness stand in the trial of this case. He gave no other reason for believing her to be insane than that he had formed that opinion from his observation of her on the witness stand, and by hearing her testify in this suit. He admitted that she had not displayed a mania on any subject, except that she was opposed to the eating of meat, and he said that might be regarded as a fad. He said the greatest scientists and doctors agreed that it was healthy to eat meat, and that the relator might take the idea of furnishing to her children only a certain kind of bread or vegetable, and that she might go so far as to take the wrong steps towards an education or towards a mental or spiritual teaching that might result to the detriment of her children. It is in evidence that the relator is a devout Seventh Day Adventist, whose religious and hygienic teaching and belief is that the human race should not eat meat or flesh food. Vegetarianism is as old as the ancient religion of Hindoostan. It was taught by Plato, Plutarch, and other writers of classical antiquity. It cannot be called a fad or fanaticism at this late day without doing violence to the opinions expressed in the writings of some of the most noted scientists in Europe and America during the last three centuries.

The only witnesses who testified to the insanity of the relator were the two physicians whose testimony is referred to above. A practicing attorney testified that from his acquaintance with the relator and his observations of her he "would not say that she was a proper person to have the custody of these two children, Rebecca and John." He admitted that his only acquaintance with her consisted of his having met her from time to time within a few months, and he gave no reason whatever for his unwillingness to say that she was a proper person to have the custody of these two children, Rebecca and John. Two of the respondents, Wm. P. Sevier and Albert R. Nichols, testified to the modest comforts and happiness and welfare of the children in their present place of abode, and related the circumstances under which the children were taken charge of by them. The children, Rebecca and John, also testified to their welfare and happiness and to the kind-

ness of their adopters; and they expressed their unwillingness to return to their mother.

No proof was offered—no witness testified—that the relator had ever done or said anything since she was discharged from the asylum in Milledgeville that might be considered evidence of insanity. Our reading of her testimony and that of the witnesses who associated with her and knew her well convinces us that she is not insane.

The record of the interdiction proceedings, which took place nearly two years before the trial of the present suit, was admitted in evidence in this case over the objection of the relator's attorney, that it was irrelevant to the issues presented here. Our opinion is that the objection was aimed more at the effect than at the admissibility of the evidence. We have read the record carefully, as part of the evidence in this case, and it does not alter our opinion that the relator is sane.

It is not disputed that the two younger children, Katie and Helen, have had all the care and comfort that any mother's industry and devotion could afford her children since the relator has had possession of them.

We are not called upon to decide, as a question of sociology or of the welfare of the children, whether they are better provided for where they are than they would be with their mother, nor are we to be governed by the preference expressed by the children, who testified in this case. The minds of children—their likes and dislikes—respond readily to the influence of associations and environment. It is in evidence in this case that, when the relator first visited little Katie, after being released from the Milledgeville asylum, the child put her arms about her mother's neck and said she loved her, but could not go home with her. When the mother asked why, the child hugged her tighter and said: "You can't give me auto rides, fine dresses, gold rings, piano lessons, and laces on my clothes." When the Washington county court gave little Katie and Helen over to their mother, the children wept and created a distressing scene in the courtroom. The next morning, and thenceforth, they were as happy with their mother as they ever were in their lives. We hope and believe that Rebecca and John can make their lives as happy with their mother as their little sisters are with her. Be that as it may, the question is not whether they will be as happy or as well provided for with their mother as they are now with their foster parents. The only question for us to decide is that of the relator's rights in the premises. If she is capable of taking care of her children, no one better able to care for them can question her right to have them in her own custody. The tutorship and authority over minor children whose father is dead belongs of right to the surviving mother. R. C. C. 216 and 250; Succession of Reiss, 46 La. Ann.

346, 15 South. 151, 25 L. R. A. 798; Prieto v. St. Alphonsus Convent of Mercy, 52 La. Ann. 631, 27 South. 153, 47 L. R. A. 656. Our conclusion is that the relator is entitled to the relief prayed for.

For the reasons assigned, the judgment appealed from is annulled and reversed, and it is now ordered, adjudged, and decreed that the relator have possession of her children Rebecca and John, and that the respondents pay the costs of this suit.

(141 La. 67)

No. 22312.

STATE v. HILL.

(Supreme Court of Louisiana. March 12, 1917.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW §396(2) — EVIDENCE — THREATS OF ACCUSED—WHOLE CONVERSATION.

The substance of a conversation with accused four nights before the homicide in which he made threats to kill on certain conditions is admissible, though the witness stated that in relating the substance of the conversation the second time he remembered and repeated more than he did the first time, and that it might be that other things were stated in the conversation which he had forgotten, but he did not think he had omitted anything of importance; it being for the accused to bring out on cross-examination anything he may have said in that conversation in exculpation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 862.]

Appeal from Fifteenth Judicial District Court, Parish of Allen; Winston Overton, Judge.

Leonard Hill was convicted of murder, and he appeals. Affirmed.

Daniel Wendling, of New Orleans, for appellant. A. V. Coco, Atty. Gen., J. H. Jackson, Dist. Atty., of Lake Charles (Vernon A. Coco, of Marksville, of counsel), for the State.

PROVOSTY, J. The accused was convicted of murder, sentenced to be hanged, and has appealed.

Annexed to a bill of exceptions is the following:

"Robert Dickens, being duly sworn for the state, testifies as follows: 'Q. Was Leonard Hill at your place any time prior to Thursday night? A. He was there Sunday night. Q. Did he have any conversation with you about Leona Booker? A. He did. Q. About how long did you talk? A. So far as I recollect, I don't know. Q. Do you remember substance of conversation? A. Yes. Q. Relate what you said. A. He called me out about 11 o'clock and told me that he loved Leona and wanted her to go back to him; that he had offered to get her a house at Mab, and she wouldn't accept; that he had offered her money to go home, and if she did not do either one of the two he was going to kill her; that if she did not do him anything good she would not do any one else any good, and if she was caught in company with a certain party he would kill both. He asked me to call her out to talk with him. I went inside and called her there. He went around the house to the back door. I told her Leonard

wanted to see her. She told him she did not want to talk with him. He pleaded with her from outside to come out and talk to him. She told him he ought not come around and disturb people at that hour of the night. He again asked her to come out and talk with him. He said there must be some one else in the room. She said, "There is no one in here but me." He tried to force his way from the side. She gets up called me to stop him. I told him he should not do that; it wasn't right. He said, "All right," and then left."

"Cross-examination of witness by counsel for defendant: 'Q. Are you sure that was all said? A. Something I might have forgotten. Q. You have repeated this story twice have you not? A. Yes, sir. Q. And you have stated some things second time that you did not state the first time? A. Yes; things that I forgot. Q. There may be a number of other things that you have forgotten? A. Probably so. (Counsel for defendant objects to this testimony on the grounds: First, that the witness admits that he may have forgotten important things that were said, and admits further that upon repeating the story the second time he thought of and stated several things which were forgotten and left out in his first statement; second, on the ground that it is too remote in point of time for a part of the res gestae and is therefore not admissible.) By the Court: Q. How long was the conversation before shooting? A. Four nights. Q. When you say that you may have forgotten something that was said do you recall anything that was forgotten, the substance of which you do not now remember? A. No, sir. Q. Do you feel as if you have left anything of importance out of the conversation? A. No, sir. Q. You think then you have given the substance of all that was said? A. Yes, sir. (The objection of counsel for defendant is now overruled, to which ruling defendant excepts.)"

In State v. Vallery, 47 La. Ann. 182, 16 South. 745, 49 Am. St. Rep. 363, this court said:

"The witness states she cannot recollect all that the accused said, but is quite distinct as to the remark in question. The general rule is that the confession sought to be urged against the accused must be used in its entirety, so that he may have the benefit of any exculpation or explanation his whole statement may afford. Undoubtedly, where the confession offered was interrupted, or there are circumstances suggesting that the confession or declaration on the point involved was incomplete and would be modified if all that the accused said was before the jury, in all such cases the portion of the statement offered should be excluded. Here the declaration, preceding by only a short time the killing, appears to be complete as to the purpose. There is nothing to suggest or afford any basis for the inference of any qualification or modification. We think the tendency of the authorities in such cases is to let the testimony go to the jury, and that the objection is only to its effect, of which the jury is to judge."

In Fertig v. State, 100 Wis. 301, 75 N. W. 960, the court said:

"The rule that all parts of a conversation bearing on the subject in controversy must be taken together, and that, if the whole of it, in substance at least, cannot be given, so that its bearing on such controversy, from the standpoint of the party offering it, can be established, the whole shall be excluded, is familiar; but that does not require that a witness testifying to a conversation shall remember it all, either literally or in substance, but only that he shall remember that part relative to the controversy. If a witness can testify to a part of a conversation, sufficiently complete of itself to show its bearing on the

fact in issue, or some evidentiary fact in the case, that is sufficient, though other things were said, which the opposite party may call out on cross-examination, so far as they in any way explain or modify that part testified to in chief, and though the other party to the conversation may be called and his version of it be given. The rule does not go so far as to exclude damaging admissions or declarations made in a conversation, because all said cannot be remembered. All the conversation, or the substance of it, which shows the bearing of the damaging statement as to the fact in issue, or the evidentiary fact sought to be established, must be given or all excluded; but, that being satisfied, the evidence is admissible."

In the case at bar, if the accused knew of anything he had said in the course of the conversation in question which might qualify the statement testified to by the witness, he should have called the attention of the witness to it on cross-examination. As the record stands, the parts of conversation which the witness may have forgotten were unimportant, or, in other words, did not qualify the statements testified to.

Judgment affirmed.

SOMMERVILLE, J., concurs.

(141 La. 70)

No. 21931.

PETTIT v. NELSON CO.

(Supreme Court of Louisiana. March 12, 1917.)

(Syllabus by the Court.)

DAMAGES — 184 — EVIDENCE — DETERMINATION.

Where the evidence does not fix the amount of damages suffered by plaintiff with certainty in cases of tort the quantum is left largely to the sound judgment and conscience of juries and trial judges.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 502.]

O'Niell, J., dissenting in part.

Appeal from Civil District Court, Division A. Parish of Orleans; T. C. W. Ellis, Judge.

Suit by William F. Pettit against the Nelson Company. Verdict for plaintiff in the sum of \$1,500, and judgment thereon, and defendant appeals. Affirmed.

Howe, Fenner, Spencer & Cocke and L. P. Bryant, Jr., all of New Orleans, for appellant. E. M. Stafford, H. W. Robinson, and Daniel Wendling, all of New Orleans, for appellee.

SOMMERVILLE, J. This is a suit for damages growing out of a collision between an automobile owned and driven by plaintiff and an automobile truck owned by defendant, and operated by one of its employees. As a result of the accident, plaintiff's automobile was seriously damaged, and plaintiff was painfully bruised and his ankle and wrist were sprained. None of plaintiff's bones were broken, and he sustained no permanent injury, although ten months after

the accident his wrist was not entirely recovered at the time of the trial.

The case was tried before a jury, and resulted in a verdict for plaintiff in the sum of \$1,500. From this verdict and the judgment thereon, defendant has appealed.

"Defendant seeks by this appeal merely to reduce the amount of the verdict and judgment, the error complained of being that the award of the jury in view of the evidence adduced is excessive.

"The weight of evidence in this case supports plaintiff's contention that the driver of defendant's truck was at fault; but, conceding this, we respectfully submit that the evidence does not warrant a recovery by plaintiff of \$1,500.

"Plaintiff bases his claim for damages on two grounds: First, the personal injuries which he sustained; and, second, the damage done to his automobile." (Quoting from defendant's brief)

Plaintiff testified as to the injuries to himself as follows:

"I had a sprained wrist, a sprained ankle, and contusion of the hip, and laceration—superficial laceration—on my arm and on my leg, and small cuts from the glass and wind shield, on my head and hands. Q. You say that you were kept in bed two weeks, and then wore a bandage on your wrist for ten days after that? A. Yes, sir. Q. And after that period, was your wrist entirely recovered? A. Well, my wrist is not entirely recovered as yet. Occasionally, in cloudy weather, I feel my wrist and ankle, both. Q. Are you required to use that wrist in your professional work? A. Very often. Q. Does the pain in your wrist affect its usefulness in your work? A. Well, I don't attempt lots of work now that I would have done, or would do, if it did not disturb me. If I strain it the least bit too much, I feel pain in it."

As to the damages to the automobile, plaintiff says:

"There was hardly any part of it that did not have some damage, from the front to the rear. The top was totally demolished. The radiator in front, both lamps, cowl, gasoline tank and cowl, running boards, fenders, and the whole chassis was twisted, which would necessitate practically being rebuilt, for it to be safe. Q. Now, what was the matter? You say that both lamps and radiator and cowl, and gas tank and cowl, and running boards, but you don't say just what was the matter with them? A. Well, the gas lamps were all bent up and the crystals in them broken, and the globes were broken, and you could not use them at all any more. The radiator, the top of it was knocked off and bent in—you practically had to have a new radiator, if the machine were to be rebuilt. The fenders were all bent up, and a portion of them torn—torn from the car, too. The only portions of the car that did not have any injuries were the four wheels, and they were up on top of the car, when the car stopped. Q. What was the damage to the gas tank? A. It must have had a leak. There was not any gasoline in it when it came in. It was under the cowl, and it must have been mashed, the same as the cowl was mashed. Q. What was the matter with the chassis? A. All twisted. Q. Where is the machine now? A. It is up in my back yard. I had it removed to the garage, and they wanted storage for it, so I thought, well, since they are going to charge storage on it, I might as well store it in the yard, as store it down there. Q. It has never been repaired? A. Nothing has ever been done to it."

He is corroborated by the witness Ralston, who said:

"The car was pretty well demolished. The four wheels were standing straight up in the air, and that was all that seemed to me to be intact."

The automobile was almost a new car, for which plaintiff had paid \$1,332; and it was virtually demolished and made into junk through the fault of defendant.

The jury has awarded plaintiff \$1,500 damages, without division as to the amount for personal injuries and the amount for the automobile.

"The evidence \* \* \* does not fix with certainty the damages which plaintiff is entitled to, but in suits upon tort the quantum of damages is left largely to the sound judgment and conscience of juries and trial judges." *Wood v. Monteleone*, 118 La. 1005, 43 South. 657.

Affirmed.

O'NIELL, J., is of opinion the amount of the judgment is excessive.

(141 La. 73)

No. 22308.

STATE ex rel. NORRIS v. GRAHAM.

(Supreme Court of Louisiana. March 12, 1917.)

(Syllabus by the Court.)

PARENT AND CHILD §2(4) — CUSTODY OF CHILD—JURISDICTION OF JUVENILE COURT.

The juvenile court for the parish of Washington has no jurisdiction over a mother and child, residents of the parish of St. Tammany; and their forced, or transient presence in the former, conferred no jurisdiction on the local court over them.

[Ed. Note.—For other cases, see *Parent and Child*, Cent. Dig. §§ 25-32.]

Appeal from Twenty-Sixth Judicial District Court, Parish of Washington; Prentiss B. Carter, Judge.

Proceeding by the State, on relation of Quincy Norris, against Mrs. Maggie Goings Graham. Judgment awarding the custody of defendant's child to the relator, and defendant appeals. Reversed, and prosecution dismissed.

Sidney W. Provensal, of Slidell, for appellant. Ott & Johnson, of Franklinton, for appellee.

LAND, J. Defendant appeals from a judgment depriving her of the custody of her child, Clay Goings, by a former marriage, on the ground of her moral unfitness, and awarding the custody of the boy to one Quincy Norris.

The appellant assigns as error the overruling of her exception to the jurisdiction of the court, which reads in part as follows:

"That this honorable court acting in the parish of Washington has no jurisdiction; that she and her husband are residents of the parish of St. Tammany, La.; that the child mentioned in the affidavit, her son Clay Goings, was with her in the said parish of St. Tammany; and that she brought him to this honorable court in answer to a habeas corpus which was dismissed;

and while she was in the parish of Washington, the present affidavit was filed."

The minutes of the court of date September 18, 1916, contain the following entries:

"On motion of Ott & Johnson, counsel for plaintiff, Quincy Norris, the writ of habeas corpus previously filed herein is dismissed at mover's costs."

On the same day the case presented by the affidavit of Quincy Norris, to deprive Mrs. Graham of the custody of her child, was taken up and proceeded with as shown by the following minute entries:

"This matter is taken up and testimony heard, and the child, Clay Goings, is left in the custody of Quincy Norris pending the settlement of this matter.

"By agreement of counsel, the assignment of the case is stricken out, and the case set for Tuesday, September 26, 1916, at 10 o'clock a. m."

When the juvenile court convened on September 28, 1916, counsel for defendant filed the exception to the jurisdiction of the court, which was taken up and overruled by the presiding judge. Defendant thereupon filed an answer to the charges contained in the affidavit, and the case was taken up and proceeded with, the testimony of plaintiff's witnesses was heard, and the case left open for witnesses for the defendant, said witnesses to be heard by agreement at Slidell, La.

Here the minute entries close.

It appears from the statement of facts in the record, signed by counsel for both parties, that the judge heard the defendant's witnesses at Slidell, and that no witness appeared against her.

On October 3, 1916, the juvenile court, after expressing the opinion based on the evidence, "that the health, morals, and physical well-being of the child, Clay Goings, would be jeopardized if placed in the custody of its mother," ordered and decreed that the care and custody of the child be awarded to Quincy Norris.

It appears from the statement of facts that in the year 1913, the defendant, recently divorced from her second husband, while very sick at her mother's house in the parish of Washington, consented that Mrs. Quincy Norris take charge of the child, Clay, then about two years old.

It further appears from the statement of facts that after the mother recovered from her illness she took no steps to recover the child until in the month of September, 1916, she went from her home in Slidell to the home of Mrs. Norris, and told her that she wanted her child.

After some little trouble, a relative of Mrs. Norris took the child over to a house where the defendant was stopping, and delivered the child to her, and she carried the child to her home in Slidell.

The statement of facts shows that about a week later, Quincy Norris sued out a writ of habeas corpus in the parish of Washing-

ton, and had it served on defendant in the parish of St. Tammany, who, without consulting counsel, obeyed at once the order of court and took the child at once to Franklinton, the parish seat.

Thereupon the writ of habeas corpus, having served its purpose, was abandoned.

The defendant and her child were brought within the territorial jurisdiction of the juvenile court of the parish of Washington by an abuse of the process of habeas corpus; and the first plea she filed was the exception to the jurisdiction of the court.

This plea should have been sustained and the proceedings dismissed, as it is obvious that the juvenile court of one parish has no jurisdiction over the residents of another parish, for the purpose of enforcing the provisions of article 118 of the Constitution.

And it is equally obvious that such jurisdiction cannot be vested by a forced or transient presence in another parish.

Under the Code of Practice (article 162) the law requires all personal actions to be brought against the defendant at his domicile; and article 9 of the Constitution requires all criminal trials to "take place in the parish in which the offense was committed."

Hence, whether we take this case as a civil or as a criminal one, or as a quasi criminal proceeding, the juvenile court for the parish of St. Tammany is the only tribunal having jurisdiction of this cause.

It is therefore ordered that the judgment appealed from be reversed, and that the prosecution herein be dismissed, and that all costs in both courts be paid by the relator.

SOMMERVILLE, J., concurs.

(141 La. 76)

No. 22277.

TOWN OF KENNER v. ZITO.

In re ZITO et al.

(Supreme Court of Louisiana. March 12, 1917.)

(Syllabus by the Court.)

1. DEDICATION ⇨44—INTENTION—PROOF.

An intention to dedicate property to public use must be clearly established, but such an intention may be shown by deed, by words or by acts.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85-87.]

2. DEDICATION ⇨44—INTENTION—EVIDENCE.

Where a plat representing a proposed subdivision of the site of a town, to be named "Hanson City," was filed and recorded in the year 1894, and there appeared thereon a certain square represented as bounded on one side by a railroad track, and on the opposite side by "Park Street," and next to said track a railroad depot, and next to Park street a small quadrilateral piece of ground, bisected by a roadway leading from Park street to the said depot, and marked "Hanson City Railway Park," held, that the intention to dedicate the so-called park

to the municipality to be created is doubtful on the face of the plat, and is repelled by evidence tending to show the intention to dedicate, or reserve said park for the purpose of beautifying the depot grounds.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85-87.]

Certiorari to Court of Appeal, Parish of Orleans.

Suit by the Town of Kenner against Frank Zito, in which he called his warrantor, the Hanson City Land Company, Limited. From a judgment of the Court of Appeal reversing the judgment of the district court for defendant, and rendering judgment for plaintiff, defendants bring writ of certiorari. Judgment of Court of Appeal set aside, and judgment of district court affirmed.

Johnston Armstrong, of New Orleans, for applicant Zito. Gustave Lemle, of New Orleans, for applicant Hanson City Land Co., Limited. F. A. Middleton and Frank J. Clancy, both of New Orleans, for respondent.

LAND, J. In 1894, the Hanson City Land Company, Limited, caused to be made and duly recorded a plat of a large tract of land, fronting on the Mississippi river, in the parish of Jefferson, subdivided into blocks, lots, streets, boulevards, places, etc., naming the subdivision "Hanson City," now within the corporate limits of the town of Kenner.

This suit was instituted by the town of Kenner to recover, as property dedicated to public use, a certain piece of ground, designated on said plat as "Hanson City Railway Park."

The plat shows this park as bisected by a roadway extending from Park street to certain structures, representing the station of the Yazoo & Mississippi Valley Railroad.

The roadway curved in such a manner as to subdivide the park into two irregular shaped pieces of ground, somewhat in the form of triangles.

The defendant denied that the Hanson City Railway Park was ever dedicated to public use, and claimed ownership of the same by purchase from the Hanson City Land Company, Limited, on June 5, 1914, and called his vendor in warranty.

For answer to the petition and call in warranty, the Hanson City Land Company, Limited, denied the alleged dedication, admitted the sale to the defendant, and averred that he had a legal title to the so-called park.

The cause was tried, and judgment was rendered in favor of the defendant.

The town of Kenner appealed to the Court of Appeal for the parish of Orleans, which reversed the judgment below, and rendered judgment in favor of the plaintiff.

The case is before us on a writ of review.

[1, 2] The question was dedication vel non of the park in the year 1894.

The Court of Appeal pointed out that the ground in controversy was styled a "park,"



was laid out as a park, and for nearly 20 years the Hanson City Land Company never exercised, performed, or claimed any right of ownership or possession over the property.

The court held that the word "park" means primarily a public place, to the same degree that the word "street" signifies a public thoroughfare—citing *City of New Orleans v. Carrollton Land Co.*, 131 La. 1094, 60 South. 695, where the designation on the plat was "Fredrick Square."

The Court of Appeal also cites *Town of Vinton v. Lyons*, 131 La. 674, 60 South. 54, where it was held that the recording of a plat with a vacant block marked "Park," and the sale of lots according to the plat, is an irrevocable dedication of the park to public use.

The Court of Appeal continues as follows:

"The destination of the space as a park is emphasized by the adjacent street being 'Park street,' and the testimony, in this connection, to the effect that the company designated the street 'park' in honor of an employé of that name, is immaterial, as the ordinary meaning of the word is to be considered, and not the peculiar or special sense in which it was used by the company. *Liyaudais v. Municipality No. 2*, 16 La. 509.

"And, moreover, the use of 'Hanson City' in the title of the square clearly suggests a municipal or public, and not a private, ownership, interest, or use.

"But it is claimed that the presence of the word 'Ry.' or 'Railway' materially affected the meaning of the title and clearly manifested an intention on the part of the warrantor to reserve to itself this property in order that it might thereafter sell or donate it to the Yazoo & Mississippi Valley Railway Company as a private park adjacent to its station.

"But, as we have heretofore remarked, this title must be considered as a whole and its interpretation governed by the ordinary meaning its language conveys, and not by the latent intention of the warrantor. And thus considered it manifestly evidences a purpose to dedicate and not to reserve, and the sole significance that would readily attach to the word 'Ry.' would be that this particular park derived its distinguishing title from its proximity to the railroad."

We make the following excerpt from the opinion of the district judge:

"Taking into consideration the fact that it is named railway park, the fact that it has never been improved, used, or considered as public property, the fact that it had borne for more than twenty years its just proportion of taxes, and also taking in consideration the evidence of Mr. Leake, which in the mind of the court explains why the space was named 'Hanson City Railway Park,' the court can come to but one conclusion, and that is that the property was not dedicated to public use."

The plat of 1894 shows the "Hanson City Railway Park" as a part of a square of ground fronting on "Park street," and running back to the track of the Yazoo & Mississippi Valley Railroad, including the railroad station and other buildings.

On the same plat appear two parallel lines, marked "New Orleans & Hanson City Electric Railway," and two similar lines encircling most of the blocks, marked "Hanson City Belt Line."

Such lines and words import dedications of rights of way for railroad purposes, and

the term "Hanson City" indicates nothing more than locality.

So in the case at bar, the words "Hanson City" may be construed as meaning locality, and the word "Railway" as indicating the kind of park intended.

The facts and circumstances of the case warrant such a construction, and the testimony of Mr. Leake, the president of the Hanson City Land Company and the general attorney of the said railroad, makes such construction imperative.

It is an undisputed fact that the ground in question was never used as a park or otherwise by the authorities of Hanson City or the town of Kenner.

It is also an undisputed fact that the so-called park was never occupied or used by the Yazoo & Mississippi Valley Railroad Company; and it is also an undisputed fact that the said piece of ground remained vacant until after it was sold by the Hanson Land Company to the defendant in the year 1914.

As before stated, on the face of the plat of 1894, the small park and the station of the Yazoo & Mississippi Valley Railway appear to be on the same square of ground.

Mr. Leake testified that the railroad company took possession of the whole square, less the small park, and declined to accept the latter, because of the expense of improving and beautifying the site.

Mr. Leake further testified that his company did intend to dedicate sufficient grounds for a railroad depot, and a small park, to beautify the grounds, as was customary among railroads.

Counsel for relators say in their brief:

"In the instant case, Mr. Leake testified positively that the word 'Railway' was used for the reason the dedication was to the Yazoo & Mississippi Valley Railway Company of a strip of land to beautify the depot grounds, and was not a dedication to the public of a public park.

"Mr. Leake has testified to this being a fact, and his testimony with the fact that the word 'Railway' was used, and that the space over which the words 'Hanson City Railway Park' appears on the map adjoins the depot.

"Unless the word 'Railway' was used for the purpose stated, then it has no meaning at all, and there was no purpose in its use. Such a conclusion is at variance with the conduct of the average human being. No one does a thing deliberately for no purpose. Assuming that there must be some reason for the use of the word 'Railway,' there can be no escape from the conclusion that it was intended to notify the public and prospective purchasers that the park was to be a railway park."

An intention to dedicate property to public use must be clearly established, but such an intention may be shown by deed, by words, or by act. *Cole et al. v. Minnesota Loan Co.*, 17 N. D. 409, 117 N. W. 354, 17 Ann. Cas. 304.

In that case, the testimony of four of the original owners of the town site as to the intention of those interested in the enterprise to dedicate the open spaces as public

parks was admitted and considered. 17 N. D. 409, 117 N. W. 354, 17 Ann. Cas. 309.

The cases cited by the Court of Appeal differ materially in their facts from the case at bar.

For the reasons stated, we are of opinion that the plaintiff has failed to prove that the space in question was dedicated to public use.

Whether the title to the park vested in the railroad company or remained in the land company does not concern the plaintiff town.

It is therefore ordered that the judgment of Court of Appeal be set aside, and the judgment of the district court herein be affirmed, and that the plaintiff pay costs in both appellate courts.

SOMMERVILLE, J., concurs.

(78 Fla. 176, 544)

STATE ex rel. CARTER v. SHEATS, State Superintendent of Public Instruction.

(Supreme Court of Florida. Jan. 31, 1917. On Motion for Peremptory Writ of Mandamus, March 2, 1917. On Application for Rehearing, April 3, 1917.)

(Syllabus by the Court.)

1. STATUTES  $\S$  225—TEACHER'S CERTIFICATE—CONSTRUCTION OF STATUTES.

Section 370 of the General Statutes of 1906, chapter 6164, Acts of 1911 (Comp. Laws 1914,  $\S$  371), and chapter 6540, Acts of 1913, relate to the same general subject of issuing teachers' certificates of qualification, and should be construed together and each given its appropriate effect.

[Ed. Note.—For other cases, see Statutes, Cent. Dig.  $\S$  802, 803.]

2. SCHOOLS AND SCHOOL DISTRICTS  $\S$  180 — TEACHERS' CERTIFICATES—STATUTES.

The teachers' state certificates authorized by section 370 of the General Statutes of 1906, and also those authorized by chapter 6540, may be a basis for "a life certificate," under section 371 of the General Statutes of 1906, as amended by chapter 6164, Acts 1911 (Comp. Laws 1914,  $\S$  371), though the life certificates issued may vary in form and verbiage to indicate the means by which they were obtained under the one or the other of the two statutes.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig.  $\S$  285, 286.]

On Motion for a Peremptory Writ of Mandamus.

3. SCHOOLS AND SCHOOL DISTRICTS  $\S$  130—TEACHERS' CERTIFICATES—LIFE CERTIFICATES—STATUTES.

A person who has been granted a state certificate under chapter 6540, Acts 1913, is entitled to a life certificate upon compliance with the requirements of chapter 6164, Acts 1911 (Comp. Laws 1914,  $\S$  371); and there should be no unjust discriminations between the persons entitled to life certificates, whether such certificates are based on state certificates issued under section 370, Gen. Stats. 1906, or based on state certificates granted by chapter 6540, Acts of 1913.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig.  $\S$  285, 286.]

Original mandamus by the State of Florida, on relation of Helen M. Carter against W. N. Sheats, State Superintendent of Public Instruction. Motion to quash alternative writ denied, and peremptory writ awarded.

Watson & Pasco and Blount & Blount & Carter, all of Pensacola, for relator. T. F. West, Atty. Gen., for respondent.

WHITFIELD, J. The following alternative writ of mandamus was issued by this court:

"In the Supreme Court of the State of Florida.

"In the Name and by Authority of the State of Florida.

"The State of Florida to W. N. Sheats, as State Superintendent of Public Instruction of the State of Florida—Greeting:

"Whereas, by a verified petition filed in our Supreme Court by Helen M. Carter, it has been made to appear:

"(1) That petitioner, Helen M. Carter, is a native and citizen of the state of Florida, and W. N. Sheats, the respondent, is the duly qualified state superintendent of public instruction for said state.

"(2) That petitioner is a graduate in the year 1914 of the collegiate department of the Florida State College for Women at Tallahassee, Fla., which institution, prior to and at the time of her graduation, and during her college course, had submitted to such regulation and inspection as the state board of education and the state board of control had prescribed in accordance with chapter 6540, Laws of Florida, approved June 8, 1913.

"(3) That subsequent to her graduation as aforesaid petitioner made application to respondent, who was then state superintendent of public instruction for the state of Florida, for a state certificate in accordance with said chapter 6540, Laws of Florida, made it appear to him that she had taken advantage of the provisions of section 1 of that act, and he granted said application.

"(4) That, in pursuance of his action granting said application, respondent, as state superintendent as aforesaid, issued to petitioner a state certificate, dated October 6, 1914, substantially as follows, viz:

"No. 12. For 5 Years.

"Graduate State Certificate.

"State of Florida.

"Office of Superintendent of Public Instruction.

"Whereas, Miss Helen Carter, having presented satisfactory evidence that she has regularly graduated from the collegiate department of the Florida State College for Women, has devoted one-fifth of the time of her course to professional training for teaching, and has made in the regular examinations at the close of the junior and senior years the grades required by statute:

"Wherefore, I, by authority vested in me by section 2 of chapter 6540, Laws of Florida, do hereby grant to her this graduate state certificate, which authorizes her to teach in any of the schools of Florida for five years from date hereof.

"Witness my hand and the seal of the state board of education this the 6th day of October, 1914.

"[Seal of State Board of Education.]

"Wm. N. Sheats,  
"Superintendent of Public Instruction.

" 'Grades Made in Final Examinations of the Junior and Senior Years as Reported by Dr. Edw. Conradi, President of Institution.

<b>ENGLISH—</b>		7. Political .....	%	<b>MUSIC—</b>	
1. The Bible .....	%	8. Zoology .....	%	1. Harmony .....	%
2. Expression .....	%	9. ....	%	2. History of .....	%
3. Rhetoric .....	%	<b>PHILOSOPHY—</b>		3. Piano .....	%
4. Literature .....	%	1. Ethics .....	78%	4. Violin .....	%
5. ....	%	2. History of .....	%	5. Sight Singing .....	%
<b>LANGUAGES—</b>		3. Logic .....	78%	6. Voice .....	%
1. French .....	%	4. Metaphysics .....	%	<hr/>	
2. German .....	%	5. Psychology .....	80%	General Average .....	
3. Greek .....	%	6. Sociology .....	92%	<hr/>	
4. Italian .....	%	7. ....	%	<b>Standing on Subjects Pursued in</b>	
5. Latin .....	%	<b>EDUCATION—</b>		Previous Courses.	
6. Spanish .....	%	1. Methods, etc. ....	87%	1. Agriculture .....	%
7. ....	%	2. History of .....	90%	2. Algebra .....	%
<b>HISTORY—</b>		3. Philos. of .....	85%	3. Arithmetic .....	%
1. United States .....	%	<b>INDUSTRIAL—</b>		4. Civics .....	%
2. English .....	%	1. Agriculture .....	%	5. Composition .....	%
3. General .....	%	2. Horticulture .....	%	6. Eng. Grammar .....	%
4. Science of .....	94%	3. Dom. Science .....	80%	7. Latin (Beginners') .....	%
<b>MATHEMATICS—</b>		4. Dom. Art .....	95%	8. Orthography .....	%
1. Geometry .....	%	5. Mechanic Arts .....	%	9. Pol. Geography .....	%
2. Analyt. Geom. ....	%	6. Phys. Training .....	%	10. Phys. Geography .....	%
3. Trigonometry .....	%	7. Meth. in H. E. ....	93%	11. Florida History .....	%
4. Surveying .....	%	<b>PRIMARY—</b>		12. U. S. History .....	%
5. Engineering .....	%	1. Drawing .....	%	13. Reading .....	%
6. Calculus .....	%	2. Kindergarten .....	%	14. Physiology .....	%
7. Astronomy .....	%	3. Methods .....	%	15. Sciences (Elem.) .....	%
8. ....	%	4. Nature Study .....	%	16. Rhetoric .....	%
<b>SCIENCES—</b>		5. Vocal Music .....	%	17. Pedagogy .....	%
1. Bacteriology .....	%	6. ....	%	18. College Eng. ....	85%
2. Biology .....	%	<b>ART—</b>		19. German .....	85%
3. Botany .....	%	1. Drawing .....	%	20. Zoology .....	%
4. Chemistry .....	%	2. Painting .....	%	21. ....	%
5. Geology .....	%	3. History of .....	95%	22. ....	%
6. Physics .....	%				

"(5) That petitioner, subsequent to receiving said state certificate, successfully did high school teaching in the state of Florida for a period of 18 months and more under her said state certificate, and thereafter, on January 1, A. D. 1917, made application to respondent, as state superintendent as aforesaid, to issue her, without examination, a life certificate as provided by section 371, General Statutes of Florida, as amended by chapter 6164, Laws of Florida, approved June 5, 1911 (Comp. Laws 1914, § 371), and presented therewith satisfactory indorsement showing her eminent ability in teaching and school government from more than three persons residents of the state of Florida who then held life certificates granted by the state superintendent of public instruction of said state.

"(6) That said respondent then and there, upon consideration of said application so made to him, was satisfied, and so stated, that petitioner had successfully done high school teaching in this state for more than eighteen months under her said state certificate. He further found that the indorsements so presented by her were satisfactory to him, and so stated. He further found that said indorsements were from three persons residents of the state of Florida then holding life certificates granted by the state superintendent of public instruction of said state, and showed eminent ability in teaching and school government, and so stated. He further stated that his only reason for refusing to issue the life certificate applied for was because petitioner did not hold a state certificate granted under the provisions of section 370, General Statutes of Florida, and that, if her state certificate had been issued to her under the provisions of said section 370, he would, upon the application then presented, issue to her a life certificate. He further stated that in his opinion the state certificate held by petitioner, which had been issued under the provisions of chapter 6540, Act approved June 8,

1913, was not such a state certificate as was contemplated by section 371, General Statutes of Florida, as the basis for a life certificate, and therefore for this reason, and none other, declined to grant petitioner's application for a life certificate.

"(7) That petitioner has fully complied with all the laws of Florida providing for the issuance to her of a life certificate, and is qualified to receive same, but respondent refuses to issue such certificate upon the sole ground that graduates holding state certificates issued under chapter 6540, Act approved June 8, 1913, are not entitled to the benefit of section 371, General Statutes of Florida, providing for life certificates, and petitioner is remediless in the premises unless the state's writ of mandamus be granted to compel respondent to issue to her a life certificate as provided by the laws of Florida:

"Now, therefore, we, being willing that full and speedy justice be done in the premises, do command you, W. N. Sheats, as state superintendent of public instruction of the state of Florida, forthwith to issue and deliver to the petitioner, Helen M. Carter, a life certificate good in any part of the state and of perpetual validity, as provided by section 371, General Statutes of the State of Florida, or that you appear before the Justices of our Supreme Court sitting within and for the state of Florida, at the courtroom in the city of Tallahassee, on the 16th day of January, A. D. 1917, at 10 o'clock a. m. of that day, and show cause why you refuse to do so, and have you then and there this writ.

"Witness, the Honorable Jefferson B. Browne, Chief Justice of the Supreme Court of the state of Florida, and the seal of said Supreme Court of Tallahassee, the capital, this January 8, A. D. 1917.

"[Seal.] G. T. Whitfield,  
"Clerk Supreme Court, State of Florida."

The respondent moved to quash the alternative writ on the following grounds:

"(1) Because no sufficient facts are stated in said alternative writ to warrant the respondent in issuing to the relator the life certificate authorized by section 371 of the General Statutes of Florida as amended by chapter 6164, Acts of 1911, Laws of Florida (Comp. Laws 1914, § 371), in certain cases as therein defined.

"(2) Because it does not appear that the state certificate alleged to be held by the relator is such a state certificate as is defined by the provisions of section 371 of the General Statutes of Florida as amended by chapter 6164, Acts of 1911, Laws of Florida, which must be held as a condition precedent to the right by the holder to demand the issuance to him or her by the respondent of a life certificate as authorized by said statute.

"(3) Because it appears from the averments of said alternative writ that the state certificate held by the relator was granted to her under authority of the provisions of chapter 6540, Acts of 1913, Laws of Florida, and the respondent says that he is not legally authorized or empowered to issue life certificates such as were contemplated by section 371 of the General Statutes of Florida as amended by chapter 6164, Acts of 1911, Laws of Florida, to the holders of such state certificates.

"(4) Because it affirmatively appears that the averments of said alternative writ that the relator is not entitled to the relief sought or to any relief."

[1, 2] The statutes to be construed and applied in determining the questions presented are as follows:

"A state certificate may be issued by the state superintendent to any eligible applicant who shall have taught twenty-four months in all, eight months under a first grade certificate obtained in this state, and shall have passed an examination conducted by the state superintendent of public instruction on geometry, trigonometry, physics, botany, zoology, Latin, rhetoric, English literature, psychology, and general history, and shall have made an average grade of eighty-five per cent. with a grade in no branch below sixty per cent.

"A state certificate shall be valid for five years from the date of issue and shall be valid throughout the state."

Section 370, Gen. Stats. of 1906, Compiled Laws of 1914.

"A life certificate, good in any part of the state and of perpetual validity, may be issued by the state superintendent of public instruction, without examination, to any teacher holding a state certificate issued since January 1, 1894, and who has successfully done high school or college teaching in this state for a period of eighteen months under a state certificate, and who shall present satisfactory endorsement showing eminent ability in teaching and school government from three persons holding life certificates." Section 371, Gen. Stats. of 1906, as amended by chapter 6164, Acts of 1911; Section 371, Compiled Laws 1914.

"Chapter 6540—(No. 120).

"An act to enable normal school and college graduates to teach and acquire certificates in this state.

"Be it enacted by the Legislature of the state of Florida:

"Section 1. That all graduates of the normal or college departments of the University of Florida and College for Women, and any other colleges and universities in this state that will submit to such inspection and regulation as the state board of education and the state board of control may prescribe are hereby granted a

state certificate: Provided, that one-fifth of the time of the collegiate departments be devoted to professional training: and provided, further, that at a regular examination conducted at the close of the junior and senior years, of all such graduates, as come under the provisions of this act, the said graduates shall make a general average of not less than eighty-five per cent., on all subjects, with a grade of not less than sixty per cent., on any subject.

"Sec. 2. Any person making it appear to the state superintendent that he or she has taken advantage of the provisions of section one of this act shall be granted a state certificate.

"Sec. 3. All laws and parts of laws in conflict herewith are hereby repealed.

"Sec. 4. This act shall take effect on its passage and approval.

"Approved June 8, 1913."

The respondent contends that section 371 of the General Statutes of 1906, as amended by chapter 6164, does not authorize the respondent to issue life certificates to holders of state certificates acquired and held under the provisions of chapter 6540.

It is argued that at the time section 370 and section 371 as the latter is amended were enacted there was no such state certificate as that now authorized by chapter 6540; therefore such certificate could not have been intended as the basis for a life certificate under section 371.

It is further urged that the state certificate referred to in section 371 as amended has a well understood and definite meaning; that the methods and tests by which it is secured are prescribed, and consequently the state certificate provided for by section 370 is the state certificate required as a basis for a life certificate under section 371.

The respondent further says:

"It is true that the certificate which is issued under authority of chapter 6540 is called a state certificate, but calling it a state certificate cannot change its character, and it is apparent that it is not a 'state certificate' as that term was defined and known when section 371 of the General Statutes was enacted or amended. That there are under the law now two classes of state certificates is perfectly apparent. That there is a wide difference between the two classes, that they are secured by different methods and different tests, and that they are of widely different value in fact, are also apparent.

Section 370 and chapter 6540 each expressly and definitely provide for the issuance of "a state certificate" though the requirements for obtaining the certificates widely differ under the two acts. Section 371 was manifestly intended to operate prospectively upon state certificates "issued since January 1st, A. D. 1894." These statutes, relating as they do to the same general subject, should be construed together and each given its appropriate effect. There is obviously a field of operation for both section 370 and chapter 6540 in the school system of the state; and "a state certificate" authorized by each statute may be a basis for "a life certificate" under section 371 as amended, though the life certificates issued may vary in form and verbiage to indicate the means by which

they were obtained under the one or the other of the two statutes. The statute does not prescribe the forms of the certificates authorized to be issued.

A person may become entitled to "a state certificate" upon compliance with section 370 of the General Statutes of 1906; and such person may thereafter become entitled to "a life certificate" upon compliance with section 371 of the General Statutes of 1906, as amended by chapter 6164, Acts of 1911. Likewise a person may become entitled to "a state certificate" upon compliance with chapter 6540; and such person may thereafter become entitled to "a life certificate" upon compliance with section 371 of the General Statutes of 1906, as amended by chapter 6164.

The form of each class of such certificates may be prescribed or approved by the state educational authorities so as to make each certificate show upon its face under which statute it was issued and what are the studies and conditions upon which the person became entitled to the certificate.

Thus construed and applied, there is no conflict in the statutes. The motion to quash the alternative writ is denied.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and ELLIS, JJ., concur.

On Motion for Peremptory Writ of Mandamus.

WHITFIELD, J. A motion to quash the alternative writ of mandamus herein having

been denied, and the relator having moved for a peremptory writ of mandamus, the respondent answered:

"That he had complied with the command of said writ by tendering to said relator a certificate in the form prepared by him as state superintendent of public instruction of the state of Florida, which said form was duly approved by the state board of education of the state of Florida, copy of which said certificate is hereto attached and made a part of this answer," viz.:

"No. \_\_\_\_\_ Perpetual.

"Life Graduate State Certificate.

"State of Florida.

"[Seal of State.]

"Office of Superintendent of Public Instruction.

"Whereas \_\_\_\_\_ having graduated from the \_\_\_\_\_ department of the \_\_\_\_\_, and having been issued a graduate state certificate, under chapter 6540, Acts of 1913, and having shown that \_\_\_\_\_ has done successfully high school or college teaching under said certificate for a period of not less than eighteen months, and having presented satisfactory indorsements showing eminent ability in teaching and in school government from three persons holding life certificates:

"Therefore, by authority given in chapter 6164, Acts of 1911, I do hereby issue to \_\_\_\_\_ this life certificate, setting forth the subjects pursued and grades made thereon in \_\_\_\_\_ student course, as reported by the president of the school from which \_\_\_\_\_ graduated, and as recorded in \_\_\_\_\_ state certificate, which guarantees to \_\_\_\_\_ the right to teach perpetually in any of the schools of Florida the specific subjects named herein and made a part of this life certificate.

"Witness, my hand and the seal of the state board of education this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 191—.

"State Superintendent of Public Instruction."

Grades Made in Final Examinations of the Junior and Senior Years, as Reported by Dr. \_\_\_\_\_, President of the Institution.

<b>ENGLISH—</b>			7. Political .....	%	<b>MUSIC—</b>		
1. The Bible .....	%		8. Zoology .....	%	1. Harmony .....	%	
2. Expression .....	%		9. ....	%	2. History of .....	%	
3. Rhetoric .....	%		<b>PHILOSOPHY—</b>			3. Piano .....	%
4. Literature .....	%		1. Ethics .....	%	4. Violin .....	%	
5. ....	%		2. History of .....	%	5. Sight Singing .....	%	
<b>LANGUAGES—</b>			3. Logic .....	%	6. Voice .....	%	
1. French .....	%		4. Metaphysics .....	%	7. ....	%	
2. German .....	%		5. Psychology .....	%	<b>General Average .....</b>		
3. Greek .....	%		6. Sociology .....	%			
4. Italian .....	%		7. ....	%	<b>Standing on Subjects Pursued in</b>		
5. Latin .....	%		<b>EDUCATION—</b>			<b>Previous Courses.</b>	
6. Spanish .....	%		1. Methods, etc. ....	%	1. Agriculture .....	%	
7. ....	%		2. History of .....	%	2. Algebra .....	%	
<b>HISTORY—</b>			3. ....	%	3. Arithmetic .....	%	
1. United States .....	%		<b>INDUSTRIAL—</b>			4. Civics .....	%
2. English .....	%		1. Agriculture .....	%	5. Composition .....	%	
3. General .....	%		2. Horticulture .....	%	6. Eng. Grammar .....	%	
4. ....	%		3. Dom. Science .....	%	7. Latin (Beginners) .....	%	
<b>MATHEMATICS—</b>			4. Dom. Art .....	%	8. Orthography .....	%	
1. Geometry .....	%		5. Mechanic Arts .....	%	9. Pol. Geography .....	%	
2. Analyt. Geom. ....	%		6. Phys. Training .....	%	10. Phys. Geography .....	%	
3. Trigonometry .....	%		7. ....	%	11. Florida History .....	%	
4. Surveying .....	%		<b>PRIMARY—</b>			12. U. S. History .....	%
5. Engineering .....	%		1. Drawing .....	%	13. Reading .....	%	
6. Calculus .....	%		2. Kindergarten .....	%	14. Physiology .....	%	
7. Astronomy .....	%		3. Methods .....	%	15. Sciences (Elem.) .....	%	
8. ....	%		4. Nature Study .....	%	16. Rhetoric .....	%	
<b>SCIENCES—</b>			5. Vocal Music .....	%	17. Pedagogy .....	%	
1. Bacteriology .....	%		6. ....	%	18. ....	%	
2. Biology .....	%		<b>ART—</b>			19. ....	%
3. Botany .....	%		1. Drawing .....	%	20. ....	%	
4. Chemistry .....	%		2. Painting .....	%	21. ....	%	
5. Geology .....	%		3. ....	%	22. ....	%	
6. Physics .....	%						

To this answer the relator replied:

"That no certificate in the form, or substantially the form, set forth in the respondent's answer has heretofore been issued to the holder of any form of state certificate as a compliance with section 371, Gen. Stats.; that said form was prepared since the decision of this court on the motion to quash the alternative writ herein; that there have been issued by the state superintendent 134 life certificates under section 371, Gen. Stats., none of which restrict the holder to teaching specified subjects, all of which exempt the holder from further examinations as a teacher; that prior to the year 1900 a form of life certificate to be issued under said section 371, Gen. Stats., was adopted by the state superintendent and state board of education, which was substantially the form then actually in use, which form so adopted was and is substantially as follows:

"No. 528.

"Teacher's Life State Certificate.

"State of Florida.

"No. ———. [Seal of State.] Perpetual.

"Teacher's Life State Certificate.

"Allos Docendo Discimus.

"The eminent qualifications of ——— as a teacher of youth having been shown by ——— distinguished success in the schools of this state, and having presented the requisite indorsements and testimonials as provided in chapter 6164, Laws of Florida of 1911, ——— is therefore awarded this diploma, which is of perpetual validity and forever exempts ——— from further examination as a teacher in the public schools of this state.

"Given under my hand and the seal of the state board of education at the city of Tallahassee this ——— day of ———, 19—.

"Supt. of Public Instruction.

[Seal, State Board of Education.]

"That after its adoption, and prior to April, 1913, many certificates in said form were issued to and are now held by persons who complied with section 371, Gen. Stats., and since April, 1912, many more certificates in the same form have been issued to, and are now held by, other persons who complied with said section.

"That the certificate tendered relator is a special and not a life certificate, for the issuance of which no authority in law exists, and is not in the form prescribed and adopted as aforesaid for issuance under said section 371, Gen. Stats."

When chapter 6164 was enacted in 1911 a life certificate was authorized to be issued only upon "a state certificate" obtained under section 370, General Statutes of 1906. Chapter 6540 granted a state certificate to "all graduates" of certain colleges in this state upon compliance with the conditions stated in the act. The policy and wisdom of granting "a state certificate" to graduates of colleges in the state were determined by the enactment of the law. While section 370, General Statutes of 1906, provided that "a state certificate may be issued," chapter 6540 enacts that all graduates as stated therein "are hereby granted a state certificate" upon compliance with the named conditions. The statute is controlling, and its provisions should be observed.

It does not appear that after the passage

of chapter 6540 the school authorities prescribed or approved a distinct form of "a life certificate" to be issued under chapter 6164 based on "a state certificate" granted by chapter 6540. It does appear from the pleadings that the form of a life certificate in use prior to the enactment of chapter 6540 has since then been in use, and chapter 6164 authorizes "a life certificate" to be issued "to any teacher holding a state certificate issued since January 1, A. D. 1894," upon compliance with the conditions stated in the act. The form of the certificate attached to the respondent's answer is not "a life certificate" within the contemplation of chapter 6164, and the form shown to be in use is appropriate as "a life certificate" whether based on section 370, General Statutes of 1906, or chapter 6540. The relator, having been granted a state certificate under chapter 6540, is entitled to have "a life certificate" issued to her as contemplated by chapter 6164.

The copy of the form of certificate referred to in and made a part of the respondent's answer as set out above is of a "life graduate state certificate," and not of "a life certificate," and it is essentially different from the "teacher's life state certificate" contained in the relator's reply to the answer and shown to be the form of the life certificates that are issued under the law. The differences between the two forms do not merely show under which statute a certificate is issued or the studies and conditions upon which the holder became entitled to the certificate issued as authority to teach. There are conditions and limitations in the form submitted by the respondent that are not contained in the other form that is in use, and that are not required by law. The form of the life certificate heretofore used in issuing life certificates to teachers, as shown above in the relator's reply, and admitted by the demurrer thereto, is apparently in substantial conformity with the requirements of chapter 6164, Acts of 1911, amending section 371 of the General Statutes of 1906. It does not refer to studies or conditions pursued, and does not contain limitations found in the other form of certificate. While the form of the life certificate as used may, consistently with the statutes, be varied in its contents to show whether it is based upon the state certificates issued under section 370 of the General Statutes of 1906, or is based upon the state certificates granted by chapter 6540, and doubtless also to show other matters of detail pertinent to the granting of the certificate, yet the statutes contemplate no other material differences; and there should be no unjust discrimination in the limitations and conditions imposed in the forms used for life certificates.

The relator, being a graduate in 1914 of the collegiate department of the Florida State College for Women, and having com-

plied with the provisions of chapter 6540, Acts of 1913, was granted a state certificate October 6, 1914. Being, as shown by the alternative writ, a "teacher holding a state certificate issued since January 1, 1894," who has successfully done high school teaching in this state for a period of 18 months under a state certificate, and who has presented satisfactory indorsement showing her eminent ability in teaching and school government from three persons holding life certificates, the relator is, under chapter 6164, Acts of 1911, amending section 371 of the General Statutes of 1906, entitled to "a life certificate, good in any part of the state and of perpetual validity." The form and contents of the life certificate should, of course, show that it is "a life certificate," and that it is "good in any part of the state and of perpetual validity."

[3] If "a life certificate" issued under chapter 6164, Acts of 1911, upon "a state certificate" obtained under section 370, General Statutes of 1906, is in the form shown by the pleadings herein, which form makes no reference to studies and conditions pursued, or to any statute except chapter 6164, under which all life certificates are issued, then "a life certificate" issued upon "a state certificate" granted by chapter 6540 should in fairness be similarly formed, except as the proper school authority may have provided different forms to indicate the means by which each certificate is obtained.

The demurrer of the respondent reaches back to his answer; and the reply of the relator is good as against the answer which is insufficient as a defense to a peremptory writ.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and ELLIS, JJ., concur.

#### On Application for Rehearing.

PER CURIAM. Notwithstanding the statements in the respondent's petition for a rehearing, the court has not required the respondent to issue a life state certificate to the relator, certifying that she is qualified to teach any stated subject, but only that he issue to the relator "a life certificate good in any part of the state and of perpetual validity," as is expressly required by section 371, General Statutes of the State of Florida, as amended by chapter 6164.

Section 371, as amended, provides that "a life certificate good in any part of the state and of perpetual validity may be issued by the state superintendent of public instruction, without examination, to any teacher holding a state certificate issued since January 1st, A. D. 1894, and who has successfully" complied with stated conditions. It is admitted by the pleadings that the relator is a "teacher holding a state certificate issued since January 1st, A. D. 1894," and that she

has complied with chapter 6540 under which she was "granted a state certificate," and that she has complied with the stated conditions and requirements of section 371, as amended, in that she "had successfully done high school teaching in this state for a period of eighteen months under a state certificate, and presented satisfactory indorsement showing eminent ability in teaching and school government from three persons holding life certificates." On this showing, admitted to be true by the demurrer of the respondent, the statute requires that "a life certificate good in any part of the state and of perpetual validity may be issued by the state superintendent without examination." The writ issued by the court merely requires the respondent to do what the statute expressly makes it his duty to do. The wisdom and policy of the statute cannot be reviewed by the court.

The opinion on the motion to quash the alternative writ expressly states that, as section 370 of the General Statutes of the state provides that "a state certificate may be issued" upon compliance with its terms, and as chapter 6540 enacts that "a state certificate" is "granted" upon compliance with that chapter, "the form of each class of life certificates may be prescribed or approved by the state educational authorities so as to make each certificate show upon its face under which statute it was issued and what are the studies and conditions upon which the person became entitled to the certificate." At that time the form of the life certificates in use was not before the court. The state certificate held by the relator, as shown in the first opinion, gave the studies she had pursued in obtaining the certificate. In the respondent's answer he set out the form of a certificate presented as a compliance with the writ. This form is patently not authorized by law. It is entitled "life graduate state certificate," and not "a life certificate," as authorized by section 371. It limits the holder to a right to teach only such subjects as are specified therein. The statute authorizes a certificate giving authority to teach, not a statement of what the person may teach. Besides this, the pleadings now show that the form of life certificates heretofore and now used under section 371, as amended, is as applicable to cases where "a state certificate" was issued under section 370, General Statutes, as to cases where "a life certificate" is "granted" under chapter 6540. The statutes do not contemplate any unjust discriminations between persons who hold "a life certificate" whether held under section 370 or chapter 6540; and, as it did not appear that the state school authorities had provided different forms to properly indicate the means by which each class of life certificates is obtained, the respondent was by a peremptory writ required to do what

the statute makes it his duty to do, to wit, to issue to the relator "a life certificate good in any part of the state and of perpetual validity," as is expressly required by section 371, General Statutes, as amended.

Rehearing denied.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

(78 Fla. 159)

**OCKLAWAHA RIVER FARMS CO. v. YOUNG et al.**

(Supreme Court of Florida. Jan. 31, 1917. Rehearing Denied March 31, 1917.)

*(Syllabus by the Court.)*

**1. HUSBAND AND WIFE §171(1) — WIFE'S SEPARATE PROPERTY — PAYMENT OF HUSBAND'S DEBT.**

Section 1, art. 11, of the Constitution of Florida of 1885, which provides that the property of a married woman owned by her before marriage, or lawfully acquired afterward, shall be her separate property, and shall not be liable for the debts of her husband without her consent given by some instrument in writing, executed according to the law respecting conveyances by married women, does not preclude a married woman from subjecting her separate property to the payment of her husband's pre-existing debt by joining with him in the execution of a mortgage in the form of a deed absolute, provided the same is executed in accordance with the law respecting conveyances by married women.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 671.]

**2. HUSBAND AND WIFE §171(7) — MORTGAGES §37(1) — LIABILITY OF SEPARATE ESTATE—EVIDENCE—CONSENT.**

When a married woman, under the provisions of section 1, art. 11, of the Constitution of Florida of 1885, consents that her separate property shall be liable for the debts of her husband, such consent may be in the form of a deed absolute to her separate property, which by evidence aliunde may be shown to be a mortgage, and need not expressly recite her consent to the subjection of her property to such purpose, nor need such consent be supported by any other consideration than the debt of her husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 674, 950, 951; Mortgages, Cent. Dig. §§ 97, 102-104, 106, 107.]

**3. JUDGMENT §693—PARTIES BOUND.**

Where a married woman who joins with her husband in the execution of a mortgage upon her separate property to secure a debt of her husband, and such mortgage is in the form of a deed absolute which recites a specific amount as consideration, and she afterwards institutes a suit against her husband and the mortgagee for the purpose of having the instrument declared to be a mortgage, and for an accounting to ascertain the amount of indebtedness to secure which the mortgage was given, she will be bound by the decree in such suit adjudicating the character of the instrument and the amount due, which it was given to secure.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1216.]

**4. HUSBAND AND WIFE §171(3, 13)—MORTGAGE BY WIFE—CONSIDERATION—STATUTE.**

A pre-existing debt of the husband is a sufficient consideration to support a mortgage to his creditor executed by the debtor and his wife upon the latter's separate property to secure the debt, and such consideration is a good consideration within the meaning of section 2514 of the General Statutes of Florida; and, in the absence of fraud and injury to a subsequent grantee, such mortgage is a valid obligation, and will not be declared void at the instance of a subsequent purchaser with constructive notice of its existence.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 674, 675, 950, 951.]

Appeal from Circuit Court, Marion County; W. S. Bullock, Judge.

Bill by the Ocklawaha River Farms Company against Jefferson D. Young and others. Demurrer to bill sustained, and complainant appeals. Order affirmed.

Hocker & Martin of Ocala, for appellant. Hampton & Hampton, of Gainesville, for appellees.

ELLIS, J. In January, 1915, the Ocklawaha River Farms Company, a corporation, exhibited its bill in chancery against Jefferson D. Young, Thomas Stonewall Kyle, Claude E. Connor, Ruby C. Connor, the Alabama City Land & Development Company, a corporation, and Nena Kyle Elliott as executrix of J. M. Elliott, Jr., deceased, and prayed that certain deeds made by Ruby C. Connor and her husband to J. M. Elliott, Jr., be declared void as against the complainant and Young and Kyle; that a deed by J. M. Elliott, Jr., and wife to the Alabama City Land & Development Company, dated July 25, 1910, and filed for record March 16, 1912, be declared void, and that Nena Kyle Elliott as executrix and the Alabama City Land & Development Company be divested of all interest or claim to such part of the lands as are owned by the complainant, and that if the deeds of March 23, and March 28, 1908, which were the deeds executed by Ruby C. Connor and her husband to J. M. Elliott, Jr., are decreed to have any binding force as a mortgage, that complainants may be permitted to redeem the lands upon the payment of whatever may be adjudged to be a valid charge against the same, and for general relief.

The bill as amended alleges, in substance: That the complainant is "seised and possessed of a fee-simple estate" in certain lands located in Marion county, and that it acquired the lands in 1913 under a deed of conveyance from Z. C. Chambliss, trustee, for the defendants Young and Kyle; that Chambliss as trustee acquired the lands under a warranty deed from Young and Kyle and their wives, and that Young and Kyle acquired the lands from Ruby C. Connor and her husband, Claude E. Connor, by warranty deed in 1909. That complainant has been in possession of the lands since the spring of



1913, and has expended a large sum of money on them in improvements. That on March 23, 1908, Ruby C. Connor, who was the owner of the lands described in the bill, "attempted to execute a deed to the said lands" to J. M. Elliott, Jr. That the deed was in the statutory form of a warranty deed, and expressed a consideration of \$5,000, but the lands were misdescribed, and on the 28th of March, 1908, the error being discovered, Ruby Connor and her husband executed to Elliott a deed correctly describing the lands. The second deed was also in the statutory form, and expressed a consideration of \$1, and recited that the same was given to correct an error in the description of the first deed. Both deeds were recorded in the same book, the first on page 1, and the second on page 4. That in July, 1908, a building which was located on the lands was destroyed by fire, and Elliott collected the proceeds of the insurance policy amounting to \$4,400. It is alleged that the two deeds were given by the Connors to Elliott for the purpose of securing the payment of money, and if they had any binding effect constituted a mortgage; but the deeds failed to specify any debt for which they were security, and did not refer to any written obligation as evidencing any debt from Ruby Connor or her husband to Elliott. That in 1909 and repeatedly thereafter Elliott claimed that he did not know the amount in which C. E. Connor was indebted to him or the companies controlled by Elliott, and asserted and claimed to Connor, and Young and Kyle, that he (Elliott) was the owner of the property described in the two deeds; refused to state what sum of money the lands were intended to secure; refused to render an accounting to Ruby C. Connor or her husband for the proceeds of insurance; and in the spring of 1909 "there was tendered in behalf of the said Ruby C. Connor to the said J. M. Elliott, Jr., the sum of \$5,000." It is also alleged: That in March, 1909, Ruby C. Connor by her next friend, J. D. Young, filed a bill in the circuit court for Marion county against J. M. Elliott, Jr., and C. E. Connor, to declare the deeds mentioned to be a mortgage, and for the purpose of taking an account and to redeem the lands. A lis pendens was filed and recorded. That Elliott contested the suit; denied that the deeds were intended as mortgages, but were intended to vest in him the absolute title to the lands. That the chancellor decreed the deeds to be mortgages, and that decree was affirmed by this court upon appeal by Elliott. 63 Fla. 408, 53 South. 241. That the said suit brought by Mrs. Connor is still pending in the circuit court, and that Elliott has brought forward and undertaken to charge a large amount of money claimed to be due to him and some of his companies by C. E. Connor as being secured by the mortgages, and some of such claims are barred by the statute of limitations and are "otherwise of a false and illegal character."

By amendment to the bill it was alleged that the lands were the separate statutory property of Ruby Connor at the time she and her husband made and executed the deeds. That she was paid a large consideration for the deed she and her husband executed to Young and Kyle, who conveyed to Chambliss as trustee for conveying the title to complainant, who paid Young and Kyle a large consideration therefor. That up to April, 1909, Elliott permitted Ruby Connor and her husband to remain in possession of a large part of the property, but none of that described in the bill. That the entire tract of lands described in the deeds was unsuitable for occupation except the part occupied by Ruby Connor and her husband. That during the winter of 1908 and 1909 Elliott, being advised that Young and Kyle were willing to undertake the reclamation of the land and expend a large sum in such work, refused to render a true account of what was due him from Connor, but claimed that he (Elliott) was the owner of the land which had greatly increased in value because of the fact becoming known that the lands could be reclaimed, and that responsible parties were willing to undertake the work.

The original bill alleges that in July, 1910, Elliott, in order to defeat the purpose of the suit brought by Ruby Connor by her next friend, J. D. Young, against Elliott and Connor, her husband, undertook to convey the lands to the Alabama City Land & Development Company for an expressed consideration of \$10,000. This deed, however, was not recorded until March 16, 1912. It was alleged that the Alabama City Land & Development Company was dominated and controlled by Elliott, and the deed to it was an attempt by Elliott to perpetrate a fraud on Ruby C. Connor; that the deed was not made until after the decree in the suit of Ruby Connor against Connor and Elliott was affirmed by this court, and after Elliott had lost an ejectment suit against Mrs. Connor and her husband involving the same lands, decided in December, 1909; that before Elliott took any steps to take or obtain possession of the lands Young and Kyle had expended a large sum of money on the lands in the work of reclamation; that the deed from Elliott to the Alabama City Land & Development Company was without consideration, and the deeds from the Connors to Elliott in 1908 were intended merely as security for any proper debt then owing from Connor to Elliott.

It is alleged that Elliott died in November, 1914; that his will was duly probated and letters testamentary executed to the defendant Nena Kyle Elliott.

It is insisted, and the bill so charges, that the deeds from the Connors to Elliott in 1908 which were decreed to be mortgages are void under section 2514, General Statutes of Florida, as to subsequent purchasers by reason of the conduct of Elliott as recited

in the bill and as stated in substance herein, and that if the deeds are valid as mortgages, they are of no binding force or effect as security for any amount in excess of \$5,000, and that after applying the proceeds of the fire insurance policy collected by Elliott, there only remains due about \$600.

A demurrer was interposed to the bill upon the grounds that the facts stated did not render the deeds from the Connors to Elliott void; that the complainant did not offer to do equity, and there was no equity in the bill. The demurrer was sustained, and this appeal was taken from the order sustaining the demurrer.

The controversy in this case arises upon two points:

First, whether the deeds from Ruby C. Connor and her husband to J. M. Elliott, Jr., executed in March, 1908, were void under article 11 of the Constitution of 1885, as being voluntary and without consideration, and because they do not contain an expressed consent of Ruby C. Connor that the lands therein described shall be liable for the debt which the instruments were given to secure. Incidental to this point arises the further question whether the amount secured by the deeds, if they are valid, is not limited by the consideration named therein, namely, \$5,000.

Second, does the conduct of J. M. Elliott, Jr., since the execution of the deeds to him by Ruby C. Connor and her husband in 1908 render them void as to the complainants under section 2514 of the General Statutes of Florida?

[1-3] Appellants contend in their brief that article 11 of the Constitution requires that before the separate property of a married woman may become liable for the debts of her husband, her consent must be obtained in writing expressly giving such consent, and that a consideration must move to her or her husband for such consent at the time the written instrument is executed.

The bill alleges that the deeds from the Connors to Elliott, executed in 1908, were given for the purpose of securing the payment of money, and if they had any binding effect constituted a mortgage.

In the case of Connor v. Connor, 59 Fla. 467, 52 South. 727, Mrs. Connor, by her next friend, J. D. Young, in a suit against her husband and J. M. Elliott, Jr., sought to have the deeds of 1908 executed by her and husband to J. M. Elliott, Jr., declared to be a mortgage to secure the indebtedness of her husband to Elliott. In that bill she alleged that she consented to secure the payment of the indebtedness of her husband to Elliott, and any future indebtedness of her husband to Elliott, and offered to pay any and all amounts due to him by her husband the payment of which was secured by said conveyances. The prayer was for an accounting,

and that she might redeem the land upon proper payments. A demurrer to the bill was sustained and an appeal taken from that order. This court held that the allegations of the bill indicated that the intention of the parties was to secure the payment of money due to the mortgagee by the husband of the mortgagor, and reversed the order sustaining the demurrer. The case came to this court again upon an appeal from a decree on the pleadings and evidence, in which decree the chancellor found the equities of the cause to be with the complainant, and referred the same to a master to state an account between C. E. Connor and J. M. Elliott, Jr. This court said that the question presented was "whether on the evidence under the statutes of this state the conveyance of the property is in fact and in law merely a mortgage to secure the payment of money." It appeared from the evidence in that case that C. E. Connor was employed by J. M. Elliott, Jr., as a bookkeeper and confidential assistant, and that he used funds of his employer without authority, to a large amount, the exact or even approximate sum not being known at the date of the execution of the deeds, and that, with a view to reimburse Elliott for the money that C. E. Connor had misappropriated, and to relieve her husband from the stress of inability to pay a large, but not definitely ascertained, sum of money that he had unlawfully taken from his employer, Mrs. Connor joined with her husband in the execution of the deeds to her separate property, the recited consideration being \$5,000. After reviewing the evidence in the case this court answered the question in the affirmative. See Elliott v. Connor, 63 Fla. 408, 58 South. 241. We think that the facts involved in the above litigation by which Mrs. Connor, as well as Elliott, was bound show a sufficient consideration moving to Mrs. Connor for the execution of the instruments, even if she were not estopped by the character of the instruments from denying a consideration. But is not the debt of the husband a sufficient consideration for the wife's consent? At the common law the estate which the husband acquired in the lands of the wife was such an estate as could be transferred or alienated by him, and was subject to sale on execution at the instance of his creditors. 13 R. C. L. 1048; 2 Blackstone's Com. 126-128; Rose v. Rose, 104 Ky. 48, 46 S. W. 524, 41 L. R. A. 353, 84 Am. St. Rep. 430; McNeer v. McNeer, 142 Ill. 388, 32 N. E. 681, 19 L. R. A. 256; 2 Kent's Com. 130; Van Duzer v. Van Duzer, 6 Palge Ch. (N. Y.) 306, 31 Am. Dec. 257.

The husband was said to have been seised of the freehold in his wife's lands *jure uxoris*. It was held to be a vested estate in him, and it was not competent for legislation, without his consent, to take it from him and give it back to the wife. See

Bishop on Law of Married Women, § 40. The act of March 6, 1845 (Laws of Florida 1845, No. 9), changed the rule of the common law, and provided that when a woman shall marry, being seised or possessed of real property, her title to the same shall continue separate, independent, and beyond the control of her husband, and shall not be taken in execution for his debts, and further provided that a married woman may become seised of real property during coverture by bequest, demise, gift, purchase, or distribution. But this act also required that the property so acquired should be inventoried and recorded in the clerk's office of the county in which the property was situated at the peril of being liable for her husband's debts "as if this act had not been passed." See *Mercer v. Hooker*, 5 Fla. 277; *Price v. Sanchez*, 8 Fla. 136.

The Constitution of 1868, art. 4, § 25, secured to the married woman all property, real and personal, owned by her before marriage, or lawfully acquired afterward, as her separate property, and provided that it should not be liable for the debts of her husband. This provision repealed such portions of the statute as prior to the adoption of the Constitution made the wife's property conditionally liable for her husband's debts. The Constitution of 1868 created an unconditional exemption of the wife's separate property from such debts. See *Fairchild v. Knight*, 18 Fla. 770. In the case of *Staley v. Hamilton*, 19 Fla. 275, which arose upon a transaction in 1866, this court, speaking through Mr. Chief Justice Randall, said the statute provided that the wife may mortgage her separate real property for any consideration whatever, "and so she may secure the payment of any debt of her husband or herself." But as the mortgage, which the wife signed in that case, was not executed in conformity with the statutory requirements, it was ineffectual, of no validity, and void. As the note which Mrs. Staley signed with her husband was not the method provided by statute for making her separate property liable for her husband's debt, it was, of course, ineffectual for that purpose. The view of the court seems to have been that parol evidence was not admissible to convert a void instrument into a valid one, nor convert a promissory note into a specific lien upon real property. There is nothing in that case inconsistent with the idea that if the mortgage had been properly executed it would have been enforced. Now while the Constitution of 1868 created an unconditional exemption of the wife's separate property from liability for the debts of the husband, the Constitution of 1885 modified such exemption. It was probably done with the view of removing all possible conflicts between a constitutional clause providing unconditionally for the exemption of the wife's separate proper-

ty from the debts of her husband and the statute which, as construed in the above case, provided that she might mortgage her property for the purpose of making it liable for her husband's debts. The statute which was in existence at the time the Constitution of 1868 was in force contemplated that the husband's debt was a sufficient consideration to support the wife's mortgage of her property and the framers of the Constitution of 1885, probably desiring to harmonize the constitutional provisions on that subject with the laws as they had existed in this state since 1835, under which the rights of property for many years had been adjudicated, merely required, as the statutes did, the consent of the wife evidenced by a written instrument executed according to certain formalities. The contention of appellant is based upon the theory that when the wife consents to the subjection of her separate property to liability for her husband's debts, she is in the same position as one who becomes a surety for a stranger, and a consideration must therefore flow to her from the creditor, else the contract of suretyship is nudum pactum.

But is this a contract of suretyship? The wife does not assume any obligation to pay the debt of her husband. It is not perfectly clear that the Constitution even requires the instrument to be in the form of a contract, or mortgage, nor is it clear that any of the essentials of a contract are necessary. It is not required that there should be any mutuality of obligation between the wife and creditor of the husband; their minds are not required to meet on any proposition; her consent may be given without the creditor's knowledge; and it is not unreasonable to say that she may even limit the amount of indebtedness for which her property is to be liable, as well as the portion of her separate property which she consents to subject to his debts. The "some instrument in writing" of the Constitution may be very informal as to language and recitations so that the formalities of execution are duly observed.

This court said in the case of *Fritz v. Fernandez*, 45 Fla. 318, 34 South. 315, speaking through Mr. Justice Hocker:

"There is, of course, a difference between the wife's power of disposition of a purely equitable estate and of her purely statutory property. In the former case courts of equity recognize her complete power of disposition, unless that power was limited in the instrument creating the estate. In the latter case the power of disposition is regulated by the statutes which create the separate statutory property."

The learned justice said in that case that no reason was conceivable why a wife could not make a gift of her statutory property to her husband. When she consents that her separate property shall be liable for her husband's debts, she merely makes a gift of it to her husband in effect.

The reciprocal obligations, duties, and responsibilities, both legal and moral, of hus-

band and wife, growing out of the status of marriage, may take the case out of the general rule. The consideration which may induce the wife to consent to the subjugation of her separate property to the payment of the valid debts of her husband may exist solely between her and her husband, it may grow out of the tenderest and most beautiful of sentiments which make the marital status a blessing to the principals and a benefit to society. These communications between husband and wife are privileged. Public policy forbids the curious from prying into them, yet they may afford the most potent reason for the wife's consent. So even as he may mortgage his property to secure the payment of a pre-existing debt, we think his wife may give her consent in the manner provided by law that her property may be subjected to the same purpose, without requiring the acceptance of a dollar from a stranger to give validity to the consent. The effect of these changes made by the statutes and Constitution upon the common law is beneficial both to the married woman and the husband's creditors; on the one hand, she is protected from annoyance in the enjoyment of her property, while, upon the other hand, the creditor, by obtaining the wife's consent according to the formalities of the statute, may secure himself fully against loss on account of a debt due by the insolvent husband.

As to the contention of counsel that the written consent of the wife should expressly state that the instrument given is for the purpose of making her property liable for the debt of her husband, we think there is no reason for such a rule, and that the language of the constitutional provision does not necessarily carry such meaning. The language is as follows:

"All property, real and personal, of a wife owned by her before marriage, or lawfully acquired afterwards by gift, devise, bequest, descent, or purchase, shall be her separate property, and the same shall not be liable for the debts of her husband without her consent given by some instrument in writing, executed according to the law respecting conveyances by married women."

The giving of the instrument in writing which is to be executed according to the requirements of the statute respecting conveyances by married women is the only evidence of consent required. If it is in the form of a mortgage, the mere placing of the lien upon the property is sufficient evidence of the consent. The only attribute required of the written instrument is that its execution must be in accordance with the formalities of the statute, which does not require that the real consideration or purpose of the conveyance shall be stated.

[4] It is insisted by appellant that the mortgage made by Ruby C. Connor and her husband to J. M. Elliott, Jr., in 1908, is void under section 2514 of the General Statutes of Florida as to complainant and those under whom it claims, by reason of Elliott's con-

duct since the mortgage was executed, and that as he paid no consideration for the mortgage, he was not a bona fide purchaser, and was in the same position as a voluntary grantee. We do not agree with this contention, as a pre-existing debt was a sufficient consideration to support the mortgage. The debt due by Connor to Elliott was a live, valid, enforceable obligation, and constituted a sufficient consideration for the execution of the mortgage by the husband and wife. At the time of this mortgage the complainants had acquired no interest or claim in or upon the property. Appellant did not become a purchaser until years afterwards. The records of the county were open to it, and it was charged with notice as to the existence of liens and incumbrances upon the land which the record might have disclosed. The deed to Elliott from the Connors had been recorded, and appellant therefore had constructive notice of its existence when it purchased. In the transaction between the Connors and Elliott in 1908 there was no injury at the time to the appellant; nor was there any element of fraud in it. Unless fraud and injury coexist in a transaction, the courts can render no relief. See *Kelley Co. v. Pollock*, 57 Fla. 459, 49 South. 934, 131 Am. St. Rep. 1101. The mortgage appears to have been made with an honest and lawful intent, and for a good consideration. This being true, it was valid, and no subsequent fraudulent or illegal act of the parties can invalidate it. See 12 R. O. L. 475; *Dodd v. McCraw*, 8 Ark. (3 Eng.) 83, 46 Am. Dec. 301; *Summers v. Roos*, 42 Miss. 749, 2 Am. Rep. 653; *Currier v. Sutherland*, 54 N. H. 473, 20 Am. Rep. 143; *Beck v. Parker*, 65 Pa. 262, 3 Am. Rep. 625.

Section 2514 of the General Statutes of Florida contains a proviso to the same effect. The language of the proviso is as follows:

"Provided, that nothing in this section contained shall extend or be construed to impeach, make void or frustrate any conveyance, assignment or lease, assurance, grant, charge, lease, estate, interest or limitation, or use or uses of, in, to or out of any lands, tenements or hereditaments, which shall be made upon and for good consideration and bona fide, to any person or persons, bodies politic or corporate, anything in this section to the contrary notwithstanding."

According to the view which we have of the above statute, and our understanding of the argument of counsel for appellant, the proviso of the act is itself an answer to the argument if it be admitted that the deed of 1908 was not a voluntary conveyance; that is to say, that Elliott was not in the position of a voluntary grantee. The history of the law of fraudulent conveyances shows that from the earliest times transfers of personal property in fraud of creditors have been deemed void at common law. The principle underlying the law was that the creditor had a claim upon the property of his debtor constituting the fund from which the debt should be paid. If the debtor, therefore, in the ex-

ercise of his right in the matter of disposing of his property, ignores the equitable right of his creditors to be paid out of the property in his hands, and exceeds the legitimate authority over his property by disposing of it with intent to delay or defraud his creditor, such disposition was deemed inequitable and void. The common law, however, was deemed too rigid in requiring proof of fraud; so statutes were passed in England to protect society from the imposition of cheats and swindlers and other fraudulent persons, and to hold in check the fraudulent contrivances of such persons. See 12 R. C. L. 465; *People v. Garnett*, 35 Cal. 470, 95 Am. Dec. 125; *Sands v. Codwise*, 4 Johns. (N. Y.) 536, 4 Am. Dec. 305. The first statutes were aimed at the fraudulent gifts of chattels, St. 13 Elizabeth, c. 5, at conveyances of land as well as chattels to defeat creditors, and St. 27 Elizabeth, c. 4, against fraudulent conveyances to defeat subsequent purchasers. See *Fleming v. Townsend*, 6 Ga. 103, 50 Am. Dec. 318; *Springer v. Drosch*, 32 Ind. 486, 2 Am. Rep. 356; *Filley v. Register*, 4 Minn. (Gil. 296) 391, 77 Am. Dec. 522; *Livermore v. Boutelle*, 11 Gray (Mass.) 217, 71 Am. Dec. 708; *Trotter v. Howard*, 8 N. C. (1 Hawks) 320, 9 Am. Dec. 640; *Heath v. Page*, 63 Pa. 103, 3 Am. Rep. 533; *Fowler v. Stoneum*, 11 Tex. 478, 62 Am. Dec. 490; *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488. These statutes were said to be declaratory of the common law, and that without their aid the common-law principles which are so strong against fraud would have, in the end, accomplished the result aimed at by the statutes. See *Howe v. Waysman*, 12 Mo. 169, 49 Am. Dec. 126; *Hall & Farley v. Alabama Terminal & Improvement Co.*, 143 Ala. 464, 39 South. 285, 2 L. R. A. (N. S.) 130, 5 Ann. Cas. 363. These statutes were adopted by the territory of Florida in 1823, and have been continued upon the statute books of this state to the present time. There are some slight variations in the language of our statutes, sections 2513-2515, General Statutes of Florida, of 1906, from that of the English originals, due, perhaps, to a laudable ambition to improve upon the English model. It is conceded that the statutes are highly remedial, beneficial in their nature, entitled to a liberal interpretation, are in pari materia, and should be construed together. The words "utterly void" in each of these statutes, 13 and 27 Elizabeth, sections 2513, 2514, General Statutes, have not been given by the courts the full significance which they seem to imply. The word is construed to read "voidable" and voidable only at the instance of those embraced within the meaning of the terms "creditors and others" or "purchasers." See 12 R. C. L. 474, and authorities cited; also *Kent v. Lyon*, 4 Fla. 474, 54 Am. Dec. 404; *McKee v. West*, 141 Ala. 531, 37 South. 740, 109 Am. St. Rep. 54; *Doster v. Manistee Nat. Bank*, 67 Ark. 325, 55 S. W. 137, 48 L.

R. A. 334, 77 Am. St. Rep. 116; *First Nat. Bank of Riverside v. Eastman*, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626; *Beldler v. Crane*, 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349; *Hendricks v. Mount*, 5 N. J. Law, 738, 8 Am. Dec. 623; *Loos v. Wilkinson*, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250; *Bynum v. Miller*, 86 N. C. 559, 41 Am. Rep. 467.

A purchaser who acquires a deed from an owner who has already incumbered his land must occupy an analogous position to a creditor of such owner before he can complain of the prior incumbrance, and if the prior incumbrance was made in good faith for a good consideration, it is valid as to such subsequent purchaser, who has no right to have it declared void.

The appellant was bound by the prior deed, he was charged with notice of its existence, and by common prudence and ordinary diligence could have ascertained the extent of the incumbrance.

The order sustaining the demurrer to the bill is affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and WHITFIELD, J., concur.

(73 Fla. 217)

CONNOR et al. v. ELLIOTT.

(Supreme Court of Florida. Jan. 31, 1917.  
On Petition for Rehearing, March 31, 1917.)

(Syllabus by the Court.)

1. JUDGMENT  $\S$  693—CONCLUSIVENESS.

Decided upon the authority of *Ocklawaha River Farms Company v. Jefferson D. Young et al.*, 74 South. 644, present term.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1216.]

On Petition for Rehearing.

2. JUDGMENT  $\S$  693—CONCLUSIVENESS—RES ADJUDICATA—MORTGAGE.

Where a married woman executed jointly with her husband a mortgage to another person, upon her separate property, consisting of lands, to secure a debt of the husband, and such mortgage was in the form of a deed absolute, and expressed a certain consideration in dollars, and the woman afterwards instituted a suit in equity against the mortgagee and her husband to declare the deed to be a mortgage and for an accounting as to the husband's indebtedness, the decree rendered in such suit is binding upon the husband both as to the character of the instrument and the amount of indebtedness found to be due, where the court rendering the decree had jurisdiction of the subject-matter and the person of the defendants, and, in another and subsequent proceeding by the mortgagee or his executrix to foreclose the mortgage, will be considered as res adjudicata as to the husband.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1216.]

3. JUDGMENT  $\S$  682(1) — CONCLUSIVENESS — AMOUNT OF INDEBTEDNESS — SUBSEQUENT PURCHASERS.

In such a case all the subsequent purchasers of the land with notice, actual or constructive, of the mortgage will be likewise bound by the de-

cree adjudicating the amount of the indebtedness secured by the mortgage.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1203.]

Appeal from Circuit Court, Marion County; W. S. Bullock, Judge.

BILL by Nena Kyle Elliott, as administratrix of the will of James M. Elliott, deceased, to foreclose a mortgage against Rubie C. Connor and others. Separate demurrers to the bill were overruled and defendants appeal. Order affirmed.

H. M. Hampton and Hocker & Martin, all of Ocala, for appellants. Hampton & Hampton, of Gainesville, for appellee.

PER CURIAM. [1] The appellee filed her bill to foreclose a mortgage given by Rubie C. Connor and her husband to James M. Elliott in 1908. Separate demurrers were interposed to the bill by the several defendants, which demurrers were overruled. From the order an appeal was taken. The questions presented have been discussed in the case of Ocklawaha River Farms Company v. Jefferson D. Young et al., 74 South. 644, decided this day.

The order of the chancellor overruling the demurrer is affirmed upon the authority of that case.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

#### On Petition for Rehearing.

ELLIS, J. [2] This case was decided at the present term of the court upon the authority of Ocklawaha River Farms Company v. Jefferson D. Young et al.

Petitions for a rehearing have been filed in behalf of Claude E. Connor, Noble W. Harrison, Jefferson D. Young, Gus A. Waters, Margaret J. Pickard, and the Ocklawaha River Farms Company.

Nena Kyle Elliott, as executrix of the last will and testament of James M. Elliott, Jr., exhibited her bill in the circuit court for Marion county against Rubie C. Connor and Claude E. Connor, Margaret J. Pickard, Jefferson D. Young, Thomas S. Kyle, Noble W. Harrison, Ocklawaha River Farms Company, Munroe & Chambliss National Bank, and G. A. Waters, to enforce a mortgage lien upon certain lands owned by Rubie C. Connor. The mortgage was executed by Rubie C. Connor and her husband, Claude E. Connor, in March, 1908, to secure an indebtedness due by Claude E. Connor to J. M. Elliott, Jr. It was in the form of a warranty deed, and expressed a consideration of \$5,000. The deed was properly acknowledged for record and duly filed in the office of the clerk of the circuit court for Marion county, in March, 1908.

In 1909 Mrs. Connor, by her next friend, Jefferson D. Young, instituted a suit in chancery in the circuit court for Marion county

against her husband, Claude E. Connor, and James M. Elliott, Jr., to declare the deed to be a mortgage to secure the indebtedness of her husband to J. M. Elliott, Jr., prayed for an accounting as to the amount of such indebtedness, and that the complainant may be permitted to redeem the property described in the mortgage by paying the amount ascertained to be due. This suit was resisted by J. M. Elliott, Jr., who insisted that the deed was absolute in fact as well as in form. The bill in this case alleges that the issues were duly made up, testimony was taken, and a decree rendered, adjudging the deed of March, 1908, to be a mortgage, and directing an accounting between C. E. Connor and J. M. Elliott, Jr., to ascertain the amount of the indebtedness secured by the mortgage. On appeal this decree was affirmed by this court. See Elliott et al. v. Connor et al., 63 Fla. 408, 58 South. 241. After the death of J. M. Elliott, Jr., the cause was revived in the name of Nena Kyle Elliott as Executrix of the last will and testament of J. M. Elliott, Jr., deceased, and after the taking of testimony and the report by the master, the chancellor rendered his decree, adjudicating the indebtedness of Claude E. Connor to Nena Kyle Elliott as administratrix to be \$19,727.65, with interest from April 12, 1915, and ordering that the mortgage be canceled upon the payment of that sum, either by Claude E. Connor or Rubie C. Connor, to Nena Kyle Elliott, as administratrix. The bill in this case alleges that the debt has never been paid.

Margaret J. Pickard, according to the bill, held a mortgage on lands in range 16 from Rubie C. Connor and her husband, dated March 20, 1908, a few days prior to the date of the mortgage to Elliott. The lands as described in the latter mortgage, however, were in range 24, and the bill alleged that Margaret J. Pickard had filed her bill to reform the description of the lands by changing the range from 16 to range 24, and to foreclose the lien which was claimed to be superior to the Elliott mortgage lien. The bill in this case alleges that J. M. Elliott, Jr., was an innocent purchaser for value without notice of the mortgage to Margaret J. Pickard, and that the mortgage of the latter was therefore subordinate to the lien of the Elliott mortgage.

The bill alleges that the claims of Thomas S. Kyle and Jefferson D. Young, who claim under a deed from Rubie C. Connor and her husband dated March 19, 1909, and a mortgage dated the same day from Rubie Connor and her husband to Thomas S. Kyle upon the same lands to secure the sum of \$5,000, and a deed to Thomas S. Kyle and J. D. Young from Rubie Connor and her husband, dated January 14, 1910, conveying an undivided one-fourth interest in certain other lands embraced in the Elliott mortgage, for a consideration of \$10 and other valuable consid-

erations, all arose after the execution of the mortgage to Elliott, and with full knowledge on the part of Thomas S. Kyle and J. D. Young of Elliott's deed and his superior lien upon the lands. It was also alleged that in March, 1909, a lis pendens was filed by Rubie Connor in the suit against Elliott and her husband to declare the deed absolute in form to be a mortgage, and for an accounting and the right to redeem, and that Thomas S. Kyle and J. D. Young had agreed to pay off and discharge "whatever decree should be rendered by the court in the said case of Rubie C. Connor, by her next friend, Jefferson D. Young, v. Claude E. Connor and J. M. Elliott, Jr." That Kyle and Young had permitted part of the lands to be sold for taxes, and Joseph Balfour to obtain a tax deed therefor, who had quitclaimed to them in July, 1910. This act is alleged to have been done in fraud and for the purpose of defeating the claim of J. M. Elliott.

The bill also alleges that in April, 1913, Rubie C. Connor and her husband executed a mortgage to Noble W. Harrison to secure the sum of \$1,000; that the mortgage was upon part of the lands, and was taken by Harrison with full knowledge of the rights and interest of Nena Kyle Elliott as executrix of the will of J. M. Elliott, Jr., deceased, and was subordinate to the lien of the Elliott mortgage.

The bill also alleges that in January, 1913, T. S. Kyle and J. D. Young, in order to cloud the title to the property, and with full knowledge of the rights of J. M. Elliott, Jr., conveyed the lands by warranty deed to Z. C. Chambliss as trustee, also in the same month executed to the same person as trustee a quitclaim deed to certain of the lands, and "a deed" to certain other of the lands, and that in February, 1913, Z. C. Chambliss, as trustee, and his wife conveyed to the Ocklawaha River Farms Company the lands described for a consideration of \$1 and other valuable considerations. It was alleged in the bill that Z. C. Chambliss had no interest or claim in or to the property, and that he acted for T. S. Kyle and J. D. Young for the purpose of getting the title out of them; that he paid no consideration for the property, nor did the Ocklawaha River Farms Company pay any consideration therefor; that the corporation was organized by T. S. Kyle, William Hocker, and D. H. Kirkland under an agreement with J. D. Young; that Kyle owns 200 shares of the stock, and Kirkland and Hocker, 2 shares each; that Kyle is president, Kirkland, vice president, and Hocker, secretary and treasurer; that Young owns or claims part of the stock which appears in the name of Kyle, and that the officers and stockholders had constructive and actual knowledge of the rights of J. M. Elliott, Jr., and of the decree that had been rendered in the case of Rubie Connor, by her next friend, J. D. Young, adjudicating the rights and interest of Nena Kyle Elliott as executrix, etc., and that said

decree was res adjudicata as to the said corporation.

The bill also alleges that in November, 1914, the Ocklawaha River Farms Company, by T. S. Kyle as president, executed to Munroe & Chambliss National Bank of Ocala a "trust mortgage," reciting therein a security of \$50,000; that the mortgage is subordinate to the mortgage lien of Elliott, and all the parties had knowledge of their rights thereunder; that in September, 1914, the Ocklawaha River Farms Company quitclaimed to G. A. Waters a certain part of the lands, and that the said Waters had full knowledge and notice of the rights and interests of J. M. Elliott, Jr., and of the complainant, and that Waters' claims are subordinate to the lien of the Elliott mortgage lien; that T. S. Kyle and J. D. Young, in order to cloud the title to the property, had allowed a great part of it to sell for taxes and had procured D. H. Kirkland, a stockholder in the Ocklawaha River Farms Company, to obtain tax deeds therefor.

The bill prayed for the enforcement of the Elliott mortgage lien, the payment by Rubie C. Connor and Claude E. Connor of the amount adjudicated to be due with costs and interest, and in default thereof that the property be sold and the proceeds applied to the payment of the debt secured by the Elliott mortgage as decreed; that the Margaret J. Pickard mortgage be decreed to be a subordinate lien to the Elliott mortgage, and that after the sale Rubie C. Connor, Claude E. Connor, Margaret J. Pickard, J. D. Young, T. S. Kyle, N. W. Harrison, Ocklawaha River Farms Company, Munroe & Chambliss National Bank of Ocala, and G. A. Waters, and each of them, and all persons claiming by, through, or under them, or either of them, be debarred and foreclosed from all right or equity of redemption in and to the said property; and for general relief and subpoena.

Demurrers were interposed to this bill by Rubie C. Connor, C. E. Connor, Munroe & Chambliss National Bank of Ocala, Ocklawaha River Farms Company, Margaret J. Pickard, T. S. Kyle, G. A. Waters, N. W. Harrison, and J. D. Young, all of which were overruled. From which order the above-named defendants appealed.

Now in the case of Ocklawaha River Farms Company, Appellant, v. J. D. Young et al., Appellees, decided at this term, the validity of the deed from Rubie C. Connor and her husband C. E. Connor to J. M. Elliott, Jr., executed in 1908 and described in this cause, was involved, and we held that the debt due by C. E. Connor to J. M. Elliott, Jr., was a live valid enforceable obligation, and constituted a sufficient consideration for the execution of the same as a mortgage by the husband and wife; that the instrument was a valid obligation, and that at the time of its execution the Ocklawaha River Farms Company, which did not become a purchaser until years afterwards, had acquir-

ed no interest or claim to the property; that it was charged with notice as to the existence of the liens and incumbrances upon the land which the record might have disclosed; that the deed to Elliott from the Connors had been recorded, and the appellant, therefore, had constructive notice of its existence when it purchased; that in the transaction between the Connors and Elliott in 1908 there was no injury to the appellant Ocklawaha River Farms Company, nor was there any element of fraud in it; that the appellant was bound by the prior deed, he was charged with notice of its existence, and by common prudence and ordinary diligence could have ascertained the extent of the incumbrance. What was said in that case as to the validity of the deed from Ruble C. Connor and her husband to J. M. Elliott, Jr., in 1908, which had been adjudicated to be a mortgage by the circuit court and upon appeal to this court, was applicable to the claims and interests of the appellants in this case, as those claims and interests were set out and alleged in the bill and admitted by the demurrers.

The bill in this case alleged that Claude E. Connor was a party to the suit instituted by his wife against him and James M. Elliott in the circuit court for Marion county, to declare the deed to be a mortgage and for an accounting from Elliott as to the amount of indebtedness due by Claude E. Connor, and for the right to redeem the land from the lien to secure such indebtedness. That suit was referred to in the case of Ocklawaha River Farms Company v. J. D. Young et al., in which we distinctly held that Mrs. Connor and Elliott were bound by the litigation. Although we did not specifically state that the other party defendant, Claude E. Connor, was also bound by it, we think that upon the authority of that case alone we were correct in holding that he was.

His petition, therefore, for a rehearing upon the ground that he was not bound by the proceedings and decree in the Connor Case, and that we had not so held, is without merit, and should be denied. As party defendant in the suit brought by his wife against him and J. M. Elliott, Jr., he had his opportunity to show the amount of indebtedness due by him to Elliott, a matter in which he was personally interested, and which was one of the objects of the suit and the reason doubtless for his being made a party to it. We think the decree is *res adjudicata* as to him.

[3] While N. W. Harrison was not one of the parties in the case of Ocklawaha River Farms Co. v. J. D. Young et al., he claims under Ruble C. and Claude E. Connor by mortgage dated April, 1913, and as the Elliott mortgage executed in 1908 was duly recorded, Harrison was, of course, charged with notice of the existence of the lien which the record disclosed and the extent of it which common prudence and ordinary dili-

gence would have revealed. This is also true as to the claim of Margaret J. Pickard, who claimed under the Connors by a mortgage dated in 1908, a few days prior to the Elliott mortgage, but which, according to the allegations of the bill, did not describe the same lands, was not recorded until after the Elliott mortgage was recorded, and of which J. M. Elliott, Jr., had no knowledge, actual or constructive. So far as the interests or claims of Margaret J. Pickard are concerned, the decree declaring the deed to Elliott to be a mortgage, instead of a deed absolute conveying the fee, was a benefit instead of a hindrance. Claiming under Ruble C. Connor, Margaret J. Pickard took subject to the lien placed on the land by Mrs. Connor and her husband.

G. A. Waters was a grantee by quitclaim deed of the Ocklawaha River Farms Company in September, 1914, and J. D. Young had actual knowledge of the transaction between the Connors and Elliott, and was party to the suit, as next friend of Mrs. Connor, in which the deed was held to be a mortgage and the debt ascertained, which decree was binding upon the parties to the suit, as well as those claiming under them with notice, actual or constructive, as to the existence of the mortgage lien.

The petitions for rehearing are therefore severally denied.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and WHITFIELD, JJ., concur.

(73 Fla. 536)

#### LEAKE v. WATKINS.

(Supreme Court of Florida. March 7, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR ~~4~~1034 — HARMLESS ERROR—INSTRUCTIONS.

Where the charges given accord with the evidence and the law applicable thereto, and there is ample evidence to sustain the verdict, technical errors, if any, in giving or refusing instructions to the jury, or in other proceedings, will not cause a reversal of the judgment, no material errors appearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4063-4068.]

Error to Circuit Court, Orange County; F. A. Whitney, Judge.

Action by Belle Leake against T. J. Watkins. Judgment for defendant, and plaintiff brings error. Affirmed.

Dickinson & Dickinson, of Orlando, for plaintiff in error. Massey & Warlow, of Orlando, for defendant in error.

PER CURIAM. The plaintiff in error brought an action against Watkins to recover damages for alleged injuries to her right eye, charged to have been caused by dust



from "a quantity of brick, dirt, and dust" which the defendant's servants permitted to fall near her while they were repairing the building in which she was employed. Trial was had on a plea of not guilty. Verdict and judgment were rendered for the defendant, and the plaintiff took writ of error.

A contract between the defendant and R. W. Logan for doing the repair work was admitted in evidence over the defendant's objection. The contract had some relevancy to the question whether the defendant was liable for the acts of the persons who were doing the repairing, and its admission in evidence was not error.

The plaintiff requested charges, stating in effect that if the defendant undertook to make improvements in his building, under an agreement with the tenant to make such improvements, the defendant owes a duty to such tenant and its employés in said building, to see that the improvements be done in such manner as not to injure the employés by negligence, and that the defendant under such circumstances could not relieve himself from responsibility and liability to the tenant and employés for negligence in doing the work, by delegating such work to an independent contractor under his employment. These requested instructions were refused. At the request of the plaintiff the court gave the following charge:

"If you find from the evidence in this cause that the defendant, T. J. Watkins, gave instructions to the contractor or his employés, as to the manner and method of removing the brick, over the doorway in the front part of the building, this will constitute the contractor, or his employés, the agent of the defendant, and render the defendant liable for any acts of negligence, committed by said contractor or his employés."

The court also gave the following charge:

"If you believe that plaintiff has proven by a greater weight of the evidence that defendant reserved or exercised control over the manner and method of removing the brick, and that the accident happened as charged in the declaration, by negligence in the removal, then plaintiff can recover."

In view of these latter charges given there was no harm if error in refusing the charges referred to above. The last-quoted charge accords with the evidence and with the law as stated in Mumby v. Bowden, 25 Fla. 454, 6 South. 453.

Besides this, there is evidence on which the jury could have found that the injury complained of was the result of another and wholly different cause for which it is not alleged or shown that the defendant is liable. No reversible error appears.

Affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

(73 Fla. 363)

PIPPIN et al., County Com'rs, v. STATE ex rel. TOWN OF BLOUNTSTOWN.

(Supreme Court of Florida. Feb. 15, 1917.)

(Syllabus by the Court.)

1. MANDAMUS  $\S$  121 — TAXATION — DUTY OF COUNTY COMMISSIONERS — MANDAMUS.

Section 850, General Statutes of 1906 (Comp. Laws 1914,  $\S$  850), provides "that one-half of the amount realized for said special tax on property in incorporated cities and towns, shall be turned over to the municipal authorities of said cities or towns," and it is the duty of the county commissioners to comply with the law, but, if they fail to do so, and expend all the money belonging to the special road and bridge fund in any year, mandamus will not lie to require them to pay from funds raised by taxation in a subsequent year the money improperly withheld from the municipalities.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig.  $\S$  255.]

2. MANDAMUS  $\S$  143(2) — ROADS AND BRIDGE TAX — APPLICATION.

Cities and towns are entitled to one-half the amount raised by taxation under the statute authorizing the collection of a special road and bridge tax on all property lying within their corporate limits, and where it is withheld by the county, the municipalities should make diligent effort to require the money to be turned over to them in accordance with the statute, and by their failure to do so they may be guilty of laches which will bar relief by mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig.  $\S$  285.]

3. HIGHWAYS  $\S$  180 — ROADS AND BRIDGE TAX — APPLICATION — DEMAND.

It is the duty of municipal authorities upon the failure or refusal of the county commissioners to turn over to them their proportion of the special road and bridge tax fund to demand and require its payment within a reasonable time after the tax has been collected.

[Ed. Note.—For other cases, see Highways, Cent. Dig.  $\S\S$  265-269.]

4. MANDAMUS  $\S$  16(1) — ACTS OF PUBLIC OFFICERS.

Where an official has put it out of his power to perform a duty, a peremptory writ of mandamus will not be issued against him; but this will not prevent the injured parties from pursuing their proper remedies, and, in the case of money wrongfully expended, from prosecuting in due and seasonable time their actions for its restoration.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig.  $\S$  48.]

5. MANDAMUS  $\S$  143(2) — LACHES — TIME.

There is no rule by which the number of years which will bar relief by mandamus can be fixed. Each case must be determined by its own facts. "An apparent laches, unexplained, is the bar. It might take effect in a year."

[Ed. Note.—For other cases, see Mandamus, Cent. Dig.  $\S$  285.]

Error to Circuit Court, Calhoun County; Cephas L. Wilson, Judge.

Mandamus by the State of Florida, on relation of the Town of Blountstown, against M. C. Pippin and others, as County Commissioners of Calhoun County. Judgment order-

ing a peremptory writ, and respondents bring error. Reversed.

J. H. Finch, of Marianna, and C. R. Warren, of Blountstown, for plaintiffs in error. Paul Carter, of Marianna, for defendants in error.

**BROWNE, C. J.** The town of Blountstown, a municipal corporation, sought by mandamus to compel the county commissioners of Calhoun county to pay to it one-half of the taxes for road and bridge purposes, amounting to \$792.60, levied upon and collected from property located in the town of Blountstown from the year 1904 to 1913, both inclusive. Petitioners allege that demand has been made on the county commissioners to issue a warrant to it upon the road and bridge fund of the county for said sum of \$792.60, but the demand has been refused, that there is in the road and bridge fund the sum of \$12,035.27, but do not state what part, if any, of the said sum now in said fund was derived from taxes levied during the years 1904 to 1913.

The respondents moved to quash the alternative writ on the grounds: (1) That the writ was vague, indefinite, uncertain, and insufficient; (2) that relator was in laches; (3) that the writ required respondents to do an unlawful act; (4) that the claim was barred by statute of limitations. The circuit judge denied the motion, and relators filed their answer, which was demurred to, and demurrer sustained. They then filed an amended answer setting up the same defenses, and added one of waiver by the town, but, as plaintiffs in error admit that they failed to prove this, it need not be considered.

The respondents admit that they collected \$1,583.20 as road and bridge tax on property located within the corporate limits of Blountstown during the years 1904 to 1913, inclusive. They allege that no demand was made on them during the years mentioned for one-half of the money so collected; that they spent more than \$850 of the money so collected for the benefit of the roads and bridges within the corporate limits of the town during the years 1904 to 1913; that during said years the town accepted from the county moneys, improvements, and expenditures far exceeding the amount claimed; that by such acceptance it is estopped from claiming payment of such money; that all the money in the road and bridge fund of the county for the years prior to 1912 has been expended as the law provides on roads and bridges in the county, and that there remains in the road and bridge fund only an unexpended balance of \$32.50 for taxes collected for all the county; that the town is in laches; that the claim of the relator, if it has any, is barred by the statute requiring claims against counties to be presented within one year from maturity; that claim did not accrue within one year, two years, three

years, and four years, respectively; that all the money in road and bridge fund of county at time of issuance of writ had been apportioned under the "budget system" provided for by the act of 1915, and that in the contingent fund of road and bridge fund there is less than the amount claimed by the relator; that all money collected for road and bridge purposes prior to 1912 has been expended; that of the entire taxes collected in said town in 1913 for road and bridge purposes there remained on hand only \$313.05, and that there was in the county treasury only \$345.55 of all money collected by the county for roads and bridges for all the years of 1904 to 1913, inclusive; and that relators were entitled only to the sum of \$172.77.

On motion of relators the court struck all of paragraphs 3 to 25, inclusive, of the amended answer on the ground that they contained matters of defense set up in original return to which a demurrer had been sustained; and, the respondents having failed to prove the waiver set up in the twenty-sixth paragraph of the amended return, the peremptory writ was issued.

[1] There is no question but that the county commissioners of Calhoun county have spent more than half of the amount of money which should have been turned over to the town of Blountstown; but, having done so, have they the right to take the money raised by taxation on property in the whole county to pay this indebtedness to the town? All the money in the road and bridge fund, except one-half of that collected for taxes on property situated within the town of Blountstown, must be expended for the purposes for which it was levied, and for no other. The statute which provides for this special tax for roads and bridges, after authorizing the levy, provides:

"And the money arising therefrom shall be paid into the county treasury as a special fund to be expended under the direction of the county commissioners solely for the purpose of maintaining, working, repairing and keeping in good condition the public roads, bridges and river crossings of the county, and purchasing suitable tools, implements and materials, teams, wagons, camp outfits and stockades for the use and safe keeping of the convict force as may be found necessary in the proper carrying out of this work, and for the employment of such additional labor as may be deemed necessary: Provided, however, that one half of the amount realized for said special tax on property in incorporated cities and towns shall be turned over to the municipal authorities of said cities or towns to be used in the repairing, working and improving and laying out of the streets thereof as may be prescribed by the ordinances of said cities and towns."

[2-4] The statute further provides that before levying this special tax 60 days' notice must be given in one or two newspapers published in the county of the intention to make the levy, and that, if a majority of the registered voters by petition oppose the levy, it

shall not be made. Section 850, Gen. Stats. 1906, Florida Compiled Laws 1914. By this publication the people of the county are notified that all the money raised by the special tax levy, except one-half of what is collected from property within the corporate limits of cities and towns, will be expended solely for roads, bridges, and other purposes mentioned in the statute, in that part of the county lying outside the cities and towns. The provision of the statute that "if a majority of the registered voters by petition oppose the levy it shall not be made" is in the nature of a referendum vote, upon the proposed levy, and if a majority of the registered voters of the county do not object to it, it is equivalent to an affirmative vote upon the proposition submitted; but their silence cannot be construed to mean that they gave assent to the application of a considerable part of the money raised by taxation upon the properties without the corporate limits of cities and towns for a purpose foreign to the purposes enumerated in the statute. The county commissioners therefore have no authority to use any of the money raised by the levy of 1914 and 1915 for any purpose not provided for in the statute. Their obligation to pay to the cities and towns one-half of all the money collected by taxes on property situated within their corporate limits is no greater than their obligation to expend all the residue on roads, bridges, etc., in that part of the county lying outside such corporate limits. It is contended, however, that they have not observed their obligation to turn over to the cities and towns their portion of the money raised during the years 1903 to 1913, inclusive, and therefore the county should be required to pay it out of the 1914 and 1915 taxes. In substance, the proposition is this: That, the county commissioners having misapplied some of the special tax funds raised during the years 1903 to 1913, they should be required by mandamus to misapply some of the funds raised for the years 1914 and 1915. The mere statement of this proposition supplies its answer. The decision of the court below was, no doubt, governed by the case of *Hillsborough County v. State ex rel. City of St. Petersburg*, 57 Fla. 50, 48 South. 976. The facts in that case and the one under consideration are materially different. In the *St. Petersburg Case* there was a demurrer to the alternative writ, and when that was overruled defendants failed to answer and the peremptory writ was issued. The only facts before the court in that case were those recited in the alternative writ, the truth of which was admitted by the demurrer. The alternative writ alleged that the county commissioners had declined to admit the claim upon the ground that they had spent the money, and it also alleged that there was in the treasury of the county a

sum of money exceeding the claim of the city. There was no sworn answer before the court that the money had been spent. In the instant case there is an answer by the respondents in which they state under oath that there was in this fund only \$32.50 of the taxes collected prior to 1912, and \$313.05 of the taxes collected in 1913, and that of the \$11,000 then in the treasury the entire amount except \$345.55 was from taxes levied for the years 1914 and 1915.

In the case of County Commissioners of Duval County v. City of Jacksonville, 36 Fla. 196, 18 South. 339, 29 L. R. A. 416, a peremptory writ was granted by the circuit judge which commanded the county commissioners of Duval county to forthwith turn over to the city of Jacksonville \$5,746.74, although the return showed that there was only \$758.91 in the treasury to the credit of the road and bridge fund, and this court in reversing the lower court said:

"The return distinctly alleges that the whole amount had been required and used for the purpose of keeping the county roads and bridges in good repair, except the sum of \$758.91, the balance remaining in the hands of the county treasurer. According to the return of the county commissioners, it is clearly shown that the county had expended all the road and bridge fund except the amount stated, and that the only sum received by the city authorities was \$2,746.05. The county had expended largely the city's part of the road money, but the money, as is clearly shown, is not in the county treasury to be turned over, and the question arises: To what extent will the remedy of mandamus apply? \* \* \* A peremptory writ of mandamus will not usually issue commanding an officer to do what is not within his power to do, and, though by putting it out of his power to perform a duty he may become liable in damages, still, where he cannot perform the act, and this is clear to the court, mandamus will not be issued against him. This rule has been applied to public officers who have improperly diverted funds in their hands or under their control so that they are unable to comply with some duty in reference to their disposal. *Rice v. Walker*, 44 Iowa, 458; *Bates v. Porter*, 74 Cal. 224, 15 Pac. 732; *Universal Church v. Trustees of Columbia Township*, 6 Ohio, 446, 27 Am. Dec. 267; *State ex rel. Board of Freeholders v. Township of Lacey*, 42 N. J. Law, 536; *People ex rel. v. Tremain*, 29 Barb. 96; *State ex rel. v. City of New Orleans*, 34 La. Ann. 477; *Township Board of Education v. Boyd*, 58 Mo. 276. Under the showing made we think the court should not have undertaken to compel the county commissioners to turn over money that was not under their control, and which it was not in their power to do as officials of the county."

It is not in the power of the county commissioners to turn over to the town of Blountstown any part of the special road and bridge tax collected for the years 1914 and 1915, except one-half of that collected for taxes on property situated within the corporate limits of the town. All the rest of the money in that fund must be expended on that part of the county lying beyond the corporate limits of cities and towns, for the purposes provided for in the statute.

It is clear that the money in the special road and bridge fund derived from taxes for

the years 1914 and 1915 is not available for the payment to the town of Blountstown for its proportion of the taxes levied and collected for the years from 1904 to 1913, inclusive.

[6] Another question raised by respondents which possesses merit is that the relator is in laches. It is a well-settled rule that an application for mandamus "must be made in proper time; i. e., it must not be delayed too long." Short on Mandamus, 227. "The court will refuse mandamus where there has been unreasonable delay in applying for it." *Id.* 250.

The rule of "*Vigilantibus, et non dormientibus jura subveniunt*," applies to mandamus. It was the duty of the municipal authorities of Blountstown, upon the failure of the county commissioners to turn over to them its proportion of the taxes, to demand and require its payment each year, or at least not to delay an unreasonable time in requiring its payment. Instead of being vigilant, they slept while the county was spending their money, and more, in road and bridge work within the corporate limits of the town. The return shows that all that the town was entitled to for the years 1904 to 1913 inclusive, was \$792.60, and the county expended \$850 directly for improvements in the city.

In the case of *Regina v. Trustees of Rochdale & Halifax Turnpike Road*, 12 Ad. & El. (N. S.) 447, and application for mandamus was denied, and Mr. Justice Coleridge said:

"We have been asked what number of years will bar an application of this kind. It is not necessary to fix any number. An apparent laches, unexplained, is the bar. It might take effect in a year."

In the case of *Rex v. Justices of Lancashire*, 12 East, 366, Lord Chief Justice Ellenborough, in passing on an application for mandamus in connection with the expenditure of money for road repairing, said:

"This is an application to the discretion of the court, to shift a burthen from these parties, on whom it has been innocently, perhaps, but certainly negligently, fixed, and to put it upon others who are also innocent of the charge. And though applications of this sort have been entertained, yet that must be understood of such as were recently made after the occasions which gave rise to them. But what perverse justice it would be to grant such an application after an interval of eight years, when a large proportion of the inhabitants must have been changed. Suppose an action of assumpsit could have been brought in such a case for the contributory shares of the other inhabitants; the statute of

limitations would have run upon it; but if this application be granted, the money must be paid under the rate. The length of time therefore which has elapsed is a sufficient answer to the application, without going more at large into the subject."

In the case of *Ex parte Scott*, 8 Dowl. Pr. Cas. 323, s. c. 4 Jur. 579, mandamus was prayed to the churchwardens of the parish of Lambeth to pay Mr. Scott the arrears of his salary to which he was entitled by a certain local act for his services as clergyman, which he had performed from 1833 to 1838. The application was to compel the churchwardens to pay the salary due or to make a rate for that purpose. The writ was refused, and Mr. Justice Coleridge said:

"As to Mr. Scott, has there not been some laches? Here he is in the year 1840 seeking to compel the inhabitants of the parish to pay what they ought to have paid in the year 1837."

In these cases it was sought to have a rate or tax levied to pay obligations which should have been paid years before.

In the case of *City of Sanford v. Orange County*, 54 Fla. 577, 45 South. 479, a bill was filed in 1903 for an accounting and payment to the city of Sanford of one-half the amount realized from the road and bridge taxes for the years 1893 to 1902, inclusive, under a provision of the Sanford charter identical with the provisions of section 850, General Statutes of 1906, under consideration. In that case this court said:

"The city is in laches in asking for it, and if it has been used for road purposes, and is consequently not in fund, the county commissioners cannot be required at this late day to account for it to an agency to be used for roads and streets."

It is true that the court also said:

"If there were any funds in the hands of the county, and the city had a clear right to its use, the proper remedy is mandamus, if duly applied for."

But there is a strong implication from the context that at such a late day—ten years after the first year's taxes should have been turned over to the city—mandamus would have been refused on account of the laches of the city.

It follows from the foregoing that the judgment ordering the peremptory writ must be reversed; and it is so ordered.

TAYLOR, SHACKLEFORD, WHITFIELD,  
and ELLIS, JJ., concur.

(113 Miss. 748)

## WILSON v. STATE. (No. 19671.)

(Supreme Court of Mississippi, Division A.  
April 9, 1917.)

## 1. CRIMINAL LAW §260(13)—FORMER JEOPARDY—JUDGMENT IN JUSTICE COURT.

Defendant was convicted in justice court for unlawful sale of liquors under two affidavits charging sales on April 8th and 10th, and appealed from both convictions to the circuit court. When cases were called, the district attorney elected to try defendant on the affidavit of April 10th, and at the trial proceeded to introduce evidence of sales within a period two years prior to April 10th. Defendant objected, on the ground that no inquiry could be made about sales prior to April 2d, as at the trial, under affidavit charging sale on April 8th, inquiry had been made of sales two years back. *Held* that, as Code 1906, § 87, provides that on appeal from justice court the case shall be tried anew, an appeal in effect vacates the judgment, and the objection was properly overruled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 569-571.]

## 2. CRIMINAL LAW §250—DE FACTO OFFICERS—COLLATERAL ATTACK.

The validity of the acts of a justice of the peace, who was also mayor at the time of conviction, cannot be questioned by person convicted in view of Code 1906, § 3473, providing that the acts of any person in possession of an office, and exercising the functions thereof, shall be valid and binding on all persons interested or affected.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 520, 521-523.]

Appeal from Circuit Court, Holmes County; Frank E. Everett, Judge.

E. S. Wilson was convicted of the unlawful sale of liquor, and appeals. Affirmed.

Elmore & Ruff, of Lexington, for appellant. Earle N. Floyd, Asst. Atty. Gen., for the State.

HOLDEN, J. The appellant was convicted of the unlawful sale of liquor in Holmes county, and appeals here from the judgment of the circuit court sentencing him to fine and imprisonment.

It appears from the record that the appellant was charged with selling liquor on April 10, 1916, by affidavit in a justice of the peace court, and was tried and convicted in that court, from which conviction he appealed to the circuit court where he was again convicted by a jury in that court, and appeals from this conviction under the affidavit dated April 10, 1916. The record also shows that an affidavit dated April 8, 1916, was filed in the same justice of the peace court where a trial and conviction was had for selling liquor, and the appellant appealed from the justice court to the circuit court. Therefore it will be seen that both of these appeals from the justice court to the circuit court were pending at the same time in the circuit court. When the cases were called for trial the district attorney, with the consent of the court, elected to try the appellant upon the affidavit dated April 10th, and proceeded to trial thereon. He offered evidence for the state show-

ing sales of liquor covering a period of two years prior to April 10, 1916. As soon as this evidence was offered and submitted by the state, the appellant, by his attorney, then and there moved the court for leave to file a plea setting up the contention that no inquiry could be made concerning any sales of liquor by the appellant prior to April 2, 1916, for the reason that the appellant had been tried and convicted in the justice of the peace court on the affidavit dated April 8, 1916, and that at this justice trial and conviction the state had offered evidence showing several sales of liquor during the two years immediately prior to April 2, 1916, and that therefore under the statute permitting proof of sales for two years prior to the date of the affidavit no inquiry could again be made as to any sales during that particular time under the affidavit of April 10th, upon which the appellant was now being tried. The court overruled the motion, and denied the appellant the right to file such a plea. The appellant again renewed the motion at the close of the testimony for the state, which was again overruled by the court. When all of the testimony had been submitted to the jury the appellant was convicted of selling liquor within the two years back of April 10, 1916, the date of the affidavit upon which he was tried.

[1] The appellant makes two contentions here for a reversal, which deserve consideration and discussion: First, whether or not the court erred in permitting the testimony, under the April 10th affidavit, as to sales of liquor prior to April 2, 1916, which sales had already been testified to under a different affidavit of April 8th, at a different time, and upon which a conviction had been had, but appealed from to the circuit court. Second, whether or not the mayor and ex officio justice of the peace of district No. 5 of Holmes county, who was also mayor of Tchula, had jurisdiction to try this case.

As to the first proposition, it appears to us that after the two trials and convictions in the justice of peace court upon the two affidavits, dated April 8th and April 10th, respectively, an appeal to the circuit court was taken in both cases, and when the two cases were pending for trial in the circuit court, they were to be tried *de novo*, in the same manner as if they had never been tried by a court before, and they should have been treated, for all purposes, as if the two cases had been first filed and started in the circuit court. It is true that there had been a conviction upon both of the affidavits in the justice court, and judgment was there entered, but when the appeal was prosecuted by the appellant to the circuit court, the conviction and judgment in the justice of the peace court was then and there "stayed" and vacated, and could in no way at any time affect the appellant, unless he, by his own

negligence, failed to prosecute his appeal in the circuit court, and by failing to prosecute his appeal it would be dismissed and the conviction and judgment of the justice of the peace court would be reinstated and restored; but this could only happen through the negligence of the appellant or at his instance or by his own conduct, for which he would be responsible, and about which he could have no just complaint. Therefore, when the two cases pending in the circuit court were called for trial, if the appellant's contentions were correct and he were permitted to plead that no evidence of sales prior to April 2, 1916, could be introduced by the state because the testimony as to the sales during this particular time had already been introduced in the justice court on the trial of the affidavit dated April 8th, and upon which evidence there was a conviction—if this were a good plea, and the district attorney then proceeded to try the charge under the affidavit dated April 8th, and offered testimony showing sales from April 8th, back two years, then the appellant may have made the same complaint and objected to this testimony under the April 8th affidavit, because when he was tried in the justice court under the affidavit dated April 10th the evidence of the sales for two years prior to April 10, 1916, was introduced and upon which there was a conviction, and therefore no further inquiry under the statute could be made as to those sales within that time in the trial of the April 8th affidavit. It will be observed that if the appellant could successfully invoke such a rule as this, then the state would be practically shut off from prosecuting the appellant under either one of the affidavits in the circuit court. But we do not think that any such contention can be upheld upon any reasonable or legal ground.

When the two cases were called in the circuit court the district attorney had the right to elect which one he would try first; and, having elected to try the defendant on the affidavit dated April 10, 1916, he had a right to proceed under that affidavit and introduce testimony of any or all sales of liquor by the appellant for two years immediately preceding the date of this affidavit. After the state had submitted the testimony of sales covering the two years back of April 10, 1916, the appellant would have received his "immunity bath" covering a space of two years back of April 10, 1916. That being true, he would have no trouble in pleading this "certificate of immunity" for these two years and securing his discharge, when the affidavit dated April 8th was called for trial. For, of course, under the April 8th affidavit no testimony could be again introduced by

the state showing any sales by this appellant for a period of two years prior to April 10, 1916. In short, a conviction or acquittal under the April 10th affidavit here could undoubtedly be pleaded in bar of the prosecution under the affidavit of April 8th for sales two years back of that date. Therefore we do not hesitate to say that the action of the lower court in permitting the district attorney to proceed with the trial of the affidavit dated April 10th, and refusing to permit the appellant to plead a former inquiry as to sales two years back, and a conviction in a justice of the peace court, from which he had appealed, was eminently correct and proper.

Our statute (section 87), which grants appeals from the justice court to the circuit court, is a remarkable statute. Such appeals are not reviewed by the circuit court, but the case appealed is tried entirely anew, in the same manner as if the circuit court had original jurisdiction of the cause. The judgment, when appealed from, is no more a final judgment, because it is "stayed," and, in effect, is vacated, and can never be reinstated or restored, unless the appeal is dismissed with a writ of procedendo back to the justice court. But when the appeal reaches the circuit court in regular form, and is there pending for trial, for all intents and purposes, there is no former judgment in existence in that case, and the case is there to be tried anew as if for the first time. Whenever the aggrieved party who appeals to the circuit court fails or refuses to prosecute his appeal, he must suffer the consequences of a restored judgment in the justice court, which in some instances might work a hardship, but the blame for such would be upon the party causing it.

[2] As to the second question, of whether or not the mayor of the town of Tchula, who was also a qualified ex officio justice of the peace, had jurisdiction to try the appellant on the affidavit, we think it is settled in this state that the acts of a de facto officer cannot be questioned by a person convicted of crime; but if the officer be holding two inconsistent offices at the same time, or be holding one office wrongfully, the remedy is to proceed by quo warranto and oust him from one or the other, or both. The appellant has no right to complain of the acts of this de facto officer. Section 3473, Code 1906; *Pringle v. State*, 108 Miss. 802, 87 South. 455; *Altman & Co. v. Wall*, 111 Miss. 198, 71 South. 318; *Powers v. State*, 83 Miss. 702, 36 South. 6.

The judgment of the lower court is affirmed.

Affirmed.

(113 Miss. 768)

**SHULER et al. v. L. GRUNEWALD CO., Limited. (No. 19014.)**(Supreme Court of Mississippi, Division B.  
April 2, 1917.)**LANDLORD AND TENANT §—271—SEIZURE FOR RENT OF PROPERTY OF ANOTHER—REMEDY OF OWNER.**

Code 1906, § 2867, providing that property not belonging to the tenant being on the leased premises shall not be liable to be distrained for rent, and section 2868, providing that a person other than the tenant claiming to be owner of property seized for rent may make affidavit, and the property shall be disposed of as in case of replevin, not expressly limiting the owner to such remedy, as did Ann. Code 1892, §§ 2529, 2530, it was the legislative intention that the owner might pursue such remedy, or claim the property by any other remedy known to the law, as by replevin against the purchaser at sale under the attachment.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1127.]

Appeal from Circuit Court, Leflore County; F. B. Everett, Judge.

Replevin by the L. Grunewald Company, Limited, against T. S. Shuler and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Lomax & Tyson, of Greenwood, for appellants. Whittington & Osborn, of Greenwood, for appellee.

COOK, P. J. Appellee instituted an action of replevin against appellants for a certain piano of the value of \$750. The case went off on an agreed statement of facts, and the trial judge instructed the jury to find for plaintiff, appellee here, and this was done. From a judgment awarding the piano to plaintiff, the defendants have prosecuted this appeal.

The agreed statement of facts is as follows, viz.:

"It is agreed by and between L. Grunewald Company, Limited, by its attorneys of record, Whittington & Osborn, and the defendant T. S. Shuler, that this case may be tried by the court, a jury being waived, and judgment rendered in this cause on the following agreed statement of facts:

"That the electric piano involved in this replevin suit was delivered by the plaintiff to one A. C. Ross, of Greenwood, Miss., on or about the 15th day of April, 1915, under the terms of a conditional contract of sale dated April 15, 1915, the original of which is hereto attached as 'Exhibit A' to this agreement and made a part hereof; that the said A. C. Ross did not pay the plaintiff any part of the consideration mentioned in said contract of sale, and is now indebted to plaintiff for the full amount of the purchase price of said piano; and that the plaintiff herein is the owner of said piano and entitled to the possession of same unless the defendant herein has acquired title to same to the exclusion of plaintiff in the following manner:

"The said A. C. Ross was operating a moving picture show in the city of Greenwood, Miss., in a building rented by the said Ross from T. R. Henderson, and on or about the — day of June, 1915, the said Ross being in arrears with the rent due said Henderson for said building, an attachment for rent was sued out by the said

T. R. Henderson against said Ross for said past-due rent in accordance with and under the provisions of chapter 76 of the Code of 1906, and, among other things, said attachment for rent was levied on the said electric piano which was at the time of said levy located in said building and in the possession of said Ross; that subsequently said piano was sold by the proper officer under said attachment for rent, and at said sale, which was regular in every respect, the defendant herein became the purchaser of said electric piano for the sum of \$40, which sum was not in excess of the amount due by said Ross to said Henderson for rent under said attachment, and said piano was delivered to the defendant by the officer making said sale and has been in the possession of the defendant since that time to the bringing of this suit. The value of said piano is that alleged in the affidavit in replevin.

"It is further agreed that said attachment was properly brought by the said Henderson against the said Ross for rent in arrears in a definite sum, and that all of the proceedings in connection with said levy and sale were regular and according to law.

"It is further agreed that neither said T. R. Henderson, nor said T. S. Shuler, nor the officer levying said attachment for rent and making said sale thereunder, knew, at any time, until after said sale, that the plaintiff herein claimed title or ownership to said piano. And it is also agreed that the said L. Grunewald Company, plaintiff, which is located at New Orleans, La., had no notice whatever of said attachment and sale thereunder until some time after said sale and after said piano had been delivered by the officer making said sale to the defendant, and that the plaintiff herein did not replevin the piano from the officer levying the attachment and making said sale, nor take any other steps to recover the said piano save and only in this replevin suit.

"The only question to be decided by the court is whether the plaintiff herein, L. Grunewald Company, Limited, or the defendant T. S. Shuler, has the better title to said property, and which is entitled to the possession of same."

The determination of this appeal turns upon a proper construction of sections 2867 and 2868, Code 1906, which sections are a rescript of sections 2529 and 2530, Code of 1892. Prior to the Code of 1892, persons claiming title to property distrained for rent were confined to the remedy provided by the statute. In other words, the only remedy was prescribed by the statute, and, unless the claimant propounded his claim in the manner prescribed by the statute, he would lose his property—the statutory scheme was exclusive. *Kendrick v. Watkins*, 54 Miss. 495; *Gibson v. Lock*, 58 Miss. 298; *Paine v. Hall*, 64 Miss. 175, 1 South. 53.

Appellants' counsel contend that the statutory limitation only amended the common law, and the remedy prescribed by the statute was necessarily exclusive, because under the common law the owner of property distrained for rent had no remedy, and, leaving out the limitations of the statute, the statutory scheme was the exclusive remedy; and therefore the limitation in the statute was surplusage. With this postulate appellants' counsel insist that sections 2867 and 2868, Code 1906, give a remedy unknown to the common law, and, this being the only remedy it necessarily follows that it is exclusive, and,

the owner of the property distrained having failed to avail itself of this remedy, the court erred in awarding the piano to it.

We here quote sections 2867 and 2868, Code 1906, viz.:

*"Property of Strangers Not Liable.*—Property, except agricultural products on which there is a lien for rent, found or being on any demised premises, not belonging to the tenant or to some person bound or liable for the rent of such premises, shall not be liable to be distrained for rent; but if the tenant or other person liable for the rent have a limited interest in the property, the same may be distrained, and the interest therein of the tenant or person liable for the rent may be sold.

*"2868. Replevin of Property by Strangers.*—When any person other than the tenant shall claim to be the owner of any property distrained or seized for rent or supplies, or either, he may make affidavit that said property is his, and not the property of the tenant, and not held to the use of the tenant in any manner whatever, and is not liable to such distress or seizure; and if he desire immediate possession of said property, he shall give bond, with sufficient sureties, in the manner directed for the tenant, and such affidavit and bond shall be delivered to the officer who made the distress, who shall deliver the property to the claimant. Such claim may be interposed without giving bond, and the same proceedings shall be had thereon, except that the property claimed shall not be delivered to the claimant, but shall be disposed of as in the case of replevy by the tenant. Upon such claim being made, the landlord may release the property so claimed and forthwith distrain or seize other property in lieu thereof."

It will be observed that section 2867 exempts all property found on the premises, not belonging to the tenant, except agricultural products, from distress. In this case, the property levied on was not liable for rent; it did not belong to the tenant; he had no limited interest in the property. The agreed statement of facts shows that the owner did not know that the piano had been distrained and sold to appellees, but, after learning the facts, the action in replevin was promptly begun.

So, the purchasers of the piano were aware that the landlord had no lien on the piano for rent, and there is no evidence that any inquiry was made as to ownership.

It is significant that the Legislature, before 1892, in precise language, confined the owner of property to the remedy prescribed by the statute, but in the present statute the precise and definite limitation is omitted. It is the business of the courts to discover the legislative intent, and, having found it, to enforce it.

The statute as written prior to the Code of 1892 had been interpreted and enforced by the courts. The owner of property distrained, not belonging to the tenant, was limited to the remedy provided by the statute, for the manifest reason, if for no other, that the statute was so written. This precise definition of the owner's rights was not written into the present statute, and we are of the opinion that the Legislature intended that the owner had the option to pursue the stat-

utory remedy, or to claim the property in any other way known to the law.

We do not believe that the chapter on landlord and tenant was designed to give the landlord preference over other creditors, except upon agricultural products grown on the land. As to all other property not belonging to the tenant, the landlord's rights must yield to the rights of the true owner in the same way and to the same extent as other creditors.

In fact, this court has already interpreted our statutes against the contention of appellant. The point made here seems not to have been made in the case referred to, but the court necessarily announced the law to be in favor of appellant there, and the appellant there is the appellee here. *Brunswick-Balke Co. v. Murphy et al.*, 89 Miss. 284, 42 South. 288.

**Affirmed.**

(113 Miss. 776)

**TISER et al. v. McCAIN et al. (No. 18997.)**

(Supreme Court of Mississippi, Division B.

April 2, 1917.)

**1. PARTITION  $\S$  12(3)—EXEMPT PROPERTY OF DECEDENT—"USE BY WIDOW."**

Exempt property of decedent descending to the widow with others is used by her, within Code 1906, § 1659, providing that "as long as it is occupied or used by" her it shall not be subject to partition during her widowhood, unless she consent, so long as its income is used for her support, whether or not she reside on it.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 50.]

For other definitions, see Words and Phrases, First and Second Series, Use; Used.]

**2. PARTITION  $\S$  12(3)—EXEMPT PROPERTY OF DECEDENT—CONSENT OF WIDOW.**

Consent of the widow without which under Code 1906, § 1659, exempt property descending to the widow, with others, so long as occupied or used by her, cannot be partitioned, being without consideration, may be withdrawn, in the absence of intervening estoppel, any time before the property has been divided under one of the two methods for partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 50.]

**3. PARTITION  $\S$  12(3)—EXEMPT PROPERTY OF DECEDENT—"USE BY WIDOW."**

An heir of deceased having, as administrator, without any authority as such, leased exempt property descending to deceased's widow with others, which under Code 1906, § 1659, so long as occupied or used by her, could not be partitioned without her consent, the lease could only be treated as valid on the theory of it being from the heirs as such, so that the tenant's possession must be treated as the widow's as well as the other heirs' possession; and thus the property did not cease to be used by the widow, within the meaning of the statute.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 50.]

Appeal from Chancery Court, Sunflower County; E. N. Thomas, Chancellor.

Suit by Joe Tiser and others against John E. McCain and others for partition. Partition denied, and complainants appeal. Affirmed.



Chapman & Johnson, of Indianola, for appellants. Thos. S. Owen, of Cleveland, for appellees.

ETHRIDGE, J. C. D. McCain died intestate in Sunflower county, Miss., seised and possessed of 160 acres of land which was occupied by him at the time of his death as a homestead. Shortly after his death his widow moved off the premises and into another county where her father lived, and J. E. McCain, one of the defendants who had administered on the estate of C. D. McCain, undertook to lease the premises in question as administrator for a term of five years. Some time during the year of the death of the deceased the widow returned to the premises and took up her residence thereon. The complainants filed a bill in chancery court for partition in August, 1913, in which the widow and other of the heirs were made defendants, stating that the widow had abandoned the homestead by moving away, and also setting up that she had agreed, shortly after the time of the death of her husband, to a partition of the homestead. The widow was made defendant, and answered with the other defendants, claiming that she was entitled to use and occupy the homestead during her widowhood, and that she was unmarried and did not have any other property or homestead. The complainants introduced the father of Joe Tiser and some other witnesses, who testified that she, at the time of the death of the husband, stated that she could not live on the premises, and that she never expected to live on the premises, and had expressed a willingness to have the property divided. It is also shown in proof that J. E. McCain was an adult who lived off of the homestead, and that Joe McCain, a minor son, was at the time in college. There was no written agreement with reference to a partition and no state of facts showing that there was any consideration for any agreement to waive the widow's right, nor any element of estoppel by which any party had been misled to his injury in dealing with the property. Section 1657, Code of 1906, provides that the exempt property shall, on the death of the husband or wife owning it, descend to the survivor of them and the children or grandchildren of the decedent as tenants in common, the children and grandchildren to take the place of their deceased parent, who would, if living, have been heir to the property, and provides that where the surviving husband or wife shall own a place of residence equal in value to the homestead of the decedent and the deceased husband or wife have not surviving children or grandchildren by last marriage, but have children or grandchildren of a former marriage, in such case the homestead shall descend to the surviving children and grandchildren by such former marriage. There is no pretense here that the widow had another homestead or property equal in value to the homestead of

the deceased. Section 1659 of the Code reads as follows:

"Where a decedent leaves a widow to whom, with others, his exempt property, real and personal, descends, the same shall not be subject to partition or sale for partition during her widowhood, as long as it is occupied or used by the widow, unless she consent."

[1, 2] This section has heretofore been interpreted as requiring a liberal construction in favor of widows' rights. See *Dickerson v. Leslie*, 94 Miss. 627, 47 South. 659, and *Moody v. Moody*, 86 Miss. 323, 38 South. 322. Giving the statute a liberal construction for the purpose for which it was enacted, we think it manifest that the partition suit in this case cannot be maintained. The object of the statute was to provide a home and a means of support for the widow to prevent her becoming a public charge or becoming a wanderer on the face of the earth without means of livelihood or place of abode, except such as might be offered her by others. The words "or used," following the words "so long as it is occupied," clearly intend that it is not necessary for the property to be physically occupied, but, so long as the income of the property is used for the support of the widow, whether she be residing upon the property or not, that the property cannot be partitioned without her consent. There are two methods of partition in this state, one by written agreement where the parties are all adults, and the other by proceeding under statute in the chancery court; and, until one of these methods has been used and the property divided, the widow is not bound by a consent not obtained for a valuable consideration, but at any time may withdraw her consent, provided some element of estoppel does not intervene. The circumstances under which the alleged consent was obtained in this case was not only without valuable consideration, but was obtained under such circumstances as it would be impossible to hold her to such alleged consent without doing violence to the public policy founded on the statute. The record shows that the parties began to discuss this question with the widow before the burial of the deceased after his death and at a time when she was overwhelmed with grief and had not had time or opportunity of considering the question and of investigating her rights.

[3] In addition to this we think the possession of the tenant must be treated as her possession as well as the possession of the other heirs. At the time the administrator undertook to lease the place as administrator, he was an heir, but had absolutely no authority as administrator to make a lease, and the lease made as administrator, being void for this reason, can only be treated as a valid lease from the heirs as such. Certainly a tenant in possession by an arrangement with one of the heirs would be treated as holding possession for all of the heirs, so the

property did not, at any time, cease to be used by the widow within the meaning of the statute. The chancellor evidently had this view, and the judgment is affirmed.

Affirmed.

(113 Miss. 776; 113 Miss. 786)

STATE ex rel. HOWIE, Dist. Atty., v.  
BRANTLEY, State Game and  
Fish Com'r.

Ex parte ROBINSON.

(Nos. 19461, 19464.)

(Supreme Court of Mississippi. Feb. 5, 1917.  
On Suggestion of Error, April 2, 1917.)

On Suggestion of Error.

1. CONSTITUTIONAL LAW §9(3)—CONSTITUTIONAL AMENDMENT—"ELECTORS VOTING."

Under Const. 1890, § 273, providing that, if it shall appear that a majority of the qualified electors voting shall have voted for the proposed change, alteration, or amendment, that it shall be inserted by the next succeeding Legislature as a part of this Constitution, and not otherwise, amended returns of an election upon a constitutional amendment, showing the number of electors appearing at the polls and voting, legally or otherwise, which may or may not have been counted in ascertaining the result of the election are of no value, since they do not show the number of qualified electors voting, for the reason that, though a qualified voter succeeds in getting his name on the poll list and a ballot in the box, he is not a voter voting unless his ballot is such as is prescribed by law and conforms to the general law regulating elections.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 5, 7.]

2. CONSTITUTIONAL LAW §9(3)—CONSTITUTIONAL AMENDMENTS—MAJORITY VOTE—HOW DETERMINED—PRESUMPTIONS.

In the absence of correct certification of the number of electors voting upon a constitutional amendment submitted at a general election, the court must presume that the highest number of votes cast for candidates for any one office represented the number of electors voting, so that a vote for the amendment to the Constitution (Laws 1916, c. 159) providing for the initiative and referendum was adopted where the vote therefor was 19,118 and the highest vote cast for any office was 37,583.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 5, 7.]

3. COURTS §90(3)—STARE DECISIS.

It is the court's duty to adhere to a ruling in a former case on a constitutional question, especially where the Constitution was therein liberally construed, since an interpretation once put upon a Constitution should be thereafter adhered to, unless manifestly wrong and mischievous in effect, and Constitutions should receive a liberal interpretation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313, 317.]

4. CONSTITUTIONAL LAW §9(1)—CONSTITUTIONAL AMENDMENT—SEPARATE OBJECTS.

The mere fact that separate powers of initiative and referendum might have been submitted upon separate ballots is not determinative of the question whether submission of both projects on one ballot violated Const. 1890, § 273, as to plurality of objects.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 5, 7.]

5. CONSTITUTIONAL LAW §9(1)—CONSTITUTIONAL AMENDMENT—SEPARATE OBJECTS.

Submission on one ballot of the three powers of initiative and referendum as applied to statutes, and initiative as applied to constitutional amendments, being for the one general purpose of providing more direct control of legislation, does not violate Const. 1890, § 273, providing that, if more than one amendment shall be submitted at one time, they shall be submitted in such manner and form that the people may vote for or against each amendment separately.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 5, 7.]

6. CONSTITUTIONAL LAW §1½, New, vol. 4 Key-No. Series—STATUTES §2—CONSTRUCTION—"LAWS."

A statute and a Constitution, though of unequal dignity, are both "laws," and each rests upon the will of the people.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Law.]

7. STATUTES §35½—CONSTITUTIONAL AMENDMENTS—POWERS OF PEOPLE.

Since by the Bill of Rights all political power is vested in and derived from the people, and by Const. 1890, § 33, as amended, a part of the legislative power is conferred upon the Legislature, the remainder being reserved to the people, and by Const. 1890, § 273, the Legislature has a limited power to amend the Constitution (Laws 1916, c. 159) as to initiative and referendum gives no new power to the people and is valid.

Sykes and Holden, JJ., dissenting.

In Banc. Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Two cases; one, quo warranto, by the State, on the relation of J. H. Howie, District Attorney, against Z. A. Brantley, Game and Fish Commissioner of the State, and the other arising from habeas corpus by Sim Robinson, after conviction of hunting without a license. In the first case the writ prayed for was issued, but judgment was entered in favor of Brantley, and the relator appeals, and in the second case the petition for writ of habeas corpus was denied, and the relator appeals. In the first case, judgment set aside and vacated, and judgment entered, ousting the defendant. In the second case, judgment set aside, and judgment for relator entered, discharging him from custody. On motion for correction of judgment and on suggestion of error. Motion to correct judgment and suggestion of error overruled.

In Case No. 19461:

Lamar F. Easterling, Asst. Atty. Gen., and Robert S. Phifer, Jr., of Jackson, for appellant. J. B. Harris, of Jackson, for appellee.

In Case No. 19464:

J. M. Vardaman, of Jackson, and Robert S. Phifer, Jr., of Jackson, for relator. Ross A. Collins, Atty. Gen., opposed.

PER CURIAM. These cases were argued and submitted together, and present the same legal questions. The first cause, No. 19461, is an appeal from a judgment in quo warranto on the information of the district attorney against appellee, Z. A. Brantley,

game and fish commissioner of the state. The petition for the writ averred that appellee was unlawfully holding and exercising the functions of a public office, was claiming the right to an office in the state capitol, and was demanding hunters' licenses and threatening to impose fines upon persons violating chapter 99, Laws 1916, known as the "Game and Fish Law."

In the second cause, No. 19464, Sim Robinson was convicted before the police justice of the city of Jackson for hunting without the license required by said game and fish law. After conviction, he sued out a writ of habeas corpus before the circuit court of the first district of Hinds county. The writ was denied, and Robinson appeals from the judgment, so denying relief by habeas corpus.

The real issue presented by the appeal in the first case, the one vital question for decision, is whether Mr. Brantley legally holds and occupies the public office of state game and fish commissioner. The controlling question in the habeas corpus case is whether appellant Robinson was convicted of crime without authority of law. The determination of the main question in each case must be controlled by the further question whether the new game and fish statute above mentioned is constitutional, and therefore is a valid, subsisting law, and whether the law, if constitutional, is now in force and effect. If there is no such law now in force and effect, then it follows that there is no public office of state game and fish commissioner, and, furthermore, no one could be convicted for violating any of the provisions of such law.

The argument of these cases is directed to two general legal propositions. The first general proposition turns upon the question, Is chapter 99, Laws 1916, as drafted and prepared by the Legislature, unconstitutional and void on its face? The second general contention is that the statute in question, if a valid law, has been repealed or nullified by a vote of the people, acting under the so-called initiative and referendum amendment to the Constitution. The discussion of each of these two general propositions has necessarily directed the attention of counsel and court to many specific points of attack on the law in question.

There are several reasons advanced why chapter 99, Laws of 1916, contravenes our state Constitution, and, accordingly, why the said law should be regarded as unconstitutional and void on its face. It is suggested that the statute violates sections 20 and 175 of the state Constitution. These sections of our Constitution provide that no person shall be elected or appointed to office in this state for life or during good behavior, but the term of all offices shall be for some specified period, and that officers shall be liable to indictment for willful neglect of duty or misdemeanor in office, and upon conviction shall be removed from office. It is contended that

the county wardens and deputies provided for by the game and fish law are public officers, and that section 14 of the act authorizes their appointment and removal by the state game and fish commissioner, and that the authority to remove may be exercised by the state game and fish commissioner at any time, contrary to the provisions of the Constitution. It is further contended that the statute violates section 261 of the Constitution, which reads as follows:

"The expenses of criminal prosecutions, except those before justices of the peace, shall be borne by the county in which such prosecutions shall be begun; and all net fines and forfeitures shall be paid into the treasury of such county. Defendants, in cases of conviction, may be taxed with the costs."

Reference to section 17 of the act will show that each county warden is to receive one-half of all fines, forfeitures, and penalties collected in the county in which he holds office, for violations of the game law, and the remaining one-half is to be forwarded on the first day of each month to the state treasurer to be credited to the game and fish protection fund provided for by the statute. It is contended that the scheme provided by this new game and fish law, whereby the net fines and forfeitures are to be sent to the state capitol and paid into the state treasury to the credit of the game and fish protection fund, manifestly violates the plain provisions of section 261 of the Constitution.

Section 18 of the statute provides for a county license of \$2 for each resident hunter, a state license of \$5 for each resident hunter, and a license of \$15 for each nonresident hunter. By section 20 of the act nonresidents are prohibited from trapping in the state of Mississippi. It is contended that section 23 permits resident owners to hunt on their own premises, without license, and denies to nonresident hunters the right to hunt upon their own land without first paying for and obtaining a license. From these provisions it is suggested that the law unlawfully discriminates against nonresidents, in that it denies them the right to trap upon their own plantations or lands, and denies them the privilege of hunting upon their own lands without first obtaining a license; that every one has a qualified interest in the game found upon his own lands, and has a natural right to hunt, trap, and fish thereon, and that this right inheres in him by reason of his ownership of the soil.

It is further contended that, under section 18 of the game law, all minor members of families may hunt under the one license issued to the head of the family, and that, accordingly this unlawfully discriminates against certain other hunters. It is suggested that a large portion of the hunting and fishing is done by young men or boys under the age of 21 years, who, under the provisions of this act, would not be required to pay a license if they are living under the parental roof; that the amount of game which every

hunter is authorized to take is limited; that under this plan a father with many sons could take a much larger portion of game and fish than many other heads of families; that the orphan boy in many instances could not avail himself of the provision of hunting under a license issued to the head of a family, but, on the contrary, would be required to pay the license. From all this it is contended that, although the fish and game equitably belongs to all the people of the state, under the requirements of this new statute there is unlawful discrimination against certain classes of citizens of our own commonwealth.

The further question presents itself, that is, if the statute under attack attempts unlawfully to divert the fines and forfeitures from the various counties and deposit them in the state treasury to the credit of the game protection fund, contrary to the state Constitution, and if the licenses provided for work an unlawful discrimination against certain classes of citizens, that then no adequate revenue is provided for maintaining the office of state game and fish commissioner, for paying the extra expenses of county wardens, and for enforcing the provisions of the statute; and, if this be the true situation, then the act does not provide a workable plan and harmonious scheme for protecting the game and fish of Mississippi, and that accordingly, the whole act should be declared unconstitutional and void. It is suggested that the Legislature would not have enacted this law without the means for paying the officers charged with the duty of enforcing it; that the Legislature would not have enacted it with the other objectionable features indicated; that the law is so deficient in many important particulars that the whole act should be struck down as inoperative and void.

Many reasons are also assigned why chapter 99, Laws of 1916, has not been nullified by a referendum vote of the people. On this branch of the discussion, several reasons are assigned why the referendum amendment to the Constitution has not been legally adopted and inserted as a part of our organic law. Briefly stated, the contentions are that the initiative and referendum amendment to the Constitution is void on its face, because the amendment, purporting to be only one amendment, in fact embraces two separate and distinct powers and amendments to the state Constitution, to wit the power of the people themselves to make or nullify a statutory law; and, second, the power of the people to initiate a constitutional amendment. It is furthermore claimed that this amendment did not receive a majority of the qualified electors voting at the general election at which the people undertook to adopt or approve the initiative amendment, contrary to the provisions of section 273 of our state Constitution, requiring every amendment to our organic law to receive "a majority of the qualified electors voting" at the election.

The members of this court have given to the many delicate and constitutional questions presented by these records the most careful thought and consideration. After mature deliberation, a majority of the court are convinced beyond doubt that the judgment of the learned circuit court is erroneous, and should be reversed. The several members of the court are not agreed, however, upon any one reason that should be assigned why the judgment of the lower court should be reversed. Some of the justices are of the opinion that the game and fish statute is unconstitutional on its face, and therefore inoperative and void; and they reach this conclusion regardless of the initiative and referendum amendment to the Constitution and the vote of the people thereunder. Other members of the court are of the opinion that the statute in question has been legally voted out by the people, and therefore is no longer in force and effect. Inasmuch as a majority of the court are not agreed upon any one of the many constitutional points argued and considered, and therefore no legal principle can be conclusively settled at this time, we shall forego or waive any elaborate discussion of the merits or demerits of any one of the many contentions made or constitutional questions argued. As stated by the Wisconsin court, through Marshall, J.:

"A situation so extraordinary rarely occurs in judicial work. That it should move judicial minds to exhaust all reasonable efforts for harmony, as it has in this case, is most natural." *Will of McNaughton; Frane v. Plumb*, 138 Wis. 179, 118 N. W. 997, 120 N. W. 288.

The majority of the court are agreed that chapter 99, Laws of 1916, should not now be regarded in force and effect in Mississippi; and from this it necessarily follows that there is no such public office now as that of state game and fish commissioner. It is the judgment of the court, therefore, that the writ of quo warranto was properly issued; that the demurrer filed by the district attorney to the special plea in bar of the defendant was improperly sustained; that the judgment entered in favor of Mr. Brantley was erroneous, and that this judgment should be set aside and vacated and a judgment entered here, declaring that no such office as state game and fish commissioner now exists, and that appellee should be ousted of and restrained from exercising the functions of any such office. We are also of the opinion that the judgment of the learned circuit court, denying the petition of habeas corpus to Sim Robinson, should be set aside, and, there being no dispute as to the facts, that judgment should be entered here in favor of Sim Robinson, relieving him from the conviction mentioned, and discharging him from custody. So ordered.

SYKES, J., dissents.

On Suggestion of Error.

SMITH, C. J. Appellee was duly appointed, and qualified, as fish and game warden,

under chapter 90, Laws 1916, and entered upon the discharge of his duties as such. Afterwards the statute was referred to the people for ratification or rejection, under the provisions of the initiative and referendum amendment to the Constitution (chapter 159, Laws 1916), and there was a majority vote against it. Some time thereafter this proceeding was instituted in the court below to test the right of appellee to continue to hold and discharge the duties of the office, and this appeal is from a judgment in his favor.

On a former day of this term, the judgment of the court below was reversed, and judgment final was entered here in favor of appellant. A majority of us concurred in the result reached, but were divided upon the various questions presented for determination. The cause now comes on again to be heard upon the motion of appellee to correct this judgment, on the ground that no question presented to us by the record has been decided against him by a majority of the judges, from which it necessarily follows that the judgment of the court below should be affirmed, and also upon a suggestion of error, pointed at the conclusion arrived at by some of the judges, that the fish and game law is void, for the reason that it violates several sections of the Constitution. Upon consideration of the motion and suggestion of error, a majority of us have arrived at a conclusion that will enable us to dispose of the case without reference to either question of practice presented by the motion, or the constitutionality of the statute presented by the suggestion of error.

Appellee's main contention on the merits is that the referendum election was a nullity, for the reason that the initiative and referendum amendment is invalid on two grounds, the first of which is that it failed to receive a majority of the votes cast at the election at which it was submitted to the people for ratification or rejection. The provision of section 273 of the Constitution, with reference to the votes necessary for the adoption of a constitutional amendment, is as follows:

"If it shall appear that a majority of the qualified electors voting shall have voted for the proposed change, alteration, or amendment, then it shall be inserted by the next succeeding Legislature as a part of this Constitution, and not otherwise."

The evidence upon which this claim of appellee is based, as it appears from his plea, admitted to be true by the demurrer, and from the agreement of counsel, is that the original election returns transmitted to the secretary of state by the election commissioners of the various counties disclose that 19,118 votes were cast in favor of the amendment, 8,718 against it, and that the highest vote cast for any officer voted for at the election was 37,583, but do not disclose the total number of votes cast at the election, unless all of the voters voted for the officer receiving the highest number of votes. After the receipt of these returns, the secretary of

state wrote a circular letter to the election commissioners of each county, requesting them to reconvene and ascertain and certify to him the total number of votes cast in each county, with which request the election commissioners of all but six counties complied by certifying to the secretary of state, not the number of votes counted by them in ascertaining the result of the election, but the number of qualified electors who deposited ballots in the ballot boxes as appeared from the list thereof made by the clerk of the election as each ballot was deposited. The number of such qualified electors was 40,070. If the amended returns are to govern, the amendment was rejected; and if they are not, it was ratified.

[1, 2] Leaving out of view appellant's contention that these election commissioners were without authority under the statute to reconvene and amend the election returns transmitted by them to the secretary of state, and were also without authority at any time to declare and certify to the secretary of state the total number of votes cast at the election, and assuming, for the sake of the argument, that the amended returns transmitted to the secretary of state are official records of his office, so that we may take judicial notice thereof—for it is only evidence of which we can take judicial notice that can be considered in determining questions of this character—the amended returns are of no value here; for they show, not the number of "qualified electors voting," but simply the number thereof who appeared at the polls and deposited ballots, legal or otherwise, in the ballot boxes, which ballots may or may not have been counted by the managers or commissioners in ascertaining the result of the election. "Though a qualified voter succeeds in getting his name on the poll list and a ballot in the box, he is not a voter voting unless his ballot is such as is prescribed by law and conforms to the general law regulating elections." 9 R. C. L. 1122; *State v. Clark*, 59 Neb. 709, 82 N. W. 8; *State v. Clausen*, 72 Wash. 409, 130 Pac. 479, 45 L. R. A. (N. S.) 714. As shown in the note to *State v. Clausen*, supra, all of the authorities hold that some rejected ballots should be excluded in ascertaining the result of this kind of an election; the only conflict among them being as to the character of rejected ballots which should be excluded. That ballots are frequently rejected by the managers and commissioners of elections, so that they never become in fact votes, is a matter of common knowledge. The discrepancy, therefore, for aught that appears to the contrary, between the number of ballots deposited in the ballot boxes and the highest number of votes cast for any officer, may be caused by the fact that some ballots were rejected by the managers or commissioners. Consequently, as was done in *State v. Jones*, 106 Miss. 522, 64 South. 241 (and, for that matter, as has heretofore

been done each time an amendment has been inserted in the Constitution), we must presume that the highest number of votes cast for any officer represents the total number of votes cast at the election, from which it follows that we must hold that the amendment received the required number of votes.

[3] This brings us to the second objection urged by counsel for appellee to the amendment, which is that it contains more than one proposition, and therefore violates the requirement of section 273 of the Constitution that:

"If more than one amendment shall be submitted at one time, they shall be submitted in such manner and form that the people may vote for or against each amendment separately."

The ground of this objection is that the amendment reserves to the people three separate and distinct powers, each of which could have been the subject of a separate amendment: First, power to adopt a statute upon their own initiative; second, power to annul a statute enacted by the Legislature; and, third, power to amend the Constitution upon their own initiative.

The solution of this question will be largely determined by whether we adhere to the liberal and common sense interpretation put upon section 273 of the Constitution, in *State v. Jones*, 106 Miss. 522, 64 South. 241; or whether we return to the strict and narrow interpretation put thereon in *State v. Powell*, 77 Miss. 543, 27 South. 927, 48 L. R. A. 652. That it is our duty to adhere to the ruling in the former case we entertain no doubt, not only for the reason that an interpretation once put upon a Constitution should be thereafter adhered to, unless manifestly wrong and mischievous in effect, but for the further reason that it is one of the fundamental canons of construction that Constitutions should receive a liberal interpretation, to the end that the will of the people as therein expressed may have full and complete operation. It is true that there was a dissenting opinion in that case; but the writer thereof, who concurs herein, expressly declined to pass upon the question here presented, for the reason that, in his judgment, first, a decision thereof was not necessary for a disposition of the case; second, the amendment was not passed by the Legislature; and, third, the case was controlled by *State v. Powell*, 77 Miss. 543, 27 South. 927, 48 L. R. A. 652, which case, under the *stare decisis* maxim, should be adhered to and not overruled.

[4] It is undoubtedly true that each of the propositions contained in the amendment here under consideration could have been embodied in separate amendments, and that the failure to adopt one of them would have in no wise interfered with the operation of the other or others; but this fact alone cannot be made determinative of the question, as was pointed out in *State v. Jones*, supra. If this fact alone is determinative, the Jones

Case would have been decided the reverse of what it was; for the amendment there under consideration contained two separate and distinct propositions: First, the change from the appointment to the election of circuit judges; and, second, the change from the appointment to the election of chancellors—either of which could have been adopted and put into operation without reference to the other, and one of which might have been desirable in the opinion of some of the voters and the other not. What caused that amendment to be single, instead of double, was the unity in its ultimate end, to wit, the change from the appointment to the election of the judges of the courts of original jurisdiction; for "the unity of object is to be looked for in the ultimate end, and not in the detail or steps leading to the end." *Lobaugh v. Cook*, 127 Iowa, 181, 102 N. W. 1121. "If, in the light of common sense, the propositions have to do with different subjects, if they are so essentially unrelated that their association is artificial, they are not one; but if they may be logically viewed as parts or aspects of a single plan, then the constitutional requirement is met in their submission as one amendment." *State v. Anderson*, 49 Mont. 387, 142 Pac. 210, Ann. Cas. 1916B, 39.

[5] Returning, now, to the amendment under consideration, it seems clear from an inspection thereof that the three propositions contained in it are, in the language of the Supreme Court of California, in *Ex parte Pfahler*, 150 Cal. 71, 88 Pac. 270, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911, but "parts of one general plan or scheme looking to a more direct control of \* \* \* legislation" (or of the laws, both constitutional and statutory, by which they are to be governed) "by the people." This purpose can be partially accomplished by the adoption of any one of the three propositions, but can be accomplished in full only by the adoption of all of them.

[6] The Supreme Courts of Montana, in *State v. Anderson*, supra, and Washington, in *Gottstein v. Lister*, 88 Wash. 462, 153 Pac. 595, have each demonstrated that an initiative and referendum amendment contains but one proposition, within the meaning of a constitutional provision similar to ours. If further reasons be desired for so holding, they may be found in the opinions rendered in those cases. That the purpose of two of these propositions is to insure control by the people over statutes, and of the other to insure their control over the Constitution, is immaterial; for a statute and a Constitution, though of unequal dignity, are both "laws," and each rests upon the will of the people.

[7] There is another aspect in which this question may be viewed, which is not without value in this connection, and that is, as declared by our Bill of Rights, that "all political power is vested in and derived from

the people," and they have the right to confer as much or as little thereof on the various departments of our government as they may desire. By section 33 of the Constitution, as originally adopted, all legislative power was conferred on the Legislature. By the section as amended, only a part of this power is conferred upon the Legislature, the remainder thereof being reserved to the people. So no new power was conferred by the amendment, either upon the Legislature or the people. This is especially true with reference to the power to make or amend the Constitution, for that power had never been delegated to the Legislature, except to the limited extent provided by section 273 of the Constitution, which section remains intact, being in no way affected by the amendment here under consideration.

Much has been said in the argument of this cause, and of others, in which this question was presented, but not decided, about the evil results which may follow the adoption of this amendment—one of which may be the reopening of questions supposed to have been put at rest by the adoption of our present Constitution. This result may, or may not, follow, but with it we have here no concern; for that question was for the determination of the Legislature which submitted the amendment, and of the people who adopted it. Our duty is to uphold the amendment, unless it appears to us beyond reasonable doubt to be invalid.

We conclude, therefore, that the initiative and referendum amendment was properly inserted in the Constitution, from which it necessarily follows that the statute here in question was annulled by the referendum vote thereon. This being true, the judgment formerly entered by us is correct, without reference to the merits of the matters submitted by the motion and suggestion of error, both of which will be overruled, without any expression of opinion by us relative thereto.

Motion to correct judgment and suggestion error overruled.

COOK, J. (specially concurring). I approve the opinion written by the Chief Justice in this case. If the Jones Case is not overruled, every question raised in this case was settled by the Jones Case, except the suggestion that the record shows the amendment did not receive the vote of the majority of the voters voting at the election. I have given to this point my most careful consideration, and am unable to satisfy myself that it is supported by the record.

This question was undoubtedly considered by the Legislature, and the Legislature necessarily found that the amendment received the constitutional majority. It is regrettable that there is even a suspicion that the amendment was counted in. There was a time when "counting out" was tolerated, if not approved; but the present Constitution devised a scheme by which civilization could be

saved in this state without resorting to force or strategy. From my viewpoint, fraud, actual or imputed, must be clearly established to justify the conclusion that the amendment was counted in.

The writer dissented in the Jones Case, and indulged in some criticisms of the court's opinion; but my main reason for dissent was placed on the doctrine of stare decisis. I thought then that the court should have followed the Powell Case, but the majority declined to do so. This court, in the Jones Case, adopted the most liberal rule of construction to uphold amendments to the Constitution written into the Constitution by the Legislature. So, for the same reasons prompting me to dissent in the Jones Case, I am now concurring in this case. Again I say:

"If the law, well established, may be annulled by an opinion, a foundation is laid for the most restless instability. The decisions of one court may be overruled by another court, and those of the latter will have only a transient efficacy, until some future court, dissatisfied with them, shall substitute new principles in their place. No system of inflexible adherence to established law can be as pernicious as such ceaseless and interminable fluctuations."

SYKES, J. (dissenting). I am again called upon to dissent from the opinion of the majority of the court upon the question of the constitutionality of this amendment commonly referred to as the initiative and referendum amendment. My views upon this question were briefly summarized in a dissenting opinion in the case of Joseph W. Power, Secretary of State, v. W. T. Ratliff et al., 72 South. 864. The several oral arguments and printed briefs in the instant case have but strengthened my convictions as to the soundness of my dissent in the former case.

The opinion of the majority of the court in the present case is based upon the opinion in State v. Jones, reported in 106 Miss. 522, 64 South. 241. I agree with the decision in the Jones Case, but I do not agree with all of the reasoning or all of the opinion in that case. However, the entire opinion and the reasoning contained therein may still be sound, yet it does not negative the fact that there were in reality two amendments submitted as one in this case. The point decided in the Jones Case was a very narrow one. Section 153 of the Constitution, before amended, read as follows:

"The judges of the circuit courts and of the chancery courts shall be appointed by the Governor, with the advice and consent of the senate, and shall hold their offices for the term of four years."

As amended (see Laws 1910, c. 358) it now reads:

"The judges of the circuit and chancery courts shall be elected by the people in a manner and at a time to be provided by the Legislature and the judges shall hold their office for a term of four years."

It will be noted that the only change made in this section is from an appointive to an

elective scheme. Section 273 of the Constitution provides that:

"If more than one amendment shall be submitted at one time, they shall be submitted in such manner and form that the people may vote for or against each amendment separately."

There was only one section of the Constitution proposed to be amended, viz. section 153. The only amendment therein proposed was the election, instead of appointment, of these *nisi prius* judges. There was but one object and one purpose in view in this amendment, viz. a change from an appointive to an elective system of those *nisi prius* judges mentioned. No other section of the Constitution was expressly or impliedly amended thereby. The Constitution itself treated the judges of these two courts in one section. It regarded them as kindred subjects or kindred matter. While each has a separate or exclusive jurisdiction, in some instances they have concurrent jurisdiction. Their terms of office are the same. It would be an anomaly and there could be no reason for electing one set of these judges and appointing the other. They are so kin, so interrelated, that it would be nonsensical to have the people elect one set of these judges and the Governor appoint the other. The mere fact that the Constitution makes themselves treated them as of one class and under one subject in this section is ample authority for upholding this amendment. On page 560 of 106 Miss., on page 248 of 64 South., in the opinion in the Jones Case the court says:

"The only subject dealt with was a method of selecting the judges of the circuit and chancery courts, and the only change contemplated was that their selection should thereafter be by election by the people, instead of appointment by the Governor with the advice and consent of the senate. In other words, the whole proposition submitted by the proposed amendment was the substitution of an elective for an appointive judiciary, so far as it applies to the method of selecting the judges of the circuit courts and the chancery courts in this state."

The amendment here in question is unconstitutional and void upon its face, because it submits in one amendment two different amendments relating to separate and distinct subjects and matters, the one independent of the other. The first amendment is the one giving the people the power to initiate and regulate statutory laws. This, in common parlance, is termed the initiative-referendum amendment. Broadly and liberally speaking, this initiative-referendum amendment gives the people the power to control legislation. The only way the initiative and the referendum can stand together as one amendment is by saying that it only gives the people the power to regulate and control their statutory law. The history of these amendments, and the courts which have upheld an amendment containing the initiative and referendum, has been upon the theory that it only had one purpose and object in view, viz. giving the people the right to regulate and control their statutory

law. The demand therefor grew out of a distrust of the Legislatures. This reason is very well stated in the case of *State ex rel. Hay v. Alderson*, 49 Mont. 387, 142 Pac. 210, Ann. Cas. 1916B, 39, cited in the majority opinion in this case. The question before the court was whether or not the power to initiate and refer statutory laws was properly submitted as one amendment. Their constitutional provision relating to separate amendments is similar to section 273 of our Constitution. On page 404 of 49 Mont., on page 212 of 142 Pac. (Ann. Cas. 1916B, 39), is found the following quotation:

"'Constitutions,' says Judge Story, 'are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss.' \* \* \* If, in the light of common sense, the propositions have to do with different subjects, if they are so essentially unrelated that their association is artificial, they are not one; but if they may be logically viewed as parts or aspects of a single plan, then the constitutional requirement is met in their submission as one amendment."

On page 406 of 49 Mont., on page 213 of 142 Pac., Ann. Cas. 1916B, 39, in the same case, in a quotation from the case of *State v. Timme*, 54 Wis. 318, 11 N. W. 785, the following rule is quoted with approval:

"In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other."

Again, on the same page, the opinion goes on:

"Only one provision of the Constitution was changed, to wit, the provision by which the entire legislative authority of the state had been lodged in the legislative assembly."

This would have been true in the instant case, and the amendment would only have applied to section 33 of the Constitution, had it left out the part relating to a constitutional amendment. The material part, however, of the opinion in this case justifying the decision of the court, the *sine qua non*, so to speak, the very essence of it, is contained on page 408 of 49 Mont., on page 214 of 142 Pac., Ann. Cas. 1916B, 39, as follows:

"After all is said, then, the question is an historical one. Much is made of the fact that the initiative is wholly foreign to our institutions, whereas the referendum has been with us, in one form or another, since early ages; but the referendum established by the amendment in question is the Swiss referendum, and is not the plebiscite resorted to in American practice from the earliest times for the settlement of constitutional or local questions; and while it is a fact that the initiative is the later invention, and does not prevail in all the communities which have the referendum, a very brief glance into political history will disclose



that the initiative and the referendum came to us together and at a time when they were considered as *essentially complementary*. It will readily be recalled that for at least fifteen years prior to 1906 distrust of Legislatures as truly representative of popular will was widespread, and there was vigorous agitation for a corrective. The press teemed with discussions of the initiative and referendum, *always bracketed together*, as a supposed panacea; many states adopted them as one, and there cannot be the slightest doubt that to the *common understanding* of our people they presented the aspect of a *single plan to control the power of the Legislature* through the means of 'direct legislation.' See Oberholtzer on Referendum, c. 15; Phelps on Initiative and Referendum. By them, as the Supreme Court of California has said, the people reserved to themselves supervisory control of legislation. In re Pfahler, 150 Cal. 71, 76, 77, 88 Pac. 270, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911. They are the positive and negative poles of the same magnet—opposite sides of the same shield."

In a nutshell, the only way to sustain the initiative and referendum of statutory laws as one amendment is on the theory that it only gives the people direct control of legislation, or supervisory control of Legislatures.

That is the sole object and purpose of the amendment. To the same effect are the other initiative and referendum cases cited in the majority opinion. As is stated in that part of the opinion quoted by the majority in the case of *Ex parte Pfahler*, 150 Cal. 71, 88 Pac. 270, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911, they are, referring to initiative and referendum amendments, but "part of one general plan or scheme looking to a more direct control of local legislation by the people of the city." The strained construction placed on this amendment by the majority opinion to uphold its constitutionality is very well illustrated in this paragraph of the opinion wherein the court has placed in parentheses the words "(or the laws, both constitutional and statutory, by which they are to be governed)." None of the cases cited in this opinion bears upon the question here presented, and after a careful examination of the authorities I am satisfied that this exact question has not been decided by any court.

The only other case cited in the majority opinion upon this question is that of *Gottstein et al. v. Lister*, Governor, 88 Wash. 462, 153 Pac. 595, another initiative-referendum case, involving only statutory laws, and not constitutional amendments. The same authorities cited in that case are cited in the Montana case, the Montana case being there cited also.

The constitutional amendment in question only proposed to amend section 33 of the Constitution, which reads as follows:

"The legislative power of this state shall be vested in the Legislature, which shall consist of a senate and a house of representatives."

The amended section, after quoting in full the original section, reads in part as follows:

"But the people reserve to themselves the power to propose legislative measures, laws, resolutions, and amendments to the Constitution, and to enact or reject the same at the polls independent of the Legislature."

This amendment, so far as the initiative part is concerned, places a statutory law and an amendment to the Constitution upon exactly the same plane or basis. Section 273 of the Constitution provides the manner in which an amendment to the Constitution may be submitted to the people to be voted on by them, and it then provides that:

"If more than one amendment shall be submitted at one time, they shall be submitted in such manner and form that the people may vote for or against each amendment separately."

The meaning of this section is perfectly plain. Its object and purpose is to give the people an opportunity of voting separately on each separate amendment to the Constitution. It provides the sole and only means by which the Constitution may be amended. Its provisions are mandatory, and must be followed in submitting amendments to the people. This has been expressly held in both the *Powell Case*, 77 Miss. 543, 27 South. 927, 48 L. R. A. 652, and in the *Jones Case* above referred to. In speaking of this section of the Constitution and of the interpretation to be placed thereon, the opinion of the court in the *Jones Case*, *supra*, on page 562 of 106 Miss., on page 248 of 64 South., says:

"That the people of the state, acting through the constitutional convention which framed the Constitution, intended to impose and did impose certain limitations upon amendments to that instrument, which must be strictly followed before the same can be amended, we entertain no sort of doubt; but, in determining whether an amendment has been properly submitted after the same has been ratified by the requisite majority of the vote cast, we should examine into the matter of the spirit and according to the rule established by this court in the case of *Green v. Weller*, 32 Miss. 664, in which Judge Handy, speaking for the court, said: 'There is nothing in the nature of the submission which should cause the free exercise of it to be obstructed, or that could render it dangerous to the stability of the government, because the measure derives all of its vital force from the action of the people at the ballot box, and there can never be danger in submitting, in an established form, to a free people, the proposition whether they will change their fundamental law. The means provided for the exercise of their sovereign right of changing their Constitution should receive such a construction as not to trammel the exercise of the right. Difficulties and embarrassments in its exercise are in derogation of the right of free government, which is inherent in the people.'"

We agree with the sentiments expressed in that part of the *Jones Case* and in the quotation from *Green v. Weller*. Section 273 of the Constitution, as above said, should be strictly followed, before the Constitution can be amended. The object and purpose of section 273 is to give to the people at the ballot box the free exercise of their rights to adopt or reject each amendment *separately* so that the free exercise of their judgment may not be obstructed or hampered by causing them to have to adopt or reject as a whole more than one amendment at a time. Section 273 is mandatory, and must be followed as written. I shall not undertake to go into all of the authorities cited in the opinion in the

Jones Case. Suffice it to say that, after a careful examination of all of them, the amendments therein upheld were where the parts thereof were either interdependent the one on the other, or so interrelated that there could be no sort of reason for the adoption of one part and the rejection of the other. I unhesitatingly say that every authority to be found in the books bears out this contention. On the other hand, let us examine the amendment here in question. The majority opinion is based upon the idea that it is one amendment, because it is one general plan or scheme looking to a more direct control of legislation "(or of the laws, both constitutional and statutory, by which they are to be governed)." This opinion admits that they are laws of unequal dignity, and that these amendments could very properly be submitted separately, but nevertheless that, since they are laws, section 273 was not violated, nor, since they are laws, one amendment was sufficient. Before the enactment of this amendment under consideration, as we have above stated, the only way the Constitution could be amended was as provided under section 273 of the Constitution. This being true, it necessarily follows that section 273 of the Constitution is amended with reference to constitutional amendments just to the same extent that section 33 is amended with reference to statutory laws.

In the broadest sense of the term, it is true that a section of the Constitution, or an amendment thereto, is a law. "A Constitution is sometimes defined as the fundamental law of a state, containing principles upon which the government is founded, regulating the divisions of the sovereign powers, and directing to what persons each of these powers is to be confided, and the manner in which it is to be exercised. Perhaps an equally complete and accurate definition would be, that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised." Cooley on Constitutional Limitations, p. 4. A Constitution, or a section thereof, however, is much more than a mere law; "for the Constitution of the state is higher in authority than any law, direction, or order made by any body or any officer assuming to act under it, since such body or officer must exercise a delegated authority, and one that must necessarily be subservient to the instrument by which the delegation is made. In any case of conflict the fundamental law must govern, and the act in conflict with it must be treated as of no legal validity." Cooley on Constitutional Limitations, pp. 76, 77.

In speaking of our Constitution, Chief Justice Whitfield, in his able opinion in the Powell Case in 77 Miss. 543, 27 South. 927, 48 L. R. A. 652, has the following to say:

"That law [Constitution] reaches with its protection every one in the state. Unlike an act of the Legislature, which may or may not be general, its effectiveness is universal, its potency

reaches in its power the territorial limits of the whole state and protects all rights of life, liberty, and property thereunder. This charter of our liberties, this ark of the covenant, the people for 73 years had said should not be touched lightly or carelessly changed."

A Constitution is the foundation of the government. The very word "constitution" conveys the idea of stability and permanence. While it may be amended, these amendments are seldom necessary and very generally of doubtful benefit. A Constitution is always the protection of the minority against the majority. It protects all of the people against the passing prejudices, passions, fancies, fads, and follies that from time to time sweep over the country. If these amendments or provisions are to be put upon the same plane with statutory laws then the stability of the Constitution is done away with and lost, and a Constitution becomes merely a name. As is said in Cooley on Constitutional Limitations on page 88:

"A principal share of the benefits expected from written Constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular, and pervading in their protections; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a court or Legislature which should allow a change in public sentiment to influence it in giving to a written Constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. The violence of public passion is quite as likely to be in the direction of oppression as in any other; and the necessity for bills of rights in our fundamental laws lies mainly in the danger that the Legislature will be influenced, by temporary excitements and passions among the people, to adopt oppressive enactments. What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it."

The question for determination, and which has not been passed upon by any other court in the United States, is whether or not an amendment to our Constitution may provide for the enactment of statutory laws and constitutional amendments in one amendment. It is a cardinal rule of construction, in construing written instruments, that the intent must be gathered if possible from the entire instrument. "It is therefore a very proper rule of construction, that the whole is to be examined with a view to arriving at the true

intention of each part." Cooley on Constitutional Limitations, p. 91. The question then presents itself: Did the makers of the Constitution of 1890 treat statutory laws and sections of the Constitution, or amendments to the Constitution, as being generally laws, or as kindred subjects or as being inter-related? The word "law" is used a number of times in different sections of the Constitution, and whenever used it means either an act passed by the Legislature or refers to the common law, which may be changed by the Legislature. In no instance does the meaning of the word "law" in the Constitution include a constitutional enactment of any kind, but means a law that may be passed by the Legislature. Therefore, with all due deference to my brethren of the majority, I submit that the construction that they here say is liberal is much more than that, that they have out-Heroded Herod in their liberal construction, which here amounts to a license. Justice Story, in the quotation above made, says that Constitutions are instruments of a practical nature; that the people must be supposed to read and understand them with the help of common sense. Putting this common sense construction on section 273 of the Constitution, it simply means that amendments relating to different subjects which are independent of each other and which can stand alone, and for which good reasons may be entertained for voting for one and voting against the other, must always be separately submitted to the people to give them a free and untrammelled opportunity to exercise the privilege of amending their Constitution or not as they see fit. The construction placed upon this amendment by the majority opinion is not such a common sense construction. All intelligent laymen recognize a wide difference between a section of the Constitution and a statutory law. The construction of the majority, instead of being a liberal construction is a strained one, as I view it.

"In construing the Constitution, we are to resort to such rules as would aid in the construction of a statute, keeping always in view the fact that while statutes descend into particulars and details, Constitutions deal usually in generalities, and furnish along broad lines the framework of government. In *Daily v. Swope*, 47 Miss. 367, it was said: 'The Constitution is a law, differing only from a statute as it is of superior and paramount force, irrepealable by the Legislature, and which prescribes where it conflicts with a statute. Where the framers of the Constitution employ terms which, in legislative and judicial interpretation, have received a definite meaning and application, which may be more restricted or general than where employed in other relations, it is a safe rule to give to them that signification sanctioned by the legislative and judicial use.' To find the true meaning of the language of the Constitution, we are to look to the existing body of the law, whether common or statutory (Endlich on Inter. Stat. § 520), to former Constitutions (*Allegheny v. Gibson*, 90 Pa. 397 [35 Am. Rep. 670]), to existing evils, to the objects and purposes to be accomplished, and to the remedies intended to be provided (Cooley on Const. Lim.

70; *People v. Chataugua*, 43 N. Y. [10]; Endlich on Inter. Stat. § 518)."

The object and purpose to control legislation was completely accomplished by the initiative-referendum of statutory laws in this amendment. Entirely separated and altogether independent of that purpose, and in no way connected with the control of statutory laws, was the second amendment, viz. giving the people by direct vote the right to pass a constitutional amendment. Many good reasons might be given for wanting the control of statutory laws, and at the same time the very people desiring this direct control of these laws could give excellent reasons why they did not want a constitutional amendment placed upon the same plane or parity with a statutory law. They could give many good reasons why they wanted to maintain the permanency and stability of the Constitution and why the present way of amending the Constitution should in no way be altered or changed. The right to control statutory law is one subject, absolutely disconnected and independent of the right to pass constitutional amendments.

The majority opinion, in concluding, in substance says that, since "all political power is vested in and derived from the people," that no new power was conferred by the amendment either upon the Legislature or upon the people. That this is especially true with reference to section 273 of the Constitution, which is in no way affected by the amendment under consideration. Section 33 provided the only way that a statutory law could be passed. Section 273 provided the only way the Constitution could be amended. Under the present amendment section 33 is amended by giving back to the people the power to initiate statutory laws. Section 273 of the Constitution is amended by providing an additional way in which the Constitution may be amended, viz. by initiation and direct vote of the people. By the Bill of Rights, sections 5 and 6 of the Constitution, the political power is vested in and derived from the people and the people have the inherent right to regulate the government, etc. The power to pass statutory laws was by them delegated to the Legislature under section 33 of the Constitution and the exclusive manner in which the Constitution could be amended was set forth in section 273. This amendment amends both of these sections and provides additional ways in each instance. If the amendment in question embodied, in addition to the features already therein, the further question that none but red-headed and cross-eyed men could hold office in the state of Mississippi, the liberal construction of the Constitution of the majority of the court would hold this amendment constitutional because it related only to one subject, viz. the political power reserved in the people mentioned in sections 5 and 6 of the Bill of Rights. If a municipal corporation should pass an ordinance providing that ani-

mals should not be allowed to go at large in the municipality, under the reasoning of the majority of this court, man could not then go at large within the city because, under this liberal construction, man is an animal.

In conclusion I wish to say that, in my opinion, while the authorities cited in the majority opinion and cited in the Jones Case are authorities sustaining the contention that in this case a double amendment was submitted as one and for that reason that it is unconstitutional, at the same time I think it unnecessary to go out of the state for authorities to sustain the unconstitutionality of this amendment. The public policy of Mississippi, the reasons for the enactment of the Constitution of 1890, are totally different and distinct from those of the Western States, whose authorities have been cited in these opinions. The reasons that existed then exist now. It is true they are dormant but that is all. These reasons made it imperative that the Constitution should be as nearly permanent as a state Constitution may be. They made it necessary that this Constitution should be made difficult to amend. They made it necessary that section 273 should be strictly complied with before an amendment could become a part of it. Being conversant with this public policy and these reasons, I wish to repeat that I am satisfied beyond all reasonable doubt that this amendment is unconstitutional, and, in my opinion, the majority of my brethren have committed a most grave error in this case.

I express no opinion upon the other questions presented.

HOLDEN, J. (dissenting). The importance of this case prompts me to state the reasons upon which I base my dissent from the opinion of the majority.

1. The initiative and referendum amendment is void, because a majority of the qualified electors voting at the election did not vote for it. Section 273 of the Constitution reads in part as follows:

"If it shall appear that a majority of the qualified electors voting shall have voted for the proposed change, alteration, or amendment, then it shall be inserted by the next succeeding Legislature as a part of this Constitution, and not otherwise."

This section of the Constitution is mandatory, and provides that no amendment shall be inserted by the Legislature as a part of the Constitution unless it shall appear that a majority of the qualified electors voting shall have voted for the amendment. The authorities hold, and it is conceded here by all parties, that a majority of the electors voting means a majority voting at that election, and that whether an amendment to the Constitution has been adopted by the required majority of voters and properly inserted in the Constitution by the Legislature is a question for judicial determination, and that the courts may look to the official returns filed

in the office of the secretary of state, and from these returns may take judicial notice of the result of the election as shown thereby. *State v. Powell*, 77 Miss. 543, 27 South. 927, 48 L. R. A. 652; *Gottstein v. Lister*, 88 Wash. 462, 153 Pac. 595.

In the case before us two sets of returns were filed with the secretary of state by the election commissioners. The first set was incomplete, and did not purport to show the total number of votes cast at the election, but merely showed the highest vote cast for any candidate voted for at the election, which showing could not reveal definitely the total number of voters voting at the election, because the highest vote cast for any candidate or measure is always less than the total vote cast at the election for all the candidates or measures where there are several candidates and measures on the ballot. It is a well-known fact that a considerable percentage of the voters do not vote for each and all of the men or measures on the ballot; and so it appears here that the highest vote cast for any candidate, according to the first returns, was about an average of 31 votes less in each of the 80 counties than the total number of votes cast at the election in each county, as shown by the amended returns.

When the incompleteness and incorrectness of the first returns appeared to the secretary of state, he, realizing the necessity of an ascertainment of the total number of votes cast at the election, so that it might be correctly determined whether or not the proposed amendment had received a majority of the votes cast, requested of, and obtained from, the commissioners of election in all the counties amended and complete returns, certifying and showing the total number of votes cast at the election, as shown by the voting lists that were kept by the election officials, and which recorded the names of the voters and the ballots as they were deposited in the ballot box. See Report of Secretary of State, November, 1915, pp. 76, 77; *State v. Pigott*, 97 Miss. 599, 54 South. 257, Ann. Cas. 1912C, 1254; *State v. Powell*, 77 Miss. 543, 27 South. 927, 48 L. R. A. 652. These complete, certified, unquestioned, and undisputed returns were filed with the secretary of state within 10 days after the election, as required by law, and were duly submitted to the Legislature. These returns show that 40,070 qualified electors voted at the election, and that 19,118 electors voted for the initiative and referendum amendment, which number is less than a majority of the total votes cast at the election. Therefore, it appearing that the amendment did not receive "a majority of the votes of the qualified electors voting" at the election, it could not be validly inserted by the Legislature as a part of the Constitution. The correctness, regularity, and legality of the amended returns certifying the total number of voters voting at the election is not contested or disputed, except by argument based upon speculation and mere conjecture.

In fact, these returns are the only returns that attempt or purport to show the total number of votes cast, and they being the best evidence, and in fact the only positive and conclusive evidence, as to the material question of the total number of voters voting, they must govern and settle the question, and establish the truth to be that 40,070 votes were cast at the election; and, this being true, the amendment failed.

In the Jones Case, 106 Miss. 522, 64 South. 241, the court acted upon returns there which did not purport to show the total number of votes cast, but it acted upon the presumption that the total number of votes shown to have been cast for the candidate receiving the highest vote was the total number of votes cast at the election. This is an unsatisfactory standard, but the court had no other in that case. But in the case before us now we have the complete and correct returns which show definitely and positively the total number of votes cast, according to the records kept by the officials holding the election.

The effort of the majority opinion to discredit or undervalue these amended and complete returns can find no support in reason or authority. The certified voting list showing the registration of the names of the voters and that they voted by putting their ballots in the box, is presumptive, and even conclusive, evidence of the total number of votes cast at the election, and should prevail, unless the presumption is rebutted and overcome by evidence to the contrary. *Board of Trustees v. Board of County Commissioners*, 61 Kan. 796, 60 Pac. 1057; *People v. Ruyle*, 91 Ill. 528; 15 Cyc. 376. Nothing is shown here to discredit or impeach the truth of the amended returns. It therefore appears beyond a reasonable doubt that the amendment did not receive a majority of the votes cast at the election.

I do not know what the Legislature thought about this amendment when they passed the resolution inserting it into the Constitution. I can only judge from the language used in the resolution. There were nine constitutional amendments voted upon at the same election, and afterwards inserted into the Constitution by the Legislature at the same session of 1916. One of these nine amendments was the initiative and referendum amendment here involved. All of the other eight amendments, except one, received more than 20,036 votes, a majority of the votes cast, according to the amended returns, the only returns that even attempted to show, and did show, the actual total vote cast, and the Legislature adjudicated and certified the fact, in the resolutions inserting these other eight amendments, in the following language:

"And as appears from the returns thereof, duly made to the secretary of state, a majority of the qualified electors voting thereat voted in favor of the said amendment." Acts of 1916, p. 218.

It is seen that the Legislature adjudged and certified the important fact that these eight amendments received a majority of the votes cast as required by section 273 of the Constitution, and they had no trouble in adjudicating this fact because these eight amendments except one had, as a matter of fact, received a majority of the 40,070 votes cast at the election, and the decree of this fact by the Legislature was proper, and should forever preclude inquiry as to matters behind it. But when the Legislature resolved to insert the initiative and referendum amendment, here in question, observe what they said in this resolution, which I quote as follows:

"As appears from the returns duly made to said secretary of state, 19,118 votes were cast in favor of said amendment, and 8,718 votes were cast against said amendment. Therefore, be it resolved," etc. Acts 1916, p. 219.

It seems that the Legislature was careful to avoid adjudging and certifying that this initiative and referendum amendment had received a majority of the votes cast at the election, but they inferentially negated the fact. They did not even attempt to say how many votes were cast, but leave the reader to infer what he will for himself. And we are asked to certify a fact which the Legislature refused to do. I cannot consistently do so. Why did they not certify in this resolution, as they had in the other eight resolutions, that the amendment received a majority of the votes cast at the election? This court has often held that boards of supervisors in minor matters before them must adjudicate and certify upon their minutes certain facts in order to give validity to their actions. All will no doubt agree that the Legislature either did not believe this amendment had received the constitutional majority at the polls, or they seriously doubted it, and yet they inserted it in the face of section 273, which is mandatory and imperative, and which so clearly prohibits the insertion, unless it shall conclusively appear that the amendment received a clear majority of the votes cast at the election. And the majority decision of this court is now giving judicial sanction, in my judgment, to this violation of the Constitution.

2. I am equally certain that the initiative and referendum amendment to the Constitution is invalid, for the reason that it was not properly submitted to the voters, as required by section 273 of the Constitution, which reads in part as follows:

"And if more than one amendment shall be submitted at one time, they shall be submitted in such manner and form that the people may vote for or against each amendment separately."

I think that the amendment as submitted contains more than one subject, or purpose, and is therefore not one single amendment, which should have been submitted separately.

The majority opinion relies upon the Jones Case, *supra*, for its support, and I accept that

decision as being correct, and I propose to follow it as the law in this state in discussing the questions involved in this case. The principle announced in the Jones Case, which I quote from that opinion, is as follows:

"In order to constitute more than one amendment, the proposition submitted must relate to more than one subject, and have at least two distinct and separate purposes, not dependent upon or connected with each other."

This is a sound rule, and it was applied in the Jones Case by extreme liberal construction; but my brethren here make the plain mistake of applying that principle to a problem quite different from that presented in the Jones Case. The trouble is not with the principle announced, but the error lies in its application. The amendment involved in the Jones Case was an amendment of section 153 of the Constitution, which provides that the judges of the circuit and chancery courts shall be elected instead of appointed, as provided by this single section 153 before amended. The amendment there was of one section of the Constitution and dealing with one subject, viz. *nisi prius* courts, or judges of courts of original and concurrent jurisdiction. The Constitution treated it as one subject. Though separated in the administration of their respective functions in this state, either court could hear and determine all matters within their respective original jurisdictions—and this is done in some states—if one or the other court were abolished. The purpose there was to change the Constitution so that this particular part of the judiciary, treated as one subject in one section, would be elective, instead of appointive, thereby prescribing a harmonious scheme of electing these *nisi prius* judges, with similar, original, and concurrent jurisdictional powers.

But the case at bar is radically different. Here the amendment submitted and voted upon as one amendment contains three distinct subjects, or powers, or purposes, to wit: First, the right by petition of 6,000 voters to refer any legislative act to the people for approval or rejection; second, the right of 7,500 voters to propose any measure by initiative petition to the people for adoption or rejection; third, the word "measure" meaning any constitutional amendment or legislative measure, bill, or statutory law, it provides for amendment of the Constitution by initiative petition. In the Jones Case, *supra*, this court said, in substance, that if the proposition submitted related to more than one subject, and to separate purposes independent of each other, then it was imperative under the Constitution that the matters be submitted separately.

Is there more than one subject, or one purpose, embraced in the proposition submitted in the case before us? That there is more than one subject here must clearly appear to the mind of the well-seasoned lawyer. It deals with section 33 of the Constitution by changing the exclusive method of enacting

statutory law by the Legislature, subject to the veto power of the Governor; and it deals with section 273 of the Constitution, a different section in a different article from section 33, and changes the exclusive method prescribed there of amending the Constitution, and in effect strikes down the safeguards there provided. Therefore the amendment relates to at least two subjects: The enactment or repeal of statutory law; and the change or amendment of Constitutional law.

That there is a clear difference between a statutory provision and a constitutional provision, I have no doubt whatever. The distinction between the two is a matter of legal and judicial history. From time immemorial they have been treated as separate and distinct in character and dignity by the makers and expounders of the law. Should you say that there is no difference between the two, you then put them upon a parity, and dispute the necessity and wisdom of any Constitution at all. Constitutions are made by the people, and are basic rules, and the supreme law of the land. Statutory law is enacted by the Legislature, within the limits and powers prescribed and conferred by the Constitution. But my brethren say that the two matters or subjects are but one subject in fact; that is, "law," statutory and constitutional. This reasoning is unsound, and finds no supporting authority outside the minds of my learned associates. To illustrate the error they make: If you speak of a humming bird and an eagle, you would, in a sense, speak of the same subject, viz. "birds," "fowls of the air"; but a clear difference exists between the two kinds of birds. Here there are two subjects of "laws"—not one single subject of "laws," but two subjects of "laws," disconnected with and independent of each other.

The amendment has more than one distinct and separate purpose. Its purpose was to do three separate and distinct things, viz.: To provide a referendum to approve or reject the legislative acts; second, to provide that laws may be proposed and adopted by initiative petition; and, third, to provide that the Constitution may be changed or amended by initiative petition of a different number of voters than is required for other initiative and referendum petitions—thus showing the distinction in the different subject-matters. None of these three subjects are connected with, or dependent upon, the other, but they are separate and distinct from each other, and may stand alone; therefore the amendment here submitted contains at least two, if not three, amendments that should have been submitted separately. The voter might favor one, or even two, of these amendments, and wish to reject the other; but he must take or reject all or none, because he is denied his constitutional right to vote on the amendments separately. Some voters might think the referendum is a good law for the purpose

of a check or veto power against undesirable legislation; while others may believe that amending the Constitution by initiative petition of a small per centum of the people, thereby subjecting the Constitution to change by political waves, or the fanciful whims of a few people, is not wise or desirable. Therefore the people should be permitted to vote on the amendments separately.

In the Powell Case, *supra*, the court, through Chief Justice Whitfield, said:

"Whether an amendment is one or many clearly must depend upon the nature of the subject-matter covered by the amendment. If the propositions are separate, one in no manner dependent upon the other, so that a voter may intelligently vote for one and against the other, one being able to stand alone, disconnected wholly from the others, then such amendments are many, and not one, are severable, and not a unit, are complete each in itself, and not each a part of an interdependent scheme."

While it is true, in a broad and general sense, constitutional provisions and statutory enactments are "laws," they are treated as different subjects, as distinct subjects, both by the law writers and by the courts. They are both laws, but one is the supreme law, the organic law, superior to Legislatures creating them, and limiting and defining their powers. It is true that the people, in promulgating the Constitution, provided for its amendment, which amendment must be by the people; but in the article on the subject we have surrounded the subject with safeguards and difficulties, and this was done advisedly and for a very vital purpose. In the Jones Case, *supra*, the court said:

"The evident purpose of this section [referring to section 273 of the Constitution] is to exact the submission of each amendment to the Constitution on its merits alone, and to secure the free and independent expression of the will of the people as to each. The importance of this cannot be too strongly stated."

Again, it is said in the Jones Case:

"That the people of the state, acting through the constitutional convention which framed the Constitution, intended to impose and did impose certain limitations upon amendments of that instrument which must be *strictly followed* before the same can be amended, we entertain no sort of doubt."

Following the rule laid down in the Jones Case, and applying the principle announced there, it is not difficult to become thoroughly convinced that there is a marked difference between this case and the Jones Case, and that the case before us now does not come within the rule or principle announced by Justice Sexton in the Jones Case.

3. In speaking of the importance and necessity of the Constitution being difficult to change, and the desirability that it be a permanent instrument, Justice Whitfield, in the Powell Case, *supra*, 77 Miss. at page 578, 27 South. 933, 48 L. R. A. 652, says:

"The significant fact thus stands out, like a mountain in the landscape, that for the whole period of time from 1817 to 1890, the Constitution of the state having been four times changed during such period, a period of 73 years of

state history, the people of this state, speaking through their sovereign instrument, the Constitution, had uniformly declared that no majority of electors less than a majority of those voting for members of the Legislature (which election would bring out, it was presumed, the largest number of electors), should avail to change the organic law of the land. That law reaches with its protection every one in the state. Unlike an act of the Legislature, which may or may not be general, its effectiveness is universal, its potency reaches in its power the territorial limits of the whole state and protects all rights of life, liberty and property thereunder. This charter of our liberties, this ark of the covenant, the people for 73 years had said should not be touched lightly or carelessly changed."

The views of Justice Smith, in *Dantzler Lumber Co. v. State*, 97 Miss. 355, 53 South. 1, are valuable on this subject. Here is what he said:

"It is true that Constitutions may be amended; but it is also true that this can be done only with great difficulty, and, moreover, frequent changes in the fundamental law of a state are not desirable. But, be that as it may, Constitutions must be construed upon the theory that they were intended to last for all time. The Supreme Court of the United States long since has said, in *Martin v. Hunter*, 1 Wheat. 304, 4 L. Ed. 97, that the Constitution was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages."

The majority opinion of this court, upholding the initiative and referendum amendment to the Constitution, practically abolishes representative state government, and places constitutional amendments on a parity with ordinary statutes in Mississippi. In effect, the strength and dignity of the Constitution as a system of basic law, and its permanency as a charter of liberty and equality, protecting the weak against the strong, the minority against the majority, and preserving a government by the white man, is seriously impaired. Such was not the public policy of our state, nor the expectation of the wise constitution makers when they framed it. These public benefactors would hardly believe that the Constitution they wrote, and which has withstood all assaults, and has been followed by the Southern States as a model of ingenuity and wisdom, would so soon be changed by amendment, so as to destroy its purpose and policy. But, of course, changing or altering the Constitution is permissible under its own provisions, and if it be the wish of the people that it be changed, then no man should complain; for, after all, the people are the government, and should have the supreme right and power to control it, either directly or indirectly, as they may prefer, and this inherent right cannot be taken away nor surrendered, except by the people themselves. But when the people speak through their Constitution, and provide a plain, positive, and exclusive method of changing or amending it, that method should be followed as prescribed, for it is unquestionably true that the command of the Constitution is but the voice of the people speaking through their organic charter.



In the case before us the method prescribed by the people, through their Constitution, for amendment thereof, was not followed, but the positive directions of the Constitution on that subject, in my judgment, were ignored and flagrantly violated; and as a result of this erroneous decision, the Constitution, the rock of the fathers, may now be easily changed, or repealed, by the method provided in the crude and defective initiative and referendum amendment here in question. That sacred instrument, which has so long been regarded as a monument to the wisdom and patriotism of the great minds that framed it, some of whom have passed to the Great Beyond, is now stripped of its dignity and stability and put upon equal terms with the ordinary legislative act, and that, too, without giving the people a chance to vote on it separately, and without adopting it by a majority vote, as required by the people in speaking through their Constitution.

(118 Miss. 323)

**MISSISSIPPI R. COMMISSION v. ILLINOIS CENT. R. CO. et al. (No. 18380.)**

(Supreme Court of Mississippi, Division B.  
April 2, 1917.)

**RAILROADS — 229 — SCREENING PASSENGER COACHES—POWERS OF RAILROAD COMMISSION.**

Code 1906, § 4855, giving Railroad Commission power to establish regulations for passenger depots, and section 4860, giving it power to make orders as to the number and character of passenger coaches, give it no power to require railroads to screen their passenger coaches "to better protect the health of the general traveling public," even though it might have made such an order for the comfort of passengers.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743.]

Appeal from Chancery Court, Hinds County; O. B. Taylor, Chancellor.

Suit by the Illinois Central Railroad Company and others against the Mississippi Railroad Commission. From a decree for plaintiffs, defendant appeals. Affirmed.

Ross A. Collins, Atty. Gen., for appellant. Mayes, Wells, May & Sanders, R. H. & J. H. Thompson, and Fulton Thompson, all of Jackson, for appellees.

COOK, P. J. This suit was filed in the chancery court of Hinds county to test the power of the Railroad Commission to require railroads to screen their passenger coaches "to better protect the health of the general traveling public." The appellees challenged the power of the Commission to make such order, and from a decree sustaining the contention of appellees the Railroad Commission prosecuted this appeal.

The Commission contended that it possessed the power, and to support its contention it relies upon section 4860, Code of 1906, which reads as follows:

"Every railroad shall furnish a sufficient number of passenger cars to comfortably accommodate and seat its passengers; and if any railroad shall fail to do so, the Commission shall entertain the petition of any person cognizant of the facts. When the petition is filed, the railroad shall be duly notified thereof, and, after investigating the case, the Commission shall make and certify to the railroad such orders as to the number and character of passenger coaches necessary for the public convenience as the Commission shall deem proper; and in any proceeding concerning the matter, such order of the Commission shall be deemed *prima facie* reasonable and proper."

The railroad companies insist that the statute quoted does not sustain the contention of the Commission. In the first place, they say that the Commission did not make the order for the purposes enumerated in the statute, and secondly the statute does not empower the Commission to pass sanitary ordinances of this character, but this power, if it exists at all, is conferred upon the state board of health by chapter 64, Code of 1906. If we let the order in question speak for itself it seems quite certain, that it was intended as a health measure, and not as a measure for the comfort of passengers. In fact, the order expressly defines its purpose "to protect the health of the general traveling public."

Appellees also insist that section 4855, Code of 1906, confers upon the Railroad Commission all of the powers it possessed to regulate sanitary conditions, and that the power attempted to be exercised in this instance is not given in that section. This court has said, in *Railroad Co. v. Railroad Commission*, 94 Miss. 124, 49 South. 118:

"It is universally held that a railroad commission is a mere administrative or advisory board created to carry out the will of the Legislature, and that, before it can do any act, it must be able to point to its grant of power from the Legislature, and must be given in clear and express terms, and nothing will be had by inference."

It must be said that section 4855 does not confer the power assumed either by express terms or by inference. But the Railroad Commission points to section 4860 for its power. We do not believe it necessary to decide that the Railroad Commission may not require screened passenger coaches for the comfort of the traveling public, because we think that question is not before us in the present case. It may be reasonably said, that flies, bugs, mosquitoes, and other insects are a pestiferous lot, and that it would add very materially to the comfort of passengers if they were denied the privilege of entering passenger coaches. However, the Railroad Commission did not pass the order in question for the comfort of the passengers. The order, in its terms, was to safeguard the health of the traveling public, and while the scientific world now recognize that mosquitoes are guilty of being the sole disseminators of malaria and yellow fever, it is also true that this fact was not known when the Railroad



Commission was created and the Code sections referred to were passed. This being true, it is quite sure that the Legislature did not have in mind health and sanitation when section 4860 was written. As before stated, it is possible that wire screens could have been foreseen when the statute was being considered as contributing to the comfort of passengers, but it is somewhat difficult to believe that we were so far ahead of the times that we had already convicted the flies and mosquitoes of manslaughter.

So we have concluded that the statutes do not confer upon the Railroad Commissioners any power to pass health ordinances except in regard to the matters mentioned in the statute; that the statutes do not confer the power assumed in this case. It is not claimed that the order was for the comfort of passengers, except in the briefs, which are contradicted by the order. We do not believe that the Commission can shift its base; it must stand or fall upon the order itself.

Affirmed.

ETHRIDGE, J., took no part in this decision.

(113 Miss. 838)

**WILLIS v. STATE. (No. 19618.)**

(Supreme Court of Mississippi, In Banc.  
April 9, 1917.)

**HOMICIDE §141(3)—INDICTMENT—FORM AND REQUISITES—OMISSIONS.**

An indictment for assault with intent to murder, alleging that the defendant "on the 5th day of September, 1916, in the county and district aforesaid, willfully, feloniously and maliciously, then and there attempt to shoot and wound one 'R.' with a deadly weapon, to wit, a shotgun," etc., was fatally defective for the omission of the word "did" before the word "attempt."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 240.]

Holden and Stevens, JJ., dissenting.

Appeal from Circuit Court, Jones County;  
Paul B. Johnson, Judge.

Oscar Willis was convicted of crime, and he appeals. Reversed and remanded.

Robt. L. Bullard, of Laurel, for appellant.  
Frank Roberson, Asst. Atty. Gen., for the State.

COOK, J. The question in this case is: Did the indictment preferred against the defendant charge any crime known to the law? Omitting the formal part of the indictment, the offense attempted to be charged is in these words:

"That Oscar Willis, on the 5th day of September, 1916, in the county and district aforesaid, willfully, feloniously and maliciously, then and there attempt to shoot and wound one V. K. Reed with a deadly weapon, to wit, a shotgun, intending thereby with malice aforethought to kill and murder the said V. K. Reed, against," etc.

It will be observed that the indictment does not charge that the defendant attempted

or did attempt to shoot V. K. Reed. The omission of the word "did" has been held to be a fatal error in three cases heretofore decided by this court: Cook v. State, 72 Miss. 517, 17 South. 228; Hall v. State, 44 South. 810; McCearley v. State, 97 Miss. 556, 52 South. 796. It is conceded by the Attorney General that the case must be reversed if we follow these decisions. It is insisted that the decisions referred to are extremely technical, and should be overruled. We do not concur in this criticism of the decisions and decline to overrule them, and the judgment of the trial court is therefore reversed, and the cause remanded.

Reversed and remanded.

HOLDEN and STEVENS, JJ., dissenting.

HOLDEN, J. In dissenting from the majority opinion in this case I desire to record my views briefly. I realize that my dissent is contrary to the rule in this state as announced in Cook v. State, 72 Miss. 517, 17 South. 228, which decision was followed by this court in two other cases. But I believe that the decision in the Cook Case is wrong, as the defect in the indictment there leaving out the word "did" was a mere clerical error, inadvertently made, and was not a substantial defect, nor an integral part of the indictment, such as would make the indictment void. However, it will be noticed that the indictment in the Cook Case is somewhat different from the indictment in the case here. The indictment complained of as being fatally defective in this case is as follows:

"That Oscar Willis, on the 5th day of September, 1916, in the county and district aforesaid, willfully, feloniously and maliciously, then and there attempt to shoot and wound one V. K. Reed with a deadly weapon, to wit, a shotgun, intending thereby with malice aforethought to kill and murder the said V. K. Reed, against," etc.

It will be observed that the alleged defect in the above indictment consists only of the omission of the auxiliary verb "did," or the omission of "ed" added to the word "attempt." If either had been written into this indictment there would be no claim of defect whatever. By reading the Cook Case, supra, it will be seen that the reasoning of the court there seems to be based upon the speculation that the grand jury may have intended to charge the accused with an "attempt" instead of the commission of the crime. The indictment here charges only an attempt, so that there is a distinction, if not a material difference, in the two indictments. But aside from any such refined distinction as this, I do not think that the omission of the word "did" or "ed" in this indictment invalidates it.

During the last decade, the bar, bench, and the laity have been complaining about technical procedure causing delay and injustice in the courts of our country; and much has

been preached against the delay of the law on account of technical and antiquated rules of procedure and practice, generally in favor of the criminal, but we find some courts still clinging to the old out of date technical rules, which are in some instances so absurd as to be amusing to the criminal himself when on trial.

I do not think that an indictment should be held to be void, if from the entire language used in the indictment the plain intentment and clear meaning is ascertainable by a person of ordinary intelligence, and the accused is reasonably informed of the nature and cause of the accusation, and a conviction or acquittal under the indictment can be pleaded in bar of another prosecution for the same offense.

The omission of the word "did," or "ed," in the above indictment is not a fatal defect, but is merely an unsubstantial clerical error, inadvertently made in writing the charge. This mistake is not vital, as the intentment and plain meaning of the accusation is clearly apparent to any person of average intelligence. It fully informs the accused of the nature and cause of the accusation upon which he is to be tried. Whether we say that the word "did" or the addition of "ed" to the word "attempt" may be supplied by construction here, and the inadvertent omission be read into the indictment in order to establish its plain intentment and meaning, or whether we say that the obvious intentment and plain meaning is safely ascertainable without supplying such omission, makes little difference, so long as the correct and just conclusion is reached as to the validity of the written charge.

Words are mere vehicles, used for the purpose of conveying thoughts and ideas, and when the thought and idea intended clearly appears from the context of the indictment, the language has adequately served its purpose. The omission of the verb "did" may be supplied wherever the language used in the whole indictment justifies the conclusion that it was a clerical mistake, and without it the accused has full information as to the offense he is called upon to defend. It is not an integral part nor essential ingredient of the offense charged here, but is merely an omitted word used in the presenting part of the indictment. And while the indictment with this word omitted is imperfect, still the deformity is not such as to destroy the vitality of the whole written accusation. While the indictment may be deformed, or defective in form, yet it does not follow that it is entirely lifeless. The essentials of the crime are fully stated in the indictment here. The accused was in no way prejudiced or embarrassed in making his defense to the charge. An acquittal or conviction of the offense charged by the language used in this indictment would undoubtedly bar any subsequent prosecution for the same crime. The

conclusion above being true and correct, what reason is there left justifying the courts in upholding the contention that the unsubstantial defect caused by the inadvertent omission of the word "did" makes the indictment constitutionally void?

The main purpose of an indictment is to reasonably notify the accused of the exact offense he is charged with having committed, and for which he is to be tried, so that he may prepare and make his defense to the charge. The purpose of court procedure is not to shield the guilty, but to protect the innocent, and afford to both the guilty and innocent a fair and full hearing on the merits of the accusation. No more can be demanded by the accused. In the past the courts have required such technical strictness in criminal procedure as to merit just censure from the bar and the public. The trend of modern judicial thought is opposed to upholding mere technical unsubstantial errors, and I heartily agree with this view. The accused cannot justly complain unless he has been deprived of some substantial right under the law. This rule is a safe guide in the administration of justice.

In the case before us the accused raised no objection either by motion or demurrer to the indictment in the lower court, but he presented the merits of his defense to the lower court and jury, and upon conviction he appeals and raises the point of a defective indictment for the first time in this court, and now asks that he be granted another chance of acquittal before a jury because the word "did" was left out of the indictment. I am aware of the fact that this court has held in the Cook Case, *supra*, that the invalidity of a felony indictment cannot be waived, and may be presented in this court for the first time in any felony charge. But I also think that this latter rule is wrong; and while it seems to be the established law of this state by decisions, still I think that there should be a reform in the practice and procedure of our courts, either by enactment of the Legislature, or by this court overturning these moss-covered technical rules of practice and procedure which have so long furnished an avenue of escape for criminals, and which should now be relegated to the junk pile, and hereafter proceed in a reasonable, common-sense manner in the trial of criminal cases, so that justice, the thing desired in all cases, may be better obtained and more abundantly administered in the courts of our state.

The majority opinion relies entirely upon the Cook Case, *supra*, and proposes to follow that case as the rule in this state. I am reluctant to overrule any prior decisions of this court, unless it clearly and manifestly appears that such decision is erroneous; and of course where property rights or the rights of life or liberty, are involved, and would be disturbed or injured, I would especially hesitate to overrule a former decision of this

court. In fact, I am sincere in my support of the doctrine of stare decisis; but the decision of the question before us here now cannot injure the welfare of any person, nor disturb any property interest, if the decision in the Cook Case were overruled, and I think that it should have been done. But the majority here contend that the decision in the Cook Case has stood so long as the law of this state that they do not feel constrained to overrule it. I think that it is time now to overrule the Cook Case decision, as too many criminals have already escaped justice through the rule there announced, which is based upon an immaterial technicality; and it is time to correct this rule of practice and procedure in Mississippi, and let the man charged with crime be required to appear in the courts and defend his case upon the merits, and when he has received a fair and impartial trial, and it does not appear that he has been deprived of any substantial right due him under the law or the Constitution in the trial, then he has no good reason to complain on appeal to this court.

There are numerous decisions in the different states of America which fully sustain the views that I have expressed above. In fact, the weight of the best authority in other states favors my position in this case. I cite here below a few authorities which sustain my opinion, and they appear to announce the right and reasonable conclusions on the subject: *Stallworth v. State*, 155 Ala. 14, 48 South. 518; *Dickens v. State*, 50 Fla. 17, 38 South. 909; *State v. Whitney*, 15 Vt. 298; *State v. Edwards*, 19 Mo. 674; *People v. Duford*, 66 Mich. 90, 33 N. W. 28; *Cæsar v. State*, 50 Fla. 1, 39 South. 470, 7 Ann. Cas. 45; *People v. Haagan*, 139 Cal. 115, 72 Pac. 836; *State v. Hawkins*, 155 N. C. 466, 71 S. E. 326; *Caples v. State*, 3 Okl. Cr. 72, 104 Pac. 463, 26 L. R. A. (N. S.) 1063; *Krueger v. People*, 141 Ill. App. 510; *Couch v. State*, 6 Ala. App. 43, 60 South. 539; *Smith v. United States*, 157 Fed. 721, 85 C. C. A. 353; *People v. Miles*, 123 App. Div. 862, 108 N. Y. Supp. 510; *Jones v. United States*, 162 Fed. 417, 89 C. C. A. 303; *Bowes v. State*, 8 Okl. Cr. 277, 127 Pac. 883; *State v. Sharp*, 121 Minn. 381, 141 N. W. 526; *Rutland v. Commonwealth*, 160 Ky. 77, 169 S. W. 584; *Deen v. State*, 7 Okl. Cr. 150, 122 Pac. 941; *State v. McAninch*, 172 Iowa, 96, 154 N. W. 399; *Gamblin v. State*, 45 Miss. 658.

"The extreme technical accuracy anciently required called forth the remarks of Lord Hale that 'The great, strict, and unseemly niceties required in some indictments tend to the reproach of the law, to the shame of the government, to the encouragement of villainy, and to the dishonor of God.' It is plain, however, that much of the tautology and prolixity which characterized indictments in the early period of criminal procedure can be safely avoided without any infringement of the right of the accused to demand the nature and cause of the accusation against him, and it is the policy of modern courts to disregard mere technical objections and

to require only that a criminal pleading shall fully state the essential elements of the offense charged." 14 R. O. L. 171.

"The charge in the indictment that the defendant 'kill' the deceased is so plainly a clerical mistake in leaving off 'ed' that it is self-correcting; and so, also, is the omission of the word 'is' in the usual formula, 'whose name is to the grand jury unknown.'" *Stallworth v. State*, supra.

"The rule for the interpretation and construction of even indictments, which are construed more strictly than affidavits \* \* \* is, if the sense is clear, nice, or technical exceptions are not to be favorably regarded, and verbal inaccuracies, or clerical errors, which are explained and corrected by necessary intendment from other parts of the indictment, or errors in spelling, which do not obscure the sense, are not fatal." *Couch v. State*, supra.

(118 Miss. 850)

# KELLY v. STATE. (No. 19664.)

(Supreme Court of Mississippi, Division A.  
April 9, 1917.)

## 1. HOMICIDE §234(10)—SUFFICIENCY OF EVIDENCE.

Evidence of accused's alleged confession and testimony of an alleged eyewitness held to sustain a murder conviction as against an alibi defense proved principally by members of accused's family.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 491.]

## 2. CRIMINAL LAW §1111(3)—BILL OF EXCEPTIONS—ARGUMENT OF COUNSEL.

On appeal of a murder case, a special bill of exceptions establishes what the prosecuting attorney said in his argument to the jury, although he testified on motion for a new trial that he did not make all of such statements.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2894.]

## 3. CRIMINAL LAW §730(12)—ARGUMENT OF COUNSEL.

In a murder trial, the prosecuting attorney's vigorous urging for conviction, characterizing accused as a bad negro, although the evidence did not support this charge, and stating he never prosecuted innocent persons, constitutes reversible error, where the court sustained accused's objections to the remarks, but did nothing further.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1693.]

Appeal from Circuit Court, Coahoma County; W. A. Alcorn, Jr., Judge.

Horace Kelly was convicted of murder, and appeals. Reversed and remanded.

Adams & Adams, of Clarksdale, for appellant. Frank Roberson, Asst. Atty. Gen., for the State.

SYKES, J. The defendant, Horace Kelly, a negro, in the circuit court of Coahoma county, was tried and convicted of the murder of one Martha Ann Kimmons, a negro woman, and sentenced to be hanged, from which judgment this appeal is prosecuted.

[1] The testimony upon which the defendant was convicted was principally that of a negro woman, Rosa Dearing, who claimed to have witnessed the tragedy. Rosa was also indicted for this offense, but the indictment

was nolle pros'd against her. The other material testimony against the defendant was that of a negro man by the name of Cato, a paramour of the woman killed, who testified to a rather strange confession made to him by the accused. The defense was an alibi proved principally by the members of the family of the accused. After a careful consideration of the record we have concluded that we would not disturb the finding of the jury alone upon the testimony.

In the closing argument of the case the district attorney used the following language, as is shown by the special bill of exceptions:

"I want this negro, gentlemen, I want him. You may as well tear down this courthouse if you don't convict this negro. I want you to give me this negro."

"I want you to convict this negro; if you don't convict him I won't be able to convict anybody. God knows I am in earnest and mean what I say."

"You must give me this negro; I must have him; I never will feel like prosecuting another if you don't, and I want you to go and give me this negro."

"I want you to go out and convict that fellow; if you don't convict him you had just as well tear down the courthouse and turn every other son of a gun a loose."

"I don't know whether he is guilty or not, I believe it so strong that I would not mind being sheriff when he is hung."

"This is a mean negro; a bad negro; it is up to you, gentlemen; you can turn this negro a loose, and dam up the Sunflower river with dead negroes, and back the water up to Clarksdale."

"I never prosecuted an innocent man. I always investigate the cases thoroughly, as I have done in this case, and while the law does not allow me to talk to defendants in this court, I did get a statement of this case from Rose Hill, who was charged with the murder of Martha Ann Kimmons, in presence of her attorneys, and found that she was not guilty, and nolle pros'd her case and the case of Lucile Hill."

[2] On motion for a new trial in this case, the district attorney testified that he did not make all of the statements hereinabove quoted. The special bill of exceptions, however, signed by the judge, certifies that he did, and we are governed by the facts as set out in this bill of exceptions, and not by the testimony introduced on the hearing of the motion for a new trial.

[3] To each of the above statements the attorneys for the defendant objected, and the objection was sustained by the court. However, the court did not instruct the jury that they must disregard this portion of the argument of the district attorney, neither did it stop the district attorney from making this character of argument. So far as being harmful to the defendant, the objection might as well have been overruled. While great latitude is allowed in the argument of counsel, at the same time these arguments must be based upon the testimony introduced in the case. The portion of the above-quoted argument was highly prejudicial to the accused. All of it was improper. It was not an argument to convict the defendant upon the testimony, but rather an appeal to the

prejudice of the jury to convict him on general principles. There was no testimony whatever introduced to show that the accused was a man with a bad reputation for peace and violence, yet the district attorney in this argument characterizes him as "a mean negro; a bad negro." In the case of *Martin v. State*, in 63 Miss. on page 507, 56 Am. Rep. 813, the court, in condemning a similar argument, says:

"This was an assumption or declaration of facts as to the character of the prisoner made by counsel without being sworn or examined as a witness, and of a nature well calculated to influence the jury against the prisoner. The general character of the prisoner had not been put in issue. If evidence had been offered by the prosecution to prove that his character was such as that attributed to him by counsel, it would, upon the plainest principles of law, have been rejected as incompetent. The prisoner was on trial for a specific offense, and it was his right under the law to be tried for that offense, upon competent evidence confined to that issue. We are of opinion that the counsel for the prosecution, in the matter above quoted, passed the bounds of legitimate advocacy, and that, under the circumstances of the case, the prisoner may have been, and probably was, thereby injured. Such declarations uttered by distinguished counsel, of high moral and social standing, in any case, would inevitably tend to prejudice the jury against the prisoner."

The last paragraph of the above-quoted argument of the district attorney was perhaps the most prejudicial and improper part. By it he told the jury that he never prosecuted an innocent party, that he always investigated the cases thoroughly, as he had done in this case, and that he had gotten a statement from Rose Hill or Rosa Dearing, who was also charged with the murder, and had found that she was not guilty of it.

It was the theory of the defense in this case that this woman, Rose Hill, or Rosa Dearing, was the guilty party. She had been under an indictment also for the same offense. There was no testimony showing the facts about the private investigation made by the district attorney in this case and of his conference with Rosa Dearing and the facts and reasons why he nolle pros'd the case against her and Lucile Hill. The state would not have been permitted to introduce this testimony had it tried. Consequently the argument of the district attorney amounted in effect to his unsworn testimony, which was incompetent. It further had the effect of giving the jury the benefit of his private opinion as to the guilt of the accused, not based upon the testimony introduced before the jury, but based upon his opinion resulting from his private investigation of the case. In other words, the district attorney threw the weight of his personality and his private opinion into the scales, and asked the jury to convict this negro at least in part because he was satisfied of his guilt from his private investigation. The jury might well have reasoned that under the testimony they had some doubt as to whether the accused or Rosa Dearing killed the de-

ceased, but since the district attorney had assured them that from his private investigation the accused was guilty, then they would be safe in accepting this assurance. Quoting again from the Martin Case, supra:

"Within the limits of the testimony the argument of counsel is and should be free, but that freedom does not extend either to the statement or the assumption of facts, or to commenting upon facts not in evidence, to the prejudice of the adverse party. \* \* \* Being counsel and witness in the same cause is not prohibited by law if counsel chooses to testify, but such a union of offices is permissible and tolerable only where counsel is sworn and examined like other witnesses."

This court fully recognizes that in the enthusiasm of the moment counsel, who have an abiding faith in the guilt of the accused, are often swept from the legitimate bounds of argument by this enthusiasm on the spur of the moment. It is well, however, to remember, as is said by Justice Calhoun in the case of *Hampton v. State*, 88 Miss. 257, 40 South. 545, 117 Am. St. Rep. 740, that:

"Trials are to vindicate innocence or ascertain guilt, and are not to be vehicles for denunciation."

Because of the above argument we are of the opinion that the defendant has not had that fair and impartial trial to which every one is entitled under the law of this state, regardless of his race or station in life

Reversed and remanded.

(113 Miss. 735)

**STATE v. HURDLE. (No. 19418.)**

(Supreme Court of Mississippi, Division A.  
April 9, 1917.)

**MASTER AND SERVANT—§343—ENTICING LABORER—POLICE POWER—STATUTE.**

Code 1906, § 1146, providing that one who interferes with or induces a laborer or renter to leave his employ before the expiration of his time without consent of employer shall be guilty of a misdemeanor, is a legitimate exercise of the police power of the state.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1288.]

Appeal from Circuit Court, Lafayette County; J. L. Bates, Judge.

An affidavit was filed against J. T. Hurdle for enticing and inducing a laborer to quit work before expiration of his time. From a judgment sustaining a demurrer to the affidavit, the State appeals. Reversed and remanded.

**Section 1146, Code of 1906:**

If any person shall willfully interfere with, entice away, knowingly employ, or induce a laborer or renter who has contracted with another person for a specified time to leave his employer or the leased premises, before the expiration of his contract without the consent of the employer or landlord, he shall, upon conviction, be fined not less than twenty-five dollars nor more than one hundred dollars, and in addition shall be liable to the employer or landlord for all advances made by him to said renter or laborer by virtue of his contract with said renter or laborer, and for all damages which he may have sustained by reason thereof. The provisions of

this section shall apply to minors under contract made by a parent or natural guardian.

Frank Roberson, Asst. Atty. Gen., for the State. L. C. Andrews, of Oxford, for appellee.

**HOLDEN, J.** This is an appeal by the state from a judgment of the circuit court of Lafayette county sustaining a demurrer to an affidavit, the material parts of which are here set forth:

"Jim Tom Hurdle did unlawfully and willfully interfere with and entice away and knowingly employ and induce Columbus Garrison, a laborer of Elic Lyles, who had contracted with Elic Lyles to work on shares for one year from January 1, 1916, to January 1, 1917, to leave the said Elic Lyles before his time expired and without the consent of said Elic Lyles, landlord of Columbus Garrison, laborer, against the peace and dignity of the state of Mississippi."

The affidavit follows the statute (section 1068, Code 1892, and section 1146, Code 1906), which provides that any person convicted of violating the statute shall be guilty of a misdemeanor. Upon what ground the lower court sustained the demurrer to the affidavit does not appear in this record; but as the demurrer urged that the statute was unconstitutional, we presume that the court below sustained the demurrer upon this ground.

The statute here in question has been in existence for many years, and has been enforced, and its constitutionality upheld by this court. Similar statutes in other states have also been upheld as valid and constitutional. *Hoole v. Darroh*, 75 Miss. 257, 22 South. 829; *Gregory v. State*, 42 South. 168; *Hadacheck v. Sebastian*, 239 U. S. 394, 36 Sup. Ct. 143, 60 L. Ed. 348; 18 Amer. & Eng. Encl. of Law, 739; *Lakeview v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71; *State v. Aye*, 63 S. C. 458, 41 S. E. 519; *Tarp-ley v. State*, 79 Ala. 271; *Lee v. State*, 75 Ala. 29; *State v. Nix*, 165 Ala. 126, 51 South. 754; *State v. Harwood*, 104 N. C. 724, 10 S. E. 171; *Kline v. Eubanks*, 109 La. 241, 33 South. 211; *Petty v. Leggett*, 38 South. 549.

There is a clear difference between section 1146 and section 1147 of the Code of 1906. This court, in *State v. Armstead*, 103 Miss. 790, 60 South. 778, Ann. Cas. 1915B, 495, declared section 1147, Code 1906, unconstitutional, which decision was eminently correct; but we think that section 1146, Code 1906, is constitutional and valid as a legitimate exercise of the police power of the state.

The judgment of the lower court is reversed, and the case remanded.

(113 Miss. 857)

**ILLINOIS CENT. R. CO. v. SMALL**

(No. 19025.)

(Supreme Court of Mississippi, Division B.  
April 2, 1917.)

**CARRIERS—§286(7), 287(3)—RAILROADS—INJURY—NEGLIGENCE.**

Where plaintiff at night proceeded from defendant's station to wrong side of waiting pas-

senger train, without knowledge of the customary method of boarding the train at the station, and in hastening to other side of train tripped over a sidewalk projection, defendant was negligent in not lighting the premises or indicating a safe way to the train, irrespective of whether reasonable care, or the highest degree of care due a passenger, was required of it.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1148, 1149, 1156.]

Appeal from Circuit Court, Montgomery County; H. H. Rogers, Judge.

Action by J. B. Small against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mayes, Wells, May & Sanders, of Jackson, for appellant. Hill & Witty, of Greenwood, for appellee.

COOK, P. J. Mr. Small sued the appellant railroad company for injuries received by him while he was a passenger. The facts of the case are about these: Mr. Small was a resident of Winona, and, being in Jackson and desiring to return to his home at Winona, he went to appellant's depot and purchased a ticket, which entitled him to passage on appellant's trains from Jackson to Winona. It was his purpose to take passage on the train of defendant due to arrive somewhere about midnight. After waiting for some time in the waiting room provided for passengers the train arrived, and he immediately left the waiting room for the purpose of boarding the train. It seems that defendant's station at Jackson was a union depot for all the railroads entering and departing from Jackson. The tracks were on the west side of the depot, and it seems that the train appellee was to take passage on usually came on the second track west of the depot, and it is said in the brief of counsel for appellant that the place where this train habitually opened its doors to receive passengers was on the west side of the north-bound trains. Appellant, however, did not know of this rule or custom, and therefore he proceeded to go upon the east side of the standing train towards the day coaches which were next to the locomotive pulling the train, the Pullman coaches being at the rear of the train. When he had almost gotten to the locomotive somebody on the west side of the train cried, "All aboard!" and, believing that the train was about to pull out, he left the sidewalk for the track, and began running up the track to reach the head of the train and go around to the west side for the purpose of getting on the train, he, in the meantime, having discovered that he had made a mistake in trying to board the train on the side next to the depot. This mistake is probably a natural one to persons from the rural districts or the smaller towns of the state. While he was hurrying along he stubbed his toe on the projecting side of a wooden sidewalk leading from the depot proper across the train to the west, and fell upon his knees

on the walk, seriously and permanently injuring himself. There was no light at or near the sidewalk; there were no signs indicating the side on which the trains were to be entered; and there were no guides to direct passengers.

The trial judge instructed the jury that appellee was a passenger, and that it was the duty of the company to use the highest degree of care to protect him from injury. This instruction it is claimed was error. Appellant insists that the only duty it owed to appellant in the circumstances was to keep its premises in a reasonably safe condition.

This court, in the *Smith Case*, 103 Miss. 150, 60 South. 73, seems to have approved the rule adopted by the trial court in the present case. However, as we view the record in this case, the plaintiff was entitled to a verdict under the undisputed facts, under either of the rules.

It seems to us that it was reasonably to have been anticipated that some passenger would very likely make the same mistake that appellee made in this case, and that he would very likely stumble over the hidden sidewalk and hurt himself. It seems clear that it was negligence not to provide a light, so that persons situated as appellee was could have seen the obstruction, either that, or it was the duty of the company to have provided some means to indicate the safe way to the train.

The verdict was small, we think, and we believe that it was inevitable that appellee would recover.

Affirmed.

(114 Miss. 81)

ANDERSON, State Bank Examiner, v. BASKIN & WILBOURN. (No. 19627.)

(Supreme Court of Mississippi. April 9, 1917.)

BANKS AND BANKING—§15—INSOLVENCY—DISTRIBUTION OF ASSETS.

Bank Guaranty Act (Laws 1914, c. 124) §§ 23, 24, creates a fund from assessments levied upon all state banks to guarantee all deposits not otherwise insured. Sections 36 and 60 provide the procedure for the distribution of such fund, while section 38 declares that all deposits not otherwise secured shall be guaranteed by the act. Section 59 imposes double liability upon stockholders in favor of depositors. *Held*, that general creditors are entitled to participate in the distribution of the assets of an insolvent bank along with depositors; the depositors being protected by the guaranty provisions.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 12-17.]

Cook, P. J., and Ethridge, J., dissenting.

In Banc. Appeal from Chancery Court, Newton County; G. O. Tann, Chancellor.

Petition by W. E. Baskin and R. E. Wilbourn, partners doing a general law practice as Baskin & Wilbourn, against E. F. Anderson, State Bank Examiner, liquidator of the Bank of Newton. From a decree overruling a demurrer to the petition, the defendant appeals. Affirmed.

Appellant is one of the bank examiners of the state and by virtue of his office is now liquidator of the Bank of Newton, whose affairs were taken charge of by the board of bank examiners under the power conferred by and the general terms of chapter 124, Laws of 1914. Appellees, W. E. Baskin and R. E. Wilbourn, are partners doing a general law practice in the city of Meridian. The estate of the Bank of Newton, after being taken in charge by the bank examiners, is being administered by the chancery court of Newton county in accordance with the provisions of the state banking law. In the course of the insolvency proceedings, appellees presented to the chancery court of said county an ancillary petition, in which it is averred that some two years ago one T. H. Harper filed suit in the circuit court of Newton county against the Bank of Newton seeking to recover damages; that Baskin and Wilbourn were employed to defend the case; that a trial was had in the circuit court, resulting in a judgment of \$1 in favor of the plaintiff, which judgment on appeal to the Supreme Court was affirmed; that a reasonable fee for their professional services is \$400, \$300 of which has been paid, leaving a balance of \$100 still due and unpaid; that petitioners had presented to the bank examiner serving as liquidator their claim for allowance; and that the examiner had disallowed the claim, and petitioners asked that the court enter a decree approving and allowing the claim and directing its payment out of the general assets of the bank along with the payments to the depositors. It is the contention of appellees as petitioners in the court below that, as simple creditors of the Bank of Newton, they are entitled to share in the dividends declared by the receiver under the supervision of the court and in the distribution of the assets of the bank along with the depositors whose claims or deposits are guaranteed by the regular guaranty fund provided by the state banking law. It is the contention of the bank examiner that appellees have no right to share with the guaranteed depositors in the distribution of the assets until all of the guaranteed depositors are paid in full. There is no contention about appellant Anderson being in charge of the bank as liquidating officer, but the controversy arises over the position taken by appellant that the guaranteed depositors should first be paid out of the assets of the bank, and then, if there is any remaining assets, appellees, along with the other simple creditors of the bank, will participate in the distribution of such remainder. Appellees demurred to the ancillary petition; the chancellor overruled the demurrer; and it is this decree, overruling the demurrer and granting an appeal to settle the principles of the case, that is brought here for review.

Watkins & Watkins, of Jackson, for appellant. Baskin & Wilbourn, of Meridian, for appellees.

STEVENS, J. (after stating the facts as above). The only question for decision is whether the liquidator, in administering upon and winding up the estate of an insolvent banking establishment under the supervision of the chancery court, should distribute the assets pro rata to depositors and general creditors, or should he give priority to the guaranteed depositors. The answer to this question is determined by the provisions of the Bank Guaranty Act. The issue here raised is occasioned by different interpretations of the act itself. The statute we are now called upon to construe is lengthy, and is divided into 60 sections. About the only sections which shed any light upon this controversy are sections 23, 24, 36, 38, 59, and 60. By sections 23 and 24 a fund is created from assessments levied upon all state banks to guarantee all deposits not otherwise secured, or, to state differently, to indemnify simple or primary depositors. Section 38 defines the beneficiaries of the guaranty fund. Sections 36 and 60 provide for the distribution of the assets and the procedure for liquidating the bank's affairs. By section 59 double liability is imposed upon the stockholders in favor of depositors. A reading of this statute will show that depositors who are not otherwise secured are made safe in their deposits in two ways: First, by section 59 the stockholders are individually liable "for the benefit of the depositors in said bank to the amount of their stock at the par value thereof, in addition to the said stock. \* \* \* Such liability may be enforced in a suit at law or in equity by any such bank in process of liquidation, or by any receiver, or other officer succeeding to the legal rights of said bank." Secondly, by section 38 "all deposits not otherwise secured shall be guaranteed by this act." Under the procedure outlined by sections 36 and 60 the bank examiner, on finding a bank to be insolvent, is charged with the duty of taking charge of the institution and of winding up its affairs. In so doing the act provides that he shall issue to each depositor a certificate, evidencing the depositor's claim, bearing 6 per cent. interest per annum, and that in the insolvency proceedings dividends shall be declared upon these interest-bearing certificates. He is further charged with the duty of causing "notice to be given by advertisement in such newspaper as he may direct weekly, once a week for six consecutive weeks, calling on *all persons* who may have claims, but not including deposits shown by the books of the bank which shall prima facie be a proven claim against the bank, against such corporation, to present the same to the bank examiner and make legal proof thereof, at a place and within a time to be specified in this notice,

not less than 90 days from the date of the first publication of the notice." Also, "shall mail a similar notice to all persons whose names appear as *creditors* upon the books of the corporation." He is charged with the duty of auditing, allowing, or rejecting the claims of each and every "*claimant* or depositor." One sentence in section 60 declares that:

"Claims presented and allowed after the expiration of the time fixed in the notice to creditors shall be entitled to share in the distribution only to the extent of the assets in the hands of the bank examiner at the time claims are filed, without allowance for previous distribution."

He is required to make in duplicate "a full and complete list of the claims," and his "inventory and list of claims shall be open at all reasonable times to inspection." The act then expressly provides:

"At any time after the expiration of the date fixed for the presentation of *claims*, the bank examiner may, out of the funds remaining in his hands after the payment of expenses declare and pay one or more dividends to *creditors*, and as soon as practicable thereafter, he shall declare and pay a final dividend. \* \* \* Objections to any claims or deposits \* \* \* may be made by any party interested. \* \* \* Whenever the bank examiner shall have paid to each and every depositor and *creditor* of such corporation whose claim or claims as *such creditor* or depositor shall have been duly proven and allowed, the full amount of such claims, \* \* \* the bank examiner shall call a meeting of the stockholders," etc.

We have underscored words indicating that simple creditors are to be paid along with depositors. At the stockholders' meeting called by the examiner an agent or agents are to be selected to wind up the affairs of the corporation, and provision is made that if there are dividends or unclaimed deposits remaining unpaid in the hands of the examiner for six months after the order for final distribution, the same shall be deposited in one or more of the state depositories to the credit of the bank examiner "in trust for the several depositors in *and creditors* of the liquidated bank." Any interest earned by the money held by him in trust may be applied toward defraying the expense incurred in distributing unclaimed deposits or dividends "to the depositors *and creditors* entitled to receive the same." We quote so freely from the act itself for the purpose of directing attention to the fact that the Legislature used the word "*creditors*" advisedly. There would rarely be occasion for taking charge of any bank which is not insolvent. The main purpose accomplished by the guaranty feature is to indemnify simple depositors against loss brought about by insolvency. If then, the contention of appellant is sound, it would follow that in most instances the assets of insolvent banks would be consumed in first paying the guaranteed depositors, and the general creditors would get nothing. We do not believe the Legislature intended to produce such a result. The act expressly declares that the guaranty provided does not

apply to bills rediscounted, to bills payable, to money borrowed from its correspondents or others, or to deposits bearing a greater rate of interest than 4 per cent. per annum. The construction insisted upon by appellant would result practically in outlawing these large and honest obligations of the bank. If a bank in failing circumstances borrows large amounts from its correspondents to avert insolvency proceedings, these generous lenders and benefactors of the bank, in event of a crash, could receive no dividends until the depositors are paid in full. Even a judgment against the bank would avail nothing until the depositors are satisfied. It is a matter of common knowledge that a going banking establishment owes many legitimate obligations other than its liability to simple depositors. The point contended for would violate the time-honored principle of equity that if two creditors, one secured and the other unsecured, proceed against a certain fund or property of the joint debtor insufficient in value to pay both claims, and the secured creditor has a lien on other and different property of the common debtor, the unsecured creditor may generally compel the other first to exhaust his security. We do not say that the Legislature might not provide that the depositors should first be paid out of the bank's assets, or that the state guaranty fund should first pay the depositors and then be given a first lien upon the bank's assets. Our view is that the Legislature has not so provided, and did not so intend to provide.

The only authority in support of appellant's contention is certain language employed in the latter part of section 34 and the decision of the Oklahoma Supreme Court in *Lankford v. Oklahoma Engraving Co.*, 35 Okl. 404, 130 Pac. 278, and *Lankford v. Schroeder*, 147 Pac. 1049, L. R. A. 1915F, 623. There appears some difference between the Oklahoma and the Mississippi statutes. The opinion in the Oklahoma court in the first-named case says:

"Section 323, Comp. Laws 1909, provides that the state shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of any defunct bank or trust company, and all liabilities against the stockholders, officers, or directors thereof, and against all other persons, corporations, or firms; and that such liabilities may be enforced by the state for the benefit of the depositors' guaranty fund. The effect of this statute is to make the state a preferred creditor until any deficiency in the guaranty fund, created by the payment therefrom of the depositors of an insolvent bank, is made up. After that, any remaining assets of the bank become available for the purpose of being prorated and distributed among the general creditors of the bank."

The Oklahoma plan is for the depositor to be paid in cash out of the state guaranty fund or to have issued interest-bearing treasurer's certificates, and after the depositors are paid, the state officials take over the assets of the bank for the purpose of restoring to the treasury the money advanced



in paying depositors or of liquidating the treasurer's certificates. Under the Mississippi plan the officers in charge of the bank must first realize upon the assets of the bank and exhaust the double liability of the stockholders, and after he "shall have paid all funds so collected in dividends to the creditors, he shall certify all balances due on guaranteed deposits (if any exists) to the board of bank examiners, who shall then upon his approval of such certificates, draw checks upon the state treasury, to be countersigned by the auditor of state, payable out of the bank depositors' guaranty fund in favor of each depositor for the balance due on such proof of claim." By this plan the "balance due" is certified to and paid out of the guaranty fund, and the amount of this balance is not attempted to be ascertained, and cannot be ascertained until the assets of the bank have been realized upon and all creditors paid pro rata as far as the assets go. This is a simple but thoroughly equitable plan. By this plan the depositors are safe. They first have a right to share in the common assets. They are next given the right to proceed against the stockholders for the double liability provided by the statute, and then, if they are not made whole, any balance due is guaranteed by the state fund. If there is any delay, their certificates are bearing interest at 6 per cent., the lawful rate. They ultimately get every dime of their deposits, with legal interest. There is then a difference in the Oklahoma and the Mississippi statutes, and a difference in the procedure outlined. The fact that the chancery court is given jurisdiction to administer the insolvent estate and to allow or disallow claims of all creditors manifests a legislative intent to distribute as far as it will go the assets of the bank amongst all beneficiaries; first to do exact justice by and between all creditors. If it then develops that the depositors are not paid in full, they are given relief against the shareholders of the bank and the right to participate in the guaranty fund. This is consistent with the idea that the guaranty fund is *security* only.

There is one sentence in the latter part of section 34 that would appear to support appellants' contention. This, however, is a general statement, and if construed as giving the guaranteed depositor priority, it would be in direct conflict with other more specific language of the act, detailing the manner of liquidating the bank, paying creditors, and certifying the "balance due" to the state officials. There would be little use in making the stockholders liable to depositors, and there would be little meaning in this provision of the statute, if the construction contended for by appellant is to prevail. This construction in its practical operation would simply mean that the state would first pay the depositors and then claim a first lien upon the assets of the bank. In doing this the

state would certainly have no right of action against the stockholders. Section 59 does not undertake to make the stockholders liable to the state. The provisions of the statute whereby depositors receive interest-bearing certificates would mean little if the depositors have a right forthwith to demand and receive payment out of the guaranty fund. Such is not the scheme outlined by the statute itself.

Affirmed.

ETHRIDGE, J. (dissenting). I cannot concur in the conclusion reached by the majority in this case, nor in the reasoning which they employ to reach this conclusion. I think the facts are fairly stated in the majority opinion, and I accept that statement for the purposes of this opinion.

Looking at the act as a whole, and each of its several parts, I think it manifest that the purpose of the Legislature was to make a favored class of the common depositors who were not receiving interest on their deposits, and it was not the purpose of the act to place all the creditors of the bank on a parity in the distribution of the assets of the bank. The majority opinion practically reads out of the act the concluding portion of section 34 of the act which reads as follows:

"The fund provided for in sections 33 and 34 of this act shall be for the purpose of paying at once, and under the direction and control of the board of bank examiners of the depositors of banks that are declared insolvent by the board of bank examiners, or banks that shall fail. Said payments to be made in the manner provided by the said board of bank examiners. *All payments made to the depositors of banks under the provisions of this act shall be repaid out of the assets of any bank whose depositors are paid out of this fund, and shall be a first lien on said assets.*"

In my opinion this paragraph is to be borne in mind on reading each of the sections referred to in the majority opinion as fully as if written at large into the said sections at the appropriate place therein. Under the statutory rules of construction all parts of the law are to be considered together, and each part is to be given effect, and it is not necessary for the Legislature to rewrite a provision contained in one section into the other sections of the act. I think this portion of law has been disregarded and read out of the act by the majority opinion. In my opinion, it is the leading thought of the act, the keynote and corner stone of the entire act. What does it mean when it says that:

"All payments made to the depositors of banks under the provisions of this act shall be repaid out of the assets of any bank whose depositors are paid out of this fund, and shall be a first lien on said assets?"

It clearly means that the bank examiners are to pay the common depositors, whose claims appear free from suspicion, in full out of the guaranty fund and then to impress a first lien, that is to say, a lien supe-

rior to all other liens, upon the assets of the bank for the repayment of the fund taken from the depositors' guaranty fund. Surely my Brethren do not believe, and do not mean to say, that lien creditors of the bank are placed on an equal footing as to the assets of the bank with those who have no liens and who would, in the absence of this act, be postponed until the lien creditors were first satisfied. If the act was so construed by the Legislature passing it, they fail to express it in appropriate language, and I cannot think that it so intended. The only cases I have found bearing on the question are the Oklahoma cases construing the Oklahoma banking act, which support the view that I contend for in this case. See *Lankford v. Oklahoma Engraving & Printing Co.*, 35 Okl. 404, 130 Pac. 278, Columbia, etc., Co. v. U. S. F. & G. Co., 33 Okl. 535, 126 Pac. 556, and *Lankford v. Schroeder*, 147 Pac. 1049, L. R. A. 1915F, 623, in which cases the Supreme Court of Oklahoma, construing the Oklahoma statute, held that a state was a preferred creditor and that the claims of depositors must be paid in full before the common creditors of the bank were paid anything. The Oklahoma statute (Oklahoma Session Laws 1907-1908, p. 141, § 6) reads as follows:

"In the event that the bank commissioner shall take possession of any bank or trust company which is subject to the provisions of this act, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in section two, the amount necessary to make up the deficiency, and the state shall have for the benefit of the depositors' guaranty fund a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities may be enforced by the state for the benefit of the depositors' guaranty fund."

In my opinion, the Oklahoma statute, while somewhat more specific than our own statute, does not go any further in impressing upon the bank assets claims of the depositors and of the state where the moneys are paid out of the state guaranty fund. An attentive examination of the clause of our law just quoted in connection with the quoted act of Oklahoma will carry the conviction, in my opinion, that my construction is correct. Chapter 124, § 38, Laws of 1914, p. 123, reads as follows:

"Any bank doing business in this state under the general banking laws of Mississippi and any bank subject to the provisions of this act which may after the passage of this act be authorized to do business in this state, is hereby authorized and empowered to participate in the assessments and benefits and to be governed by the regulations of the bank depositors' guaranty fund of the state of Mississippi hereinafter provided for. Before any bank shall become a guaranteed bank within the meaning of this act a resolution of its board of directors, authorized by its

stockholders, duly certified by its president and secretary, asking therefor, in form to be provided by the board of bank examiners shall be filed with said board; who shall upon the filing of such resolution, authorize one of the examiners to make a rigid examination of the affairs of such bank, and if it is found to be solvent, to be properly managed and conducting its business in strict accordance with the banking law, such examiner shall after the bank shall have deposited with the state treasurer bonds or money hereinafter provided issue to such bank a certificate stating in substance that said bank has complied with the provisions of this act, and that its depositors are guaranteed by the bank depositors' guaranty fund of the state of Mississippi, as herein provided."

Section 34 provides that before receiving such certificate according to section 33 of the act the bank shall, in good faith, deposit and at all times maintain with the state treasurer, subject to the order of the bank examiners, certain bonds to the amount of \$500 for every \$100,000 or fraction thereof of the average deposits eligible to guaranty under the act, provided that each bank shall deposit not less than \$500, and then provides that in addition each bank shall pay in cash an amount equal to one-twentieth of 1 per cent. of the average deposits eligible to guaranty, less its capital and surplus, and the same shall be credited to the depositors' guaranty fund with the state treasurer, subject to the order of the bank examiners, and providing that the minimum in each case shall be not less than \$20. Then follows the clause as quoted in the concluding part of section 34.

Section 35 requires the bank examiners to make assessments during January of each year of one-twentieth of 1 per cent. of the average guaranteed deposits less capital and surplus, the minimum in each case to be \$20 until the total fund placed to the credit of the bank depositors' guaranty fund shall be approximately \$500,000 over and above the cash deposited in lieu of bonds. When said amount is reached, the assessments to be discontinued, but if it shall become depleted, new assessments shall be made until the amount is restored, and concludes:

"The treasurer of the state shall hold this fund in the state depository banks as provided by law governing these funds subject to the order of the board of bank examiners to be countersigned by the auditor of state for the payment of depositors of failed guaranteed banks as hereinafter provided. The state treasurer shall credit this fund quarterly with its proportionate share of interest received from state funds computed at the minimum rate of interest provided by law, upon the average daily balance of said fund."

All the funds provided in the above portions of the act are funds for the guaranty of bank deposits.

Section 38 of the act provides what class of deposits are guaranteed under the act, and provides that:

"All deposits not otherwise secured shall be guaranteed by this act. The guaranty as provided for in this act shall not apply to a bank's obligation as indorser upon bills rediscounted, nor to bills payable, nor to money borrowed from its correspondents or others, nor to

deposits bearing a greater rate of interest than four per cent. per annum. Each guaranteed bank shall certify under oath to the board of bank examiners at the date of each called statement the amount of money it has on deposit not eligible to guaranty under the provisions of this act, and in assessing such bank this amount shall be deducted from the total deposits."

It will be seen from this act that secured deposits and general creditors of the bank are not guaranteed, and it does not apply to deposits that bear a greater rate of interest than 4 per cent. per annum.

Section 59 of the act creates an additional liability against the stockholders above the value of their stock. The section in full reads as follows:

"The stockholders of every bank shall be individually liable, actually and ratably, and not for one another, for the benefit of the depositors in said bank to the amount of their stock at the par value thereof, in addition to the said stock; but persons holding stock as executors, administrators, guardians, or trustees, and persons holding stock as collateral security, shall not be personally liable as stockholders, but the assets and funds in their hands constituting the trust shall be liable to the same extent as the testator, intestate, ward or person interested in such trust fund would be, if living or competent to act; and the person pledging such stock shall be deemed the stockholder and liable under this section. Such liability may be enforced in a suit at law or in equity by any such bank in process of liquidation, or by any receiver, or other officer succeeding to the legal rights of said bank."

No creditor except the depositor has any right to participate in the funds collected under this section, and this, in my opinion, is a strong argument against the right of the general creditors to participate in the assets of the bank until the depositors have first been paid. It was not the purpose of the Legislature to impose this double liability for the protection of depositors on the stockholders until the assets of the bank had been exhausted in the payment of guaranteed deposits.

Section 36 of the act deals with the liquidation of the bank by the bank examiners without court proceedings. Of course, in considering this section, we must consider that if the assets are ample to pay the guaranteed deposits and the other depositors, and then to pay, either in whole or in part, the other creditors, the bank examiners are to pay those claims, but it does not, in my opinion, warrant the construction that the general creditors share alike with the depositors out of the assets of the bank. On the contrary, I think the concluding portion of the section supports my contention. I quote as follows:

"Provided, however, that whenever the board of bank examiners shall have paid any dividend to the depositors of any failed bank out of the bank depositors' guaranty fund, then all claims and rights of action of such depositors so paid shall revert to the board of bank examiners for the benefit of said bank depositors' guaranty fund, until such fund shall have been fully reimbursed for payments made on account of such failed bank, with interest thereon at three per cent. per annum."

Of course, the Legislature in dealing with the liquidation of the bank must deal with the situation that might easily arise at some critical period of the state where the depositors' guaranty fund would not at once pay off the depositors. If a large number of banks should become insolvent within a short time of each other and owed the depositors large sums, the guaranteed fund would not be adequate to pay these in full, and the depositors would have to await liquidation of the assets of the bank, and would not, by reason of this fact, surrender any of their rights to have their claims first paid out of this fund.

Section 60 of the act is a lengthy section, but seems to provide for the liquidation of banks under the supervision of courts, and, in substance, is not materially different from section 36. None of the provisions (referred to in the majority opinion), of section 60, in my judgment, warrants the conclusion that the common creditors have equal rights with the depositors and with the secured creditors. Of course, a depositor is a creditor and the word "creditor" may have a different application in its use in different provisions of the statute. Both section 36 and section 60 recognize the fact that the common secured creditors have rights against the assets of the bank, and the only difference in my opinion and the majority opinion on this is as to whether such rights are coextensive with the rights of depositors or whether they are postponed until the depositors are first paid. A significant feature of section 60 is that in requiring the bank to give notice to creditors to present claims that such notice is not required to include depositors shown by the books of the bank, which depositors so shown are *prima facie* correct. The scheme is elaborate, and provides for a contest of claims both of deposits and other claims. Necessarily this must be so; otherwise a fictitious depositor, appearing on the books of the bank, would absorb the assets of the bank to the detriment of the other depositors and other creditors of the bank. The act also recognizes that there would be cases in which the depositors would not promptly present the claims and draw them from the fund, and provided that in such case, if they were not drawn within a certain period of time, they should cease to draw interest which was manifestly just, considering the rights of other creditors of the bank. Of course, where it was manifest to the bank examiner in administering the bank's affairs that the funds in his hands and the assets of the bank would pay, not only the deposits, but also the creditors, either in whole or in part, then dividends could be paid common creditors in such situations. If the act is looked at from this angle, many of the provisions which seem to convince the majority that the secured general creditors are to share in the dividends can be explained.

There is another observation I desire to make, and that is that the act in question imposes burdens on innocent banks in no wise responsible for the failure of the bank that becomes insolvent and fails. Each bank in the state is required to contribute whatever amount called for by the bank examiners, to be paid into the guaranty fund up to the required amount. In my opinion, the Legislature did not intend to impose this burden on other banks unless the assets of the bank would not pay the depositors of the bank in full. The construction put upon the act in the majority opinion materially and largely increases this obligation of other innocent banks to assume and pay the debts of other banks over which it had no control or supervisory power. Such a requirement would be manifestly unjust, in my opinion. The object of the bank guaranty fund was to preserve the public credit and the financial stability of the banking interest, because it is well known that if a bank failure occurred where it has large deposits, it carries financial ruin to many other innocent business interests of the community. Prior to the passage of the banking act there had been many failures of many banks in this state, and people who had placed their funds in the banks not for the purpose of making a profit on the funds but for the convenience of carrying on their own business were swept into the vortex of ruin. The conditions found on investigation were such that it was shown that many banks had been doing a banking business practically on no capital at all, and as long as financial conditions were prosperous in the state this was not made manifest, and was not known to the public generally. With the advent of the cotton pest, the boll weevil, came a stringency in financial and business circles that brought these insolvent banking institutions to an untimely end, and left many people who supposed that they had means deposited in the bank insolvent and unable to meet business demands. It was this situation that prompted the Legislature to provide for the guaranty of deposits and to make of depositors a favored class. It was not the purpose of the Legislature, in my opinion, to guarantee the general creditors who did business with the bank with the view of making profit from such business dealings. Many restrictions are found in the act on the banking business as applied to deposits, but few restrictions as applied to general business dealings with others than depositors. For instance, no depositor can receive more than 4 per cent. interest without losing his right as a guaranteed depositor and taking his place with the common creditors, while the common creditors may receive, if the bank will pay, as high as our highest legal rate, to wit, 8 per cent. Under the construction adopted, these heavy obligations bearing high interest rates may be, in practical effect, imposed upon solvent and

responsible banks of the state who, perhaps, would not, but for this compulsion, pay anything like 6 or 8 per cent. I am therefore of the opinion that the court below erred in allowing the claim presented.

COOK, P. J. (specially concurring in the dissenting opinion). I believe that the foregoing dissenting opinion prepared by Brother Ethridge correctly interprets the purposes of the guaranty banking law. To give effect to the entire act it is very clear to my mind that the common depositors, as defined by the act, are necessarily preferred creditors. In other words, that class of creditors are first paid in full out of the guaranty fund, but if the guaranty fund is not sufficient, the entire assets of the bankrupt bank are impounded to pay the balance due to the common depositors. If the majority of the court are right section 34 of the act means nothing at all.

I fear that the court has written a statute, rather than enforced a statute already written. The history of banking just preceding the enactment of this statute explains and gives life to the thought reflected in the act. The money lenders, whether they were other banks or men who knew what they wanted, always absorbed the assets of insolvent banks, while the less capable depositors were left with the bag to hold, and financial ruin followed in the community affected by the failure of the bank. It is my opinion that the act in question reflects two dominant purposes, to wit: (1) The supervision and control of banking; (2) the protection of unsecured depositors.

The first purpose was to prevent wild-cat banking, while the second purpose was to pay the depositors in case there was a disaster.

(113 Miss. 863)

YAZOO & M. V. R. CO. v. HERRIN.  
(No. 17182.)

(Supreme Court of Mississippi. In Banc.  
April 9, 1917.)

1. RAILROADS — 73(4) — CONTRACTS — CONSTRUCTION.

Plaintiff entered into an agreement with a railroad company, whereby he was licensed to place a track scale in the track of the company. The contract provided that the scale should be constructed at the sole expense of plaintiff under the supervision of the company's roadmaster, that the company could be allowed to use the scale free of charge whenever it should desire, that plaintiff should indemnify the company for any expense or damage it might incur or suffer, caused by the construction, use, or maintenance of the scale, and that plaintiff should remove the scale within 30 days after being notified in writing by the company to do so, and if he should fail to comply with such request, the company should have the right to remove the scale at the risk and expense of plaintiff. Held, that the contract did not give plaintiff any right to maintain the scale for a term of at least 30 days, and the railroad company, without being guilty of a conversion, might, without notice, remove the scale, although in such case plain-

tiff would not be liable for the expense of removal.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 182.]

## 2. RAILROADS §73(4) — CONTRACTS — CONSTRUCTION.

In such case, the destruction or loss of the scale will not be regarded as tortious if it was necessary to the protection of the property of the railroad company or the safe operation of the road.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 182.]

Ethridge, J., dissenting.

Appeal from Circuit Court, Coahoma County; T. B. Watkins, Judge.

Action by W. K. Herrin against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Mayes & Mayes, of Jackson, for appellant. Cutrer & Johnston, of Clarksdale, for appellee.

COOK, J. In July, 1902, appellant made a contract with appellee, in writing, which contract is in the following words, viz.:

"This agreement made and entered into this tenth day of July, A. D. 1902, by and between the Yazoo & Mississippi Valley Railroad Company, party of the first part, and W. K. Herrin, of Robinsonville, Mississippi, party of the second part, witnesseth: That the party of the first part hereby grant unto the party of the second part license and permission to place a railroad track scale in the track of the party of the first part at Robinsonville, Miss., under and subject to the following conditions and stipulations:

"1. The said track scale shall be constructed at the sole expense of the party of the second part and under the supervision of the roadmaster of the party of the first part and to his satisfaction, and at such place as he may direct, and at such time and in such manner as not to interfere with the operation of the railroad of the party of the first part.

"2. The party of the second part hereby agree to permit the party of the first part to use the said scale, free of charge, whenever it may desire.

"3. The party of the second part hereby agree to indemnify the party of the first part for any expense or damage it may incur or suffer, caused by the construction, use or maintenance of the said scale.

"4. The party of the second part hereby agree to take up and remove the said scale within thirty (30) days after being notified in writing by the party of the first part to do so, and if the party of the second part shall fail to comply with such request, the party of the first part shall have the right to take up and remove the said scale at the risk and expense of the party of the second part.

"5. This agreement shall be binding on the heirs, executors, administrators and assigns of the party of the second part.

"In testimony whereof, the parties hereto have caused these present to be executed in duplicate the day and year first above written. The Yazoo & Mississippi Valley R. R. Co., by J. T. Harahan, Second Vice President. W. K. Herrin. Form Approved B. L."

Shortly after the execution of this contract, in February, 1903, Mr. Herrin installed a railroad track scale on the track of the appellant railroad company. The scale was in-

stalled under the supervision of the appellant, and the cost of its emplacement amounted to \$1,995.35. The scales were thereafter used by the firm of Herrin Bros., of which firm appellee was the senior member. The business of Herrin Bros. was located at Robinsonville, in Tunica county, but W. K. Herrin, appellee here and plaintiff below, resided at Clarksdale, in Coahoma county. It seems, that after the scales had been erected, Mr. Herrin, for a valuable consideration, assigned to Abbey & Leatherman, planters and merchants, located at Commerce, a few miles from Robinsonville, a half interest in the scales. It appears that some time in September or October, 1909, the railroad company decided to remove the scales, and after making some effort to inform Abbey & Leatherman of their purpose, without results, the employees of the railroad removed the scales, over the protest of Mr. Herrin's representative. Mr. Herrin had no personal knowledge of the removal of the scales until after they were removed, or while the removal was going on. This suit was instituted by Mr. Herrin to recover damages for the removal of the scales. We judge from the averments of the declaration and the briefs of counsel that the plaintiff proceeded upon the theory that the railroad company—

"willfully, maliciously, knowingly, intentionally, and with the purpose to oppress and injure the plaintiff and the said uses, with force and arms entered upon the said railroad track scale aforesaid, belonging to said plaintiff aforesaid, \* \* \* and then and there undermined, uprooted, broke to pieces and otherwise destroyed and damaged and converted and disposed of to its own use the said scales," etc.

We gather from the evidence that for some months prior to the removal of the scales the scales had not been used by Mr. Herrin to any considerable extent—only a few times at best, either because of a wreck, or derailment, near or on the scales, switching charges, or lack of occasion for using the scales. The precise reason is not clear. Appellee was advised that the appellant was removing the scales from its right of way, and filed a bill in the chancery court, praying for an injunction restraining appellant from removing the scales, but the work was completed before the injunction was served; therefore this suit.

Appellee refused to take possession of the scales and the material used in its emplacement, but it seems that later a formal tender was made and refused.

To get the right start, it is necessary to understand the contract under which Mr. Herrin installed the scales on the right of way of the railroad company, a public service corporation. It will be noted that the language employed in the granting clause of the contract defines the thing granted, viz.:

"License and permission to place a railroad track scale in the track of the party of the first part at Robinsonville."

After this follows the conditions imposed upon the grantee in consideration of this "license and permission." The conditions in the first paragraph are that the scale shall be constructed under the supervision of representatives of the grantor and at the sole expense of the grantee. Furthermore, the scales were to be constructed at the time and at the place and in such manner as the grantor deemed best for the free exercise of the grantor's business as a common carrier. Again, the railroad reserved the right to use the scales, free of charge, whenever it desired to do so. Again, the grantee agreed to indemnify the grantor from any expense or damage it might incur or suffer from the construction, use, or maintenance of the scales. Again, the grantee agreed to take up and remove the scale whenever notified, and within 30 days, at his own expense, and, failing to do so, the grantor reserved the right to remove the scale at the expense of the grantee. Lastly, it is provided that the agreement shall be binding on the heirs, executors, administrators, and assigns of the grantee, Mr. Herrin. There is a notable absence of any covenants on the part of the grantor, after granting Mr. Herrin the privilege to construct, at his own expense and according to the directions of the railroad company, a track scale. There is not a word in the entire contract fixing the time when the license shall begin or terminate, but Mr. Herrin is required to remove the scales within 30 days after notice to do so—and if he fails to do so, the railroad company expressly reserved the right to remove the scales at Mr. Herrin's expense and risk.

[1, 2] In this case, it appears that the company did not give Mr. Herrin any notice to remove the scales, but undertook the job itself. Not having given the notice, the expense of removing the scales must be borne by the company. We can see nothing in the contract requiring 30 days' notice of the termination of the contract. By its failure to give the notice the expense and risk of the removal was assumed by the company; and, if there was a tortious destruction or injury to the property, that would be a conversion, but destruction or loss will not be regarded as tortious if it was necessary to the protection of the property of the company, or to the safe operation of the road. 38 Cyc. 2017.

Mr. Herrin proceeded upon the idea that the contract conveyed to him at least a 30 days' term; that the company obliged itself to give him 30 days' notice; that he had the right to use the scales for 30 days after notice. If this view of the contract is correct, no matter what may have been the exigencies, the railroad company would be guilty of conversion if it removed the scales without giving the notice.

It seems to us that in interpreting this contract, we must necessarily take into consideration the fact that one of the parties to

same was a public service corporation, controlled by duties and obligations which it owed to the entire public. When we do this, we can understand why the contract was a one-sided contract—why all of the conditions were imposed upon Mr. Herrin and none on the common carrier.

Inasmuch as this case was conducted upon the mistaken theory that Mr. Herrin had a term of at least 30 days, and when the railroad company removed his scales without notifying him, they thereby converted his property, there was no serious effort to prove that the property was destroyed or seriously damaged. Mr. Herrin never examined the property after it was removed—he refused to have anything to do with it—he considered the scales as the property of the company. This is made manifest by the fact that Mr. Herrin resorted to injunction proceedings at once when he was informed that the railroad company was removing the scales. We think the railroad company acted advisedly when it entered into the contract, and, no doubt, carefully refrained from giving Mr. Herrin any fixed term, however short. It realized that something might occur, at any moment, which would render it absolutely necessary to assume undivided control of all of its equipment and right of way. But whether the company was so far-seeing or not, there is nothing in the contract which required the company to terminate the contract by any sort of notice. The company reserved the right to require Mr. Herrin to remove the scales, at his own expense, within 30 days. It did not see fit to avail itself of this right, and therefore it cannot compel Mr. Herrin to pay the cost of removal. The evidence does not support the theory of conversion, and therefore the judgment of the circuit court will be reversed.

Reversed and remanded.

ETHRIDGE, J. (dissenting). I am unable to concur in the opinion or the result reached in this case. This is a suit by the appellee for the conversion of railroad scales installed by the appellee on the side track of appellant under a contract stated in the majority opinion, and the plaintiff was awarded a judgment in the court below for the value of the scales installed under this contract and taken out by the railroad company without notice to the appellee and over his protest, and, after having notice that the plaintiff had applied for and obtained an injunction in the chancery court against its so doing. I deem it unnecessary to set out the contract in this dissenting opinion as it has been set out in the majority opinion, but I desire to refer to clause 4 of this contract, which reads as follows:

"The party of the second part hereby agrees to take up and remove the said scale within thirty (30) days after being notified in writing by the party of the first part to do so, and if the party of the second part shall fail to comply with such request, the party of the first part

shall have the right to take up and remove the said scale at the risk and expense of the party of the second part."

Let us examine this clause and see when the right of the railroad company to remove the scales accrued. Under the terms of this clause the party of the second part was to have 30 days after being notified in writing by the party of the first part to do so, and then if the party of the second part, the appellee in this case, had failed to comply with the request, then, and not until then, would the railroad company have the right to remove them at all. This contract was the common contract made by the different railroad companies of the country in conducting its business, and is in aid of its duty as a common carrier. By means of this contract the railroad company gets the scale constructed in its track at the expense of another party, and gets all the benefit of weighing its own cars and freight at such scale as if it were constructed by the company itself. But for this contract, and but for the scales being constructed by the plaintiff, it would have been either the duty of the railroad company to itself construct suitable scales or to move the loaded cars from the point in question to some other point for the purpose of being weighed. It is always necessary for the railroad company and shipper each to know what the weight of the shipment is, so that the rate adopted by the company under its tariffs may be applied to the shipment and its freight charges prepaid, or paid without dispute or litigation or vexatious misunderstanding and disagreement. A contract of the nature involved here is highly beneficial to both the contracting parties, and it certainly was intended under this contract that it should exist for some time. It might be a 30-day period, but it certainly could not be contended, under the contract in question, that the railroad company could have proceeded to remove these scales the day following their construction. The only right that the plaintiff would secure by constructing a pair of expensive scales, costing approximately \$2,000, in this case was the right to operate them at least for a period of 30 days, and that they could not be disturbed or interfered with until he had 30 days' notice in which to make his arrangements and take care of his property. The plaintiff in his declaration charges:

"That the railroad company wholly damaged and destroyed and converted and disposed of to its own use plaintiff's scales in question."

The railroad merely filed a plea of the general issue; and the proof that there is no merit in the contention announced by the majority opinion is that the railroad company itself did not present, claim, or insist upon any such theory, but contends for the right to remove the scales without the 30-day notice upon the theory of a necessity by reason of its being a common carrier, and that there was a defect in the scales dangerous to their operation. There are cases in which this

court may rightfully assume that parties have misconceived their rights under a contract and may proceed properly to declare the law contrary to the theory adopted by the litigants in litigating their differences, but a great railroad company, like the appellant, having enormous property interests and doing business in three or more states, and having on its legal staff the most eminent counsel to be found in the land, who certainly are capable of understanding and presenting the rights of the appellant, should cause the court to hesitate long and ponder well before it adopts the theory of the case not contended for, and which is tantamount to exercising a guardianship over the rights of such company, in my opinion. It must be remembered that in dealing with contracts of this kind, and in drafting them, that the company were advisedly inserting a limited period of time in which the right granted could be revoked. If the company intended to reserve the right to revoke at any time, certainly it would have inserted language calculated to convey that meaning to the party with whom it was contracting. The company in this case undertook to show that it gave a notice to another party whom it supposed to have held the right to these scales, but it had a copy of this contract somewhere in its files, and it would have been an easy matter for the company to determine who the proper party was. It certainly made no contract with any one other than the appellee herein, and it never contended, but practically admits throughout the case, both below and here, that the contract could not be terminated under 30 days' notice, except in case of some pressing necessity. In other words, they do not plant themselves at all upon a construction of the contract adopted in the majority opinion. If the construction adopted in the majority opinion be correct, then, in a contract of tenancy at will the landlord could go and dispossess the tenant without any notice whatever, throw his household effects into the street, and, unless some of them were damaged or broken by so doing, he would not be responsible.

I think the present case shows a most deliberate and willful violation of the plaintiff's rights by the appellant; and, while the court below instructed the jury that punitive damages could not be allowed, and that question (in the nature of this appeal) is not involved here, still, I think it was a case for a proper granting of instructions on punitive damages. An attentive examination of the instructions requested by the railroad company appearing in the record will fail to disclose a request for an instruction submitting the theory upon which this case is decided. It is well settled that an unauthorized and unlawful taking charge of a person's property amounts to a conversion. Judge Cooley, in discussing this question in his valuable work on Torts (3d Ed.) vol. 2, p. 859, discusses this subject as follows:



**"What Constitutes Conversion.**—Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion. "The action of trover being founded on a conjoint right of property and possession, any act of the defendant which negatives or is inconsistent with such right amounts, in law, to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is in law a conversion, be it for his own or another person's use." Warner, J., in *Liptrot v. Holmes*, 1 Ga. 381, 391. "Conversion which will sustain trover must be a destruction of the plaintiff's property, or some unlawful interference with his use, enjoyment, or dominion over it; an appropriation of it by the defendant to his own use, or to the use of a third person, in disregard or defiance of the owner's rights; or a withholding of possession under a claim of title inconsistent with the title of the owner." *Bolling v. Kirby*, 90 Ala. 215, 7 South. 914, 24 Am. St. Rep. 789. While, therefore, it is a conversion where one takes the plaintiff's property and sells or otherwise disposes of it, it is equally a conversion if he takes it for a temporary purpose only, if in disregard of the plaintiff's right. Therefore, if one hire a horse to go to one place, and drive him to another, this is a conversion, though he return him to the owner. "The word conversion, by a long course of practice, has acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them." Martin, B., in *Burroughes v. Bayne*, 5 H. & N. 296, 302. "Any asportation of a chattel for the use of a defendant or a third person amounts to a conversion, for this simple reason: That it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times, and in all places." *Laverty v. Snethen*, 68 N. Y. 522 (23 Am. Rep. 184)."

In 28 Am. & Eng. Enc. Law (2d Ed.) p. 679, the rule is stated as follows:

"It may be stated as a general rule that every act of control or dominion over personal property without the owner's authority, and in disregard and violation of his rights, is, in contemplation of law, a conversion."

At page 683 of the same work, under the head of "Effect of Return to, or Subsequent Acquisition of Possession by, Owner," the following appears:

"It seems to be well settled that trover for a conversion may be maintained, in case of an unlawful taking or exercise of dominion over the chattels of the plaintiff, though the property may have been returned to the plaintiff and accepted by him prior to the institution of the action, or though he may have reacquired possession by purchase from a third person or by means of an action of replevin."

In the case of *Johnson v. White*, 13 Smedes & M. [Miss.] 584, p. 588, Justice Sharkey, speaking for this court, used the following language:

"But when goods are tortiously taken, the statute of limitations begins to run from the taking, for the tortious act is of itself a conversion. So an unlawful disposition of property rightfully in possession is a conversion, and the statute begins to run from the time of such disposition. And it is immaterial whether the plaintiff knew of the conversion or not, if no fraud was practised to prevent his knowledge. *Angell on Limitations*, 327, 328; *Read v. Markle*, 3 Johns. [N. Y.] 523."

It seems to be thoroughly settled, and without dissent so far as I know, that a willful and wrongful taking possession of a person's property is a conversion, and that after taking the property and dealing with it as though it were one's own, a person cannot then tender back the property and claim that he is only liable for the damage done to the property. Having willfully elected to exercise ownership over the property, he cannot escape the responsibility for the value of the property. In the present case a railroad company sent its crew to take up this scale, without any notice whatever to the owner of the scale. The owner protested vigorously against such wrongful act, went so far as to procure an injunction, which the majority opinion says was not served at the time of the taking of the scale, but which the proof shows that the railroad company, through its agents, had notice that the injunction had been granted, the proof showing that the party in charge, on getting such notice from the owner, went to the agent of the company at the place where the work was being done, and the agent told him he had not received notice, but no inquiry was made by the agent or employee of the road to see whether or not an injunction had in fact been issued. It in fact had been issued, as I understand the record, and, over both protest of the owner and a knowledge of his efforts to protect his rights under this contract, the railroad company proceeded to tear up and throw out of its track the scales of the plaintiff, and to take away a portion of it. I do not think a railroad can take such portion of a scale as it may desire and tender back to the owner the balance. Having taken part of it, I think it was bound for the value of the entire property. The proof in this case abundantly shows that the property was valued at as much as the judgment of the court amounted to, and I see no reason why this judgment should be disturbed. If the construction adopted by the majority becomes the accepted law of this state, then it will be impossible to have those tracks installed. It will impose on a railroad company the duty of installing such scales at many points where it does not now install them at its own expense, and will impose a burden upon the railroad company, and, at the same time, will deprive people of the right and privilege of having scales at small places where freight may be weighed, so the shipper may see that the weight of the railroad company is correct. It is inconceivable to me that, with the interpretation placed upon this contract by the majority opinion, any person not afflicted with thirty-second degree idiocy or 18-carat insane delusions would install, at a great expense, scales in a railroad spur or side track that may be thrown out by the company at will. Necessarily much of the material used in constructing a scale is wasted and destroyed in the removal thereof. The evidence in this



case shows that the greater part of expense of installing such scales is lost and destroyed in the removal. The railroad company in this case wins a victory which it will live to regret.

(113 Miss. 331)

**YAZOO & M. V. R. CO. v. DUKE.**  
(No. 18827.)

(Supreme Court of Mississippi, Division A.  
March 26, 1917.)

**CARRIERS §277(6) — CARRIAGE OF PASSENGERS — PERFORMANCE OF CONTRACT OF TRANSPORTATION — LIABILITY OF CARRIER — DAMAGES — EXCESSIVE DAMAGES.**

Where a train employé told plaintiff that her station was reached, and assisted her from the train at the wrong station, and the train left before she could board it, whereupon the station agent took her to his home, where she spent the night, and on the next day she was carried to her destination by another train, an award of \$500 damages was excessive and would be reduced to \$200, by requirement of remittitur.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1084.]

Appeal from Circuit Court, Carroll County;  
H. H. Rodgers, Judge.

Action by Evelyn Duke against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed on condition that remittitur be filed.

Appellee, plaintiff in the court below, a minor 16 years of age, purchased a ticket which entitled her to passage on appellant's train to Charleston, Miss. In her declaration she alleges that she was sitting in the passenger coach when the train came to a stop, and one of the employes of the company approached her seat, and, without announcing the name of her station, picked up her baggage and told her that this was the place for her to get off the train, and that, relying upon this statement, appellee disembarked, and found after the train had departed that she had been put off at the wrong station. The station agent sent her to the home of his brother, where she spent the night with the family, and next morning was accompanied to the station, boarded another train, and carried to her destination. There was no proof of mistreatment or exposure or any hardship or lack of comfort suffered by the appellee. She recovered a verdict for \$500, and the railroad company appeals.

Mayes, Wells, May & Sanders, of Jackson, for appellant. T. O. Yewell, of Carrollton, for appellee.

**SMITH, C. J.** The amount of damages awarded is excessive within the rule requiring that the judgment of the court below be reversed unless a remittitur is entered. Consequently if a remittitur of \$300 is entered the judgment will be affirmed; otherwise it will be reversed, and the cause remanded.

**THOMAS BROS. v. VOORHEES.**  
(No. 19189.)

(Supreme Court of Mississippi. April 16, 1917.)  
Appeal from Circuit Court, Coahoma County;  
W. A. Alcorn, Judge.  
Action by Thomas Bros. and Mrs. Charles Voorhees. Judgment for the latter, and the former appeal. Dismissed.

PER CURIAM. Dismissed.

**MOUNGER & FORD v. BALL MERCANTILE CO.** (No. 19016.)

(Supreme Court of Mississippi. April 9, 1917.)  
Appeal from Circuit Court, Marion County;  
A. E. Weathersby, Judge.  
Action between Mounger & Ford, claimants, and the Ball Mercantile Company. Judgment for the latter, and the former appeal. Affirmed.  
Mounger & Ford, of Columbia, pro se. Davis & Langston, of Columbia, for appellee.

PER CURIAM. Affirmed.

**SHIRLEY v. CITY OF GULFPORT.**  
(No. 18944.)

(Supreme Court of Mississippi. April 9, 1917.)  
Appeal from Chancery Court, Harrison County;  
J. M. Stevens, Chancellor.  
Suit between George W. Shirley and City of Gulfport. Decree for the latter, and the former appeals. Affirmed.

T. M. Evans, of Gulfport, and L. Brame, of Jackson, for appellant. T. A. Wood and Jno. L. Heiss, both of Gulfport, for appellee.

PER CURIAM. Affirmed.

**LADNER v. SMITH.** (No. 18964.)

(Supreme Court of Mississippi. March 26, 1917.)

Appeal from Circuit Court, Lamar County;  
A. E. Weathersby, Judge.  
Action between J. W. Ladner and J. G. Smith. Judgment for the latter, and the former appeals. Appeal dismissed.

Salter & Hathorn, of Purvis, for appellant. T. W. Davis, of Purvis, for appellee.

PER CURIAM. Dismissed.

**DORMAN v. NEW ORLEANS, M. & C. R. CO.**  
(No. 19150.)

(Supreme Court of Mississippi. April 9, 1917.)  
Appeal from Circuit Court, Neahoba County;  
J. D. Carr, Judge.  
Action between R. L. Dorman and the New Orleans, Mobile & Chicago Railroad Company. Judgment for the latter, and the former appeals. Dismissed.

PER CURIAM. Dismissed.

**KANTROVITZ v. GREENWOOD COMPRESS & STORAGE CO.** (No. 19035.)

(Supreme Court of Mississippi. April 9, 1917.)  
Appeal from Chancery Court, Leflore County;  
Joe May, Chancellor.  
Suit between J. Kantrovitz and Greenwood

Compress & Storage Company. Decree for the latter, and the former appeals. Affirmed.

M. B. Grace, of Birmingham, Ala., for appellant. S. R. Coleman, of Greenwood, for appellee.

PER CURIAM. Affirmed.

**WILLIAMS v. WILSON.** (No. 19190.)

(Supreme Court of Mississippi. April 16, 1917.)

Appeal from Circuit Court, Lawrence County; A. E. Weathersby, Judge.

Action between Earl Williams and Allie Wilson. Judgment for the latter, and the former appeals. Dismissed.

PER CURIAM. Dismissed.

**FULLERTON v. HINTIN BROS. LUMBER CO.** (No. 19184.)

(Supreme Court of Mississippi. April 16, 1917.)

Appeal from Circuit Court, Lamar County; A. E. Weathersby, Judge.

Action between S. H. Fullerton and the Hintin Bros. Lumber Company. Judgment for the latter, and the former appeals. Dismissed.

PER CURIAM. Dismissed.

**YAZOO & M. V. R. CO. v. HAWES.** (No. 19186.)

(Supreme Court of Mississippi. April 16, 1917.)

Appeal from Circuit Court, Warren County; E. L. Brien, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and Hattie Beard Hawes. Judgment for the latter, and the former appeals. Dismissed.

PER CURIAM. Dismissed.

**FLAKE v. MILES et al.** (No. 18870.)

(Supreme Court of Mississippi. April 9, 1917.)

Appeal from Chancery Court, Yalobusha County; F. H. Montgomery, Special Chancellor.

Suit between Mrs. M. Flake and Mrs. A. H. Miles and others. Decree for the latter, and the former appeals. Affirmed.

W. J. Lamb, of Corinth, for appellant. Creekmore & Stone, of Water Valley, for appellees.

PER CURIAM. Affirmed.

**RUSH v. BANK OF COLDWATER.** (No. 18961.)

(Supreme Court of Mississippi. April 9, 1917.)

Appeal from Chancery Court, Tate County. Suit between Phil A. Rush and Bank of Coldwater. Decree for the latter, and the former appeals. Affirmed.

J. F. Dean, of Senatobia, and G. G. Lyell, of Jackson, for appellant. Holmes & Sledge, of Senatobia, for appellee.

PER CURIAM. Affirmed.

**GAMBRELL v. LEVY, SOLINSKY & ZANDER.** (No. 19684.)

(Supreme Court of Mississippi. April 9, 1917.)

Appeal from Circuit Court, Smith County. Action between J. D. Gambrell and Levy, Solinsky & Zander. Judgment for the latter, and the former appeals. Motion to dismiss appeal sustained.

W. S. Welch, of Laurel, for the motion.

PER CURIAM. Motion to dismiss appeal sustained.

**FITHIAN LAND CO. v. JOHNSTON,** Revenue Agent. (No. 19018.)

(Supreme Court of Mississippi. April 2, 1917.)

Appeal from Circuit Court, Quitman County; W. A. Alcorn, Judge.

Action between the Fithian Land Company and J. O. Johnston, Revenue Agent. Judgment for the latter, and the former appeals. Affirmed.

Denton & Boone, of Marks, for appellant. P. H. Lowrey, of Marks, for appellee.

PER CURIAM. Affirmed.

**MACKEY v. VALLEY MOTORCAR CO.** (No. 19106.)

(Supreme Court of Mississippi. April 2, 1917.)

Appeal from Circuit Court, Coahoma County; W. A. Alcorn, Judge.

Action between C. E. Mackey and the Valley Motorcar Company. Judgment for the latter, and the former appeals. Appeal dismissed.

W. B. Miller, of Clarkdale, for appellant. Vardaman & Vardaman, of Jackson, for appellee.

PER CURIAM. Appeal dismissed.

**FLOYD v. W. T. RALEIGH MEDICAL CO.** (No. 19065.)

(Supreme Court of Mississippi. April 2, 1917.)

Appeal from Circuit Court, Tishomingo County; Claude Clayton, Judge.

Action between R. P. Floyd and the W. T. Raleigh Medical Company. Judgment for the latter, and the former appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.

**LUKE v. SPALDING MFG. CO.** (No. 19063.)

(Supreme Court of Mississippi. April 2, 1917.)

Appeal from Circuit Court, Neshoba County; J. D. Carr, Judge.

Action between W. I. Luke and the Spalding Manufacturing Company. Judgment for the latter, and the former appeals. Dismissed.

PER CURIAM. Dismissed.

**DURHAM v. JOHNSON.** (No. 19089.)

(Supreme Court of Mississippi. April 9, 1917.)

Appeal from Chancery Court, Pearl River County; D. M. Russell, Chancellor.

Suit between Mrs. Estelle H. Durham and R. C. Johnson. Decree for the latter, and the former appeals. Affirmed.

J. G. Napier, of Poplarville, and John T. Haney, of Hattiesburg, for appellant. O. M. McConnell and J. M. Shivers, both of Poplarville, for appellee.

PER CURIAM. Affirmed.

**HENSLEY v. STATE.** (No. 19570.)

(Supreme Court of Mississippi. April 9, 1917.)

Appeal from Circuit Court, Winston County; H. H. Rodgers, Judge.

I. C. Hensley was convicted of cruelty to animals, and he appeals. Affirmed.

Gully &amp; Brantley, of Louisville, for appellant. Earle N. Floyd, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

**MCCULLAR v. STATE.** (No. 1906.)

(Supreme Court of Mississippi. April 9, 1917.)

Appeal from Circuit Court, Yalobusha County; E. D. Dinkins, Judge.

Curtis McCullar was convicted of manslaughter, and he appeals. Affirmed.

Creekmore &amp; Stone, of Water Valley, for appellant. Frank Roberson, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

**WISE BROS. v. S. F. BOWSER & CO., Inc.** (No. 18975.)

(Supreme Court of Mississippi. April 9, 1917.)

Appeal from Circuit Court, Yazoo County; W. H. Potter, Judge.

Action between Wise Bros. and S. F. Bowser &amp; Co., Incorporated. Judgment for the latter, and the former appeals. Affirmed.

Wise &amp; Bridgforth, of Yazoo City, for appellant. Campbell &amp; Campbell, of Yazoo City, for appellee.

PER CURIAM. Affirmed.

**R. P. SMITH & SONS v. RUSSELL.** (No. 18874.)

(Supreme Court of Mississippi. April 9, 1917.)

Appeal from Circuit Court, Jasper County. Action between R. P. Smith &amp; Sons and S. D. Russell. Judgment for the latter, and the former appeals. Affirmed.

Flowers, Brown, Chambers &amp; Cooper, of Jackson, for appellant. R. L. Bullard, of Laurel, for appellee.

PER CURIAM. Affirmed.

**HOAGLAND v. PHILLIPS.** (No. 19040.)

(Supreme Court of Mississippi. April 9, 1917.)

Appeal from Circuit Court, Sunflower County; Frank E. Everett, Judge.

Action between H. J. Hoagland and S. W.

Phillips. Judgment for the latter, and the former appeals. Affirmed.

J. H. Price, of Indianola, for appellant. Moody &amp; Williams, of Indianola, for appellee.

PER CURIAM. Affirmed.

**BALKIN v. CATALDI.** (No. 19084.)

(Supreme Court of Mississippi. April 9, 1917.)

Appeal from Chancery Court, Leflore County; Joe May, Chancellor.

Suit between Sam Balkin and S. S. Cataldi. Decree for the latter, and the former appeals. Affirmed.

Lomax &amp; Tyson, of Greenwood, for appellant. Gardner, McBee &amp; Gardner, of Greenwood, for appellee.

PER CURIAM. Affirmed.

**J. M. HEMPHILL LUMBER CO. v. WALLEY.** (No. 19037.)

(Supreme Court of Mississippi. April 9, 1917.)

Appeal from Circuit Court, Perry County; Paul B. Johnson, Judge.

Action between the J. M. Hemphill Lumber Company and Burie Walley. Judgment for the latter, and the former appeals. Affirmed.

Tally &amp; Mayson, of Hattiesburg, for appellant. R. S. Hall, of Hattiesburg, for appellee.

PER CURIAM. Affirmed.

**BROWN v. STATE.** (No. 19035.)

(Supreme Court of Mississippi. April 9, 1917.)

Appeal from Circuit Court, Prentiss County; Claude Clayton, Judge.

E. K. Brown was convicted of manslaughter, and he appeals. Affirmed.

Cunningham &amp; Cunningham, of Booneville, for appellant. Rankin &amp; Allen, of Tupelo, J. E. Berry, of Booneville, and Frank Roberson, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

**STATE v. FORD.** (No. 19090.)

(Supreme Court of Mississippi. April 9, 1917.)

Appeal from Circuit Court, Tunica County; Wm. A. Alcorn, Jr., Judge.

Alex Ford was indicted, and from an order sustaining a demurrer to the indictment, the State appeals. Affirmed.

Montgomery &amp; Montgomery, of Tunica, for the State. J. D. Magruder and W. L. Bankston, both of Tunica, and T. B. Watkins, of Clarksdale, for appellee.

PER CURIAM. Affirmed.

**STATE v. ROWLAND.** (No. 19055.)

(Supreme Court of Mississippi. April 9, 1917.)

Appeal from Circuit Court, Marshall County; J. L. Bates, Judge.

T. P. Rowland was indicted for enticing labor. Demurrer to indictment sustained.

Frank Roberson, Asst. Atty. Gen., for the State. L. O. Andrews, of Oxford, for appellee.

PER CURIAM. Dismissed.

(73 Fla. 525)

PRINCE et al. v. MAHIN et al.  
(Supreme Court of Florida. Feb. 28, 1917.)

(Syllabus by the Court.)

1. MORTGAGES  $\S$  401(1) — STIPULATIONS—  
SUIT.

A stipulation in a mortgage to secure several notes that, should any one of the notes or any part thereof or any part of the interest thereon remain due and unpaid for 30 days, then the whole balance of the principal and interest shall become due and payable at the option of the mortgagee, authorizes foreclosure proceedings for the entire debt secured, where one of the notes and interest thereon were past due and payable more than 30 days when the option of the mortgagee is exercised by bringing suit.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig.  $\S$  1160-1162.]

2. EQUITY  $\S$  232 — MULTIFARIOUSNESS—DE-  
MURRER.

Multifariousness goes to convenience more than to merits; and, when there is a general demurrer for want of equity, a ground of demurrer for multifariousness may not avail if there is equity in the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig.  $\S$  508.]

3. EQUITY  $\S$  232 — "GENERAL DEMURRER" —  
RULING.

A demurrer which is addressed to the entire bill must be treated as a "general demurrer," and should be overruled if there is any equity in the allegations of the bill, even though there are grounds of the demurrer which might prevail if the same were incorporated in a special demurrer, which was directed to the vulnerable parts of the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig.  $\S$  508.]

For other definitions, see Words and Phrases, First and Second Series, General Demurrer.]

Appeal from Circuit Court, Alachua County; J. T. Wills, Judge.

Bill by Lottie E. Mahin and others against S. D. Prince and others. Demurrer to bill overruled, and defendants appeal. Order affirmed.

E. G. Baxter, of Gainesville, for appellants.  
E. E. Wiggins, of Hawthorn, and Robert E. Davis, of Gainesville, for appellees.

WHITFIELD, J. The bill of complaint herein brought by Lottie E. Mahin and W. C. Mahin, her husband, alleges in effect that S. D. Prince and wife executed to W. C. Mahin a mortgage upon described property to secure four notes executed October 1, 1914, by S. D. Prince; that the mortgage was assigned to Lottie E. Teeter, who became Lottie E. Mahin; that the first of the notes is past due and unpaid, and the "interest thereon is likewise past due and unpaid, and the defendant S. D. Prince has paid no portion of the principal or interest thereon; that the said sums of money due upon said note, both for principal and interest, have been past due and unpaid for the space of more than 30 days after the maturity thereof; that under the terms and provisions of said mortgage whereby, should any one of the above described notes mentioned herein, or any part

thereof, or any part of the interest thereon, remain due and unpaid for the space of 30 days after maturity, then in that event the whole of the balance of the principal sum and interest thereby secured shall thereby become due and payable at the option of the mortgagee therein, the said complainants have elected to declare that all sums of money due and owing by the defendant S. D. Prince upon such promissory notes above mentioned, either by way of principal or interest, or both, shall have become due and payable under such terms and conditions of said mortgage aforesaid; that the complainants herein have been compelled to employ counsel to enforce the collection of the sums of money covenanted to be paid by the said notes by the foreclosure of the said mortgage; that the indebtedness due and owing by the said S. D. Prince represents the purchase price of the property above described; that immediately after October 1, 1914, the said S. D. Prince went into the use and occupation of said property, and has continued to use and occupy the same until within the past few weeks; that he has permitted the said property to depreciate in value; that repairs thereon have not been made; that the property has been so used, handled, and mismanaged that great waste has occurred, and the same has greatly depreciated in value, to the end that the same is not now worth the amount of your orators' claim and lien thereon, and, if the same shall be sold under a final decree hereafter to be rendered herein, the amount realized therefrom will not be sufficient to satisfy the indebtedness due; that prior to November 1, 1915, the said S. D. Prince was the owner of certain described lands in Alachua county, Fla.; that such lands are exceedingly valuable; that on November 15, 1915, the said S. D. Prince and wife executed and delivered to John R. Thomas and wife a conveyance of said lands, which conveyance is recorded; that the said John R. Thomas is the brother-in-law of the said S. D. Prince; that no consideration passed between the said John R. Thomas to the said S. D. Prince for the execution of said deed and for the alleged purchase of said lands above mentioned; that at the time of the execution of said deed the said S. D. Prince had no other property except the lands conveyed by him to the said John R. Thomas and Varina H. Thomas, his wife; that the said John R. Thomas and Varina H. Thomas have never entered into the possession of said lands so conveyed to them, but that the same have remained and are now in the possession of the said S. D. Prince; that the said conveyance is a fraud as against your orators and other creditors of the said S. D. Prince, and was done by the said S. D. Prince for the purpose of concealing his property and of avoiding the payment of his obligations.

The prayer is for an accounting of the amount due by S. D. Prince to Lottie E. Mahin be made and enforced by foreclosure, and that, in the event the proceeds arising from the sale of said property shall prove insufficient to pay off and satisfy the amount due and owing by the said S. D. Prince upon the notes and mortgages mentioned herein, your orators may have a decree of this court vacating and setting aside the deed of conveyance as having been made by the said S. D. Prince and Mrs. C. A. Prince, his wife, to said John R. Thomas and Varina H. Thomas, his wife, and decreeing the said deed of conveyance to be null and void and of no force and effect as against the indebtedness found to be due and owing by the said S. D. Prince to your orator, Lottie E. Mahin, and that said property is liable to such decree for a deficiency as may be entered in favor of your orator, Lottie E. Mahin, and against the said S. D. Prince herein.

A demurrer to the bill of complaint was interposed on grounds, among others: That it is multifarious as to subject-matter and as to parties; that notes 2, 3, 4, and 5 are not due; and that no equity is shown. The chancellor overruled the demurrer, and the defendants appealed.

[1] The mortgage contains the following:

"It is further agreed and stipulated that should any one of the above-described notes, or any part thereof, or any part of the interest thereon, remain due and unpaid for the space of thirty days after maturity, then in that event the whole of the balance of the principal sum and interest thereby secured shall become due and payable at the option of the mortgagee herein."

As this proceeding is to enforce the mortgage lien, it is immaterial that the notes secured by the mortgage do not contain the quoted stipulation. There is apparently no real conflict between the notes and the mortgage. It being alleged that the first note and the interest thereon were past due and payable more than 30 days when the suit was brought to enforce the mortgage lien, the institution of the suit is the exercise of the stipulated option of the mortgagee to regard the whole of the balance of the principal sum and interest secured by the mortgage to be due and payable. The suit was not prematurely brought under the terms of the mortgage. The facts here are essentially different from those in *Kirk v. Van Petten*, 38 Fla. 335, 21 South. 286, and *White v. Gracey*, 45 Fla. 657, 34 South. 223.

[2] Multifariousness goes to convenience more than to merits; and, when there is a general demurrer for want of equity, a ground of demurrer for multifariousness may not avail if there is equity in the bill. *Carlton v. Hilliard*, 64 Fla. 228, 60 South. 220.

[3] A demurrer which is addressed to the entire bill must be treated as a general demurrer and should be overruled if there is any equity in the allegations of the bill, even though there are grounds of the demur-

rer, which might prevail if the same were incorporated in a special demurrer, which was directed to the vulnerable parts of the bill. *Mitchell v. Mason*, 65 Fla. 208, 61 South. 579. Order affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and ELLIS, JJ., concur.

(73 Fla. 574)

COBB et al. v. TRAMMELL, Governor.  
(Supreme Court of Florida. March 6, 1917.)

(Syllabus by the Court.)

1. JUDGMENT  $\S$  120—DEFAULT JUDGMENT—ENTRY.

The entry of a final judgment by the clerk of the court under the provisions of section 1425 of the General Statutes of Florida 1906, presupposes the entry of a valid default against the defendant for want of an appearance, demurrer, or plea.

[Ed. Note.—For other cases, see Judgment, Cent. Dig.  $\S$  210.]

2. JUDGMENT  $\S$  108—DEFAULT JUDGMENT—ENTRY—STATUTE.

A motion by defendant in a civil action for compulsory amendment of the declaration or to strike it, filed before the rule day on which he is required to plead or demur to the declaration, and which motion is not frivolous upon its face, but presents questions affecting the plaintiff's right to proceed with the cause, suspends the power of the clerk under section 1422 of the General Statutes 1906, to enter a default against the defendant for failure to plead or demur.

[Ed. Note.—For other cases, see Judgment, Cent. Dig.  $\S$  201.]

3. JUDGMENT  $\S$  108—DEFAULT JUDGMENT—ENTRY.

A motion by defendant to strike the declaration or for compulsory amendment of it, which is pending and undisposed of upon the rule day when under the statute he is required to plead or demur, may not be ignored by the plaintiff and a default taken, unless the motion is frivolous and wholly without merit and such a one that a determination of it either way could not affect the right of the plaintiff to proceed with the cause.

[Ed. Note.—For other cases, see Judgment, Cent. Dig.  $\S$  201.]

Error to Circuit Court, Dade County; H. Pierre Branning, Judge.

Suit by Park Trammell, Governor of Florida, for the use of Dade County, against J. M. Cobb and United States Fidelity & Guaranty Company. Judgment by default for plaintiff, motion to set aside default overruled, and defendants bring error. Reversed.

Philip Clarkson, of Miami, for plaintiffs in error. Price & Eyles, of Miami, T. F. West, Atty. Gen., and John C. Gramling, State Atty., of Miami, for defendant in error.

ELLIS, J. The plaintiffs in error took a writ of error to the judgment of the circuit court for Dade county rendered in a cause wherein Park Trammell, Governor of the state of Florida suing for the use of Dade county, sued J. M. Cobb and United States Fidelity & Guaranty Company upon a bond

given by Cobb for his appearance before the court.

In the præcipe for the summons "ad respondendum" the clerk of the court was requested to issue the summons "in an action of assumpsit." The summons was issued in accordance with the directions contained in the præcipe, and the defendants were required to appear and answer the plaintiff in an action of assumpsit. The appearance day as stated in the summons was the 6th day of December, 1915. On the 22d day of November, 1915, a declaration upon the appearance bond was filed. It was a declaration in debt on the bond. The declaration contained two counts. In the first the bond was referred to and attached to the declaration as Exhibit A, and by appropriate words made a part of it. In the second count the bond was set out in hæc verba. On the 31st day of December, 1915, the defendants filed a motion to strike the declaration, and for compulsory amendment.

On January 3, 1916, the clerk of the circuit court upon request of the plaintiff entered a default against the defendants for want of a plea or demurrer, and on the same day the clerk entered final judgment against the defendants. The judgment so entered by the clerk is in the following words:

"In the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida.

"Park Trammel, Governor of the State of Florida, suing for the use of Dade County, v. J. M. Cobb and United States Fidelity & Guaranty Company.

"This cause coming on to be heard upon the application of the plaintiff for the entry of a final judgment in said cause and it appearing that the defendants J. M. Cobb and United States Fidelity & Guaranty Company appeared in said cause on the rule day of December, 1915, and that a default for want of a plea or demurrer to plaintiff's declaration was duly entered upon the 3d day of January, 1916, being the rule day in said month and recorded in Default Judgment Docket A, page 143, and the plaintiff having filed in this cause the cause of action sued upon, to wit, a certain bond executed by J. M. Cobb as principal and United States Fidelity & Guaranty Company as surety, bearing date the 9th day of August, A. D. 1915, in the sum of \$2,500; and it further appearing from said bond that the plaintiff is entitled to have, receive and recover of and from the defendants J. M. Cobb as principal and United States Fidelity & Guaranty Company as surety, upon said bond the principal sum of \$2,500, together with interest from the date of filing this suit and the costs of this proceeding, it is therefore ordered, adjudged and decreed: That the plaintiff, Park Trammel, Governor of the state of Florida, suing for the use of Dade county, Florida, have, receive and recover of and from the said defendants J. M. Cobb and United States Fidelity & Guaranty Company, the sum of \$2,500 as principal, and the sum of \$22.32 as interest, and the costs of this suit hereby taxed at \$4.58, making a total of \$2,527.90, for which let execution issue.

"This January 3, 1916.

"Z. T. Merritt, Clerk,  
[Ct. Ct. Seal.] By J. B. Hawkins, D. C."

On the 7th day of January, 1916, the defendants filed a motion to set aside the default and the judgment entered thereon,

which motion was in the following words, omitting venue, title, and signatures:

"Now come the defendants J. M. Cobb and United States Fidelity & Guaranty Company, by Philip Clarkson, their attorney, and respectfully move the court to set aside the default heretofore entered herein against these defendants, to set aside the judgment upon said default, heretofore entered herein against these defendants, and to recall the writ of execution heretofore issued upon said judgment. In support of said motion said defendants here show to the court:

"(1) That at and before the taking and entering of said default and said judgment, there was and had been filed in this court and in this cause, by these defendants acting in the utmost good faith and not for the purpose of delay, thirteen separate and distinct motions respectively for the striking of the declaration herein, for the striking of the first count of said declaration, and for the compulsory amendment of said counts, as more fully and at large appears upon the face of said various motions to which these defendants here refer and which they hereby make a part of this motion; that said declaration was inartificial, loose, insufficient, duplicitous, defective and not entitled to be filed, all of which will more fully and at large appear upon inspection thereof and to which in this behalf these defendants here refer and hereby make a part of this motion; that these defendants could not safely plead or demur to said declaration; that the same was so framed as to prejudice, hinder and delay the fair trial of said cause and to embarrass the same; that these defendants in good time filed their said thirteen motions in good faith for the sole and only purpose of causing said declaration to be dealt with by this court so as to remove the said causes of prejudice, delay and embarrassment of a fair trial as aforesaid, and to the end that said cause might promptly proceed in accordance with law; that said thirteen motions presented many important questions of law for determination by the court only, and that the clerk of this court, in entering said default and said judgment thereon, without the knowledge or consent of these defendants or either of them, was exercising judicial powers contrary to law.

"(2) That these defendants were not in law required to obtain an extension of time in which to plead or demur to said declaration, because at the taking and entering of said default and judgment, defendants' said thirteen motions were on file in this cause, and had the first of said motions, to wit, the motion to strike said declaration been allowed by the court, there would have been remaining in said cause no declaration to which these defendants could either plead or demur.

"(3) That in and by said judgment, said clerk has assumed equity powers, in that he has 'ordered, adjudged and decreed' that the plaintiff have, receive and recover of and from these defendants, contrary to law in that regard.

"(4) That said clerk has likewise 'ordered, adjudged and decreed' that plaintiff have, receive and recover of and from these defendants, excessive interest, contrary to law.

"(5) That these defendants and each of them have a good defense on the merits to the whole of the plaintiff's demand upon the following grounds:

"(a) For that the bond sued on in this cause was taken and approved out of the hearing and presence of the circuit court of Dade county, Florida, and out of the hearing and presence of the judge thereof, by one Dan Hardie, while neither said court nor said judge was sitting nor in session nor within the courthouse of said Dade county, and long after said court and said judge had adjourned, without authority of law; and that said bond is wholly void.

"(b) For that also, said bond was not filed in the circuit court of Dade county, Florida, at or

before the taking of forfeiture thereof, as the same is set forth in said declaration.

"(c) For that also, there is no record of the taking of any forfeiture of said bond, in said circuit court, as appears from inspection of the records thereof and from inquiry by the attorney of said defendants in this behalf, of the deputy clerk of said court in charge of the records thereof."

This motion was overruled.

The assignments of error attack the authority of the clerk to enter the default and the final judgment, and the correctness of the court's ruling upon the motion to set aside the default and final judgment.

The motion to strike the declaration and for compulsory amendment was on file when the clerk entered the default for want of a plea or demurrer, and the final judgment thereon. That motion, omitting venue, title, and signatures, was in the following words:

"Now come the said defendants by their attorney and, because the above declaration is so framed as to prejudice, embarrass, and delay the fair trial of the above-entitled action, move the court:

"First. To strike said declaration from the files for that the praecipe and summons herein are expressly in 'assumpsit,' whereas said declaration is in 'debt.'

"Second. To require amendment of the first count of said declaration for that the same is duplicitous in that it purports to count at once upon an appearance bond and also upon a forfeiture thereof.

"Third. To require amendment of said first count for that it is therein alleged that during the pendency of the habeas corpus proceedings therein referred to, said defendant Cobb was in the custody of the sheriff of Dade county, Florida, under a capias charging him with criminal libel, whereas it also appears in said count that during the pendency of said habeas corpus proceedings said Cobb was not in the custody of said sheriff either by virtue of said capias or otherwise.

"Fourth. To require amendment of the said first count for that the same alleges a forfeiture to have been 'duly' taken, whereas if the same be material, the facts of such forfeiture should be set out.

"Fifth. To require amendment of said first count for that the same alleges that the defendant Cobb 'entered' into an appearance bond, without alleging that the surety likewise 'entered' into said bond.

"Sixth. To require amendment of said first count for that the same alleges that the defendant Cobb 'entered' into an appearance bond, whereas if the same be material, the facts and circumstances of entering into such bond should be set forth.

"Seventh. To require amendment of said first count for that it is therein alleged that the defendant Cobb entered into an appearance bond by 'permission' of the circuit court of Dade county, Florida, whereas the facts which constitute such 'permission' should be set forth.

"Eighth. To require amendment of said first count for that lines No. 14 to No. 22 both inclusive are repetitions of the conditions of the bond which is itself a part of said count.

"Ninth. To strike said first count for that as appears from said declaration, said count in substance and effect is similar to the second count of said narr.

"Tenth. To require amendment of the second count of said declaration for that it is therein alleged that the defendant Cobb at the giving of the appearance bond therein set forth was under arrest and held in custody by the sheriff of Dade county, Florida, upon a capias charging

said Cobb with criminal libel, whereas it also appears from said count that at the giving of said bond said Cobb was not in the custody of said sheriff nor under arrest by virtue of said capias.

"Eleventh. To require amendment of said second count for that it is therein alleged that the judge of the circuit court in and for Dade county, Florida, 'allowed' the defendant Cobb bail, whereas the facts of such allowance should be set forth.

"Twelfth. To require amendment of said second count for that the same complains because the defendant Cobb 'departed from the jurisdiction of the court without the consent of the court, and without being legally discharged,' whereas no such conditions are contained in the bond as the same is set forth in said count.

"Thirteenth. To require amendment of said second count for that the same alleges a forfeiture to have been 'taken and formally declared,' whereas if the same be material, the facts thereof should be alleged."

Section 1418 of the General Statutes of 1906 provides that:

"The defendant shall file his plea or demurrer on the rule day succeeding that upon which the declaration is filed, unless upon motion further time be given by the court. He may plead, answer or demur at any time before default for not so doing."

The provisions on the subject of entering defaults and final judgments by the clerk upon personal service are found in sections 1422 and 1425 of the General Statutes of Florida 1906, and are as follows:

"1422. (1032). *Entry Upon Rule Days.*—If the defendant shall fail to appear as hereinbefore provided, or shall fail to plead or demur, at the time hereinbefore provided, or at the time fixed by the court upon motion as hereinbefore provided, the plaintiff may cause a default to be entered by the clerk against the defendant, and thereupon he may proceed to take final judgment, as hereinafter provided."

"1425. (1035). *Upon Personal Service.*—Upon the entry of any default for want of appearance or for want of demurrer or plea in any suit for the recovery of money founded upon contract, if the action is on a written instrument for the payment of money, the plaintiff at any time after such default may on the production and filing of such instrument cause final judgment to be entered for the amount thereof, with interest, and the clerk of the court (or the judge, if the court has no clerk), shall assess the amount which the plaintiff is entitled to recover for the principal and interest, and enter up judgment for the same, upon which judgment execution shall issue immediately unless otherwise ordered by the court. And if the action is upon an open account, or other contract for the payment of money not in writing, upon the entry of a default as aforesaid, the clerk (or the judge, if the court has no clerk) shall ascertain the amount which the plaintiff is entitled to recover in such action from the examination of the plaintiff under oath, or other proofs by affidavit or otherwise, and enter up judgment for the amount so assessed or ascertained, upon which judgment execution shall issue as aforesaid."

The motion to open the default was made within the time prescribed by section 1424 of the General Statutes.

[1] The first question presented for our consideration is whether the filing of the motion to strike the declaration and for compulsory amendment suspended the power of the clerk under section 1422 to enter a default for want of a plea or demurrer. If the entry of the default was without authority

and void, the final judgment entered by him was also void and of no force or effect, because the entry of a final judgment by the clerk under the provisions of section 1425 of the General Statutes presupposes the entry of a valid default.

[2] It is argued by counsel for the defendant in error that the motion to strike the declaration and for compulsory amendment was a nullity, and therefore could have been, and was ignored. If that position is correct, the default entered by the clerk was valid. In support of their proposition they cite *Register v. Pringle Bros.*, 58 Fla. 355, 50 South. 584, and *Dudley v. White*, 44 Fla. 264, 31 South. 830. In the latter case White instituted suit in Hamilton county against Dudley and Jennings, who were sued as late partners. Summons was issued and returned as having been served upon Jennings in Hamilton county. On the return day the defendants filed their special appearance and moved to dismiss the suit upon the grounds that the court had no jurisdiction of the defendants; that the cause of action did not accrue in Hamilton county; that neither of the defendants resided in that county; and that there was nothing local in the action giving the court jurisdiction. On the next rule day, no plea or demurrer to the declaration filed on the rule day in January having been filed, the clerk entered a default. On March 20th following a motion was made to vacate the default. This court following the reasoning in the case of *Huling v. Florida Savings Bank*, 19 Fla. 695, where it was held that in an action at law where a plea is not responsive to the declaration, or any part of it, it is frivolous, and may be treated as a nullity, and without motion to strike or demur the plaintiff is entitled to judgment, said:

"We think the principles of this decision must control in determining whether the filing of a motion to dismiss will prevent the entry of a default for want of a plea at the expiration of the time for pleading."

The court then adds:

"If the motion be of such a character that the plaintiff will be justified in treating it as a nullity, he may disregard it, and cause the clerk to enter the default; but if the motion be not of that character, no default can be entered until it is disposed of."

The court held that the motion was based upon grounds having no relevancy to such a motion under the facts of the case. The return upon the summons, said the court, speaking through Mr. Justice Carter, showed service upon the defendant Jennings, which gave the court jurisdiction over his person, and the cause of action sued upon consisted of two promissory notes for an amount within the jurisdiction of the court. As to the question of jurisdiction of the defendants in that case the court said that a joint motion in behalf of Jennings and Dudley would not lie to dismiss the suit as to both where the court had obtained jurisdiction of the person of one of them; and as to the other grounds

of the motion they were matters which must have been pleaded. These grounds related to the personal privilege accorded the defendants to be sued in a particular county, so the default was held to have been validly entered. In the *Register* Case the motion was for a more definite bill of particulars. There had been filed with the declaration an itemized account of goods, wares, and merchandise alleged to have been sold by the plaintiff to the defendants for the price of which the action was brought. This statement was verified by the oath of the secretary of the plaintiff corporation. The court, following the case of *Dudley v. White*, supra, held the default to have been validly entered. Speaking through Mr. Justice Shackelford, the court said:

"We are further of the opinion that the practice of waiting until the very day a plea or demurrer is due to file a motion for a more definite bill of particulars is not to be commended, to say the least of it. In the furtherance of justice such motions should be filed and called up for disposition as early as practicable."

The practice of entering a default in an action at law for want of a plea or demurrer was regarded in the *Dudley* Case to be analogous to the practice of entering a decree pro confesso in chancery for failure to file a plea, answer, or demurrer to the bill. In the case of *Trower v. Bernard*, 37 Fla. 226, 20 South. 241, cited by the court in *Dudley v. White*, supra, a plea was filed, which the court said was not only frivolous and devoid of merit upon its face, but was not sworn to or certified by counsel. In *Taylor v. Brown*, 32 Fla. 334, 13 South. 957, also cited in *Dudley v. White*, supra, a demurrer was filed to the bill, but there was no certificate of counsel that the demurrer was well founded in law, and no affidavit that it was not interposed for delay. In each case the decree pro confesso was sustained.

In the only two cases which have come before this court to which our attention has been called, the motions which were pending when the time for pleading or demurring arrived were upon their faces without merit and frivolous. In the two cases in equity cited in *Dudley v. White*, supra, the plea in one case, and the demurrer in the other, were frivolous and void upon their faces. In the case of *Glens Falls Ins. Co. v. Porter*, 44 Fla. 568, 33 South. 473, the circuit judge entered a default upon motion of the plaintiff notwithstanding a plea was on file. This court held that as the pleas were wholly immaterial and irrelevant to the plaintiff's case and tendered no material issue that was legally available as a defense, and denied nothing essential to the plaintiff's right to recover as alleged in the declaration, there was no error in granting the motion for default.

The practice may be regarded as settled in this state that in a common-law action, where a motion is filed by defendant before the day fixed by the statute for filing a plea or demurrer, and such motion is wholly frivolous



olous and without merit upon its face, it may be treated as a nullity, and the plaintiff may take a default at the proper time for want of a plea or demurrer; but if the motion is not of that character, it must be disposed of before the default may be entered.

Section 1433 of the General Statutes 1906, Florida Compiled Laws 1914, provides for compulsory amendment of any pleading upon application of the opposite party, and that the court shall make such order respecting the same, and also respecting costs, as it shall see fit. No time is fixed by that section of the statutes within which to make such application, but it would seem that the logical time for doing so would be before replying to the pleading which is deemed to be faulty. It is not unusual to make motions for compulsory amendment of declarations, and to strike them. In the case of *Western Union Telegraph Co. v. Merritt*, 55 Fla. 462, 46 South. 1024, 127 Am. St. Rep. 169, the court said that a motion for compulsory amendment of a declaration should state that it is so framed as to prejudice, embarrass, or delay a fair trial. And in *Hadlow Co. v. Sargent*, 61 Fla. 263, 54 South. 1003, a special count of the declaration was stricken upon motion. In *Seaboard Air Line R. Co. v. Scarborough*, 52 Fla. 425, 42 South. 706, there was a motion for compulsory amendment of a declaration, and the court said that the same reasoning as to the allowance of voluntary amendments would apply in construing the section above referred to relating to compulsory amendments, as the court must determine whether or not the pleading sought to be reformed is so framed as to prejudice or embarrass or delay the fair trial of the action, the matter was within the sound judicial discretion of the court. Construing sections 1433 and 1418 together, we are of the opinion that a motion to strike a declaration or compel amendments thereof is such an answer as may be included within the meaning of the words "plead, answer, or demur." So that while such a motion, not frivolous and wholly without merit, is pending and undisposed of, the power of the clerk to enter a default for failure of the defendant to "plead or demur" is suspended.

[3] There is a division among the courts as to the question, but the sounder reason seems to support the rule that where a motion not frivolous upon its face has been made by the defendant and is pending undisposed of and not waived, a judgment by default against him cannot be taken, unless the determination of the action either way could not affect the right of the plaintiff to proceed with the cause. See *Rice v. Simmons*, 89 Ark. 359, 116 S. W. 673; *Atchison, T. & S. F. R. Co. v. Lambert*, 31 Okl. 300, 121 Pac. 654, Ann. Cas. 1913E, 329; *St. Louis & S. F. R. Co. v. Young*, 35 Okl. 521, 130 Pac. 911; *Hosmer v. Holt*, 161 Mass. 173, 36 N. E. 835; *Story v.*

*Ware*, 35 Miss. 399, 72 Am. Dec. 125; *Mitchell v. Campbell*, 14 Or. 454, 18 Pac. 190. See, also, note to *Naderhoff v. Geo. Benz & Sons*, 25 N. D. 165, 141 N. W. 501, reported in 47 L. R. A. (N. S.) 853.

It cannot be said that the motion in this case was wholly without merit and frivolous upon its face, and that to have decided it in favor of the defendant it would not have affected the plaintiffs' right to proceed with the cause.

The two counts of the declaration state the same cause of action: The giving of a bond by the defendant Cobb for his appearance before the court on the 9th day of August, 1915, and his failure to appear upon that date. The second count states the cause of action in more words, although not more clearly, and it would certainly be a useless, vain, and unnecessary thing to repeat in one count after another the same cause of action. Its only effect would be to embarrass and delay the fair trial of the case. *Mitchell v. Mason*, 61 Fla. 338, 54 South. 863.

Without deciding the question whether a person may bring another into court to answer one cause of action, and then declare against him in another cause of action, see *Hooker v. Gallagher*, 6 Fla. 351, text 357, where the question is referred to, we do think that the motion presented a question which should have been determined by the court, and which the clerk nor the plaintiffs' attorney could ignore and treat as frivolous and wholly without merit.

It follows from what has been written that the entry of the default was void, and the judgment entered upon it was entered without authority, and should have been vacated and set aside upon the motion of defendants.

The judgment is reversed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and WHITEFIELD, JJ., concur.

(73 Fla. 599)

BROPHY v. WARD.

(Supreme Court of Florida. March 7, 1917.)

(Syllabus by the Court.)

EQUITY § 405(1)—MASTER'S FINDINGS—NOTICE OF HEARING.

Where the findings of a master are challenged on the ground that notice of the hearing was not given, and it appears that under the circumstances of the case due and reasonable notice was not given, the decree rendered on the master's finding will be reversed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 880-886.]

Appeal from Circuit Court, Orange County; Jas. W. Perkins, Judge.

Suit by W. M. Ward against J. J. Brophy and another. Final decree for complainant, and named defendant appeals. Reversed.

Crawford & Jarrell, of Klissimnee, for appellant. Jones & Jones, of Orlando, for appellee.

**PER CURIAM.** Ward brought suit on November 10, 1911, to enforce an alleged lien upon land and for other relief. A decree pro confesso entered January 6, 1913, was vacated March 22, 1913, and the defendant Brophy answered. An order dated October 8, 1914, enlarging the time for taking testimony before a master was filed December 17, 1914. On December 31, 1914, the master filed his report in which he states that notice was given of the hearing. On March 5, 1915, the defendant Brophy filed exceptions to the master's report, one exception being:

"That the said master gave no notice of the hearing to the defendant J. J. Brophy."

On March 5, 1915, the defendant filed a motion for rehearing, one ground being:

"That said defendant J. J. Brophy was not served with notice of the hearing before the special master as alleged in exceptions to said report filed this day."

Brophy presented to the chancellor an affidavit:

"That he has been in the city of Pittsburg, Pa., continuously for more than a year last past; that he has never been served with any notice by mail or otherwise of any hearing of any kind to take testimony before a master, special master, or otherwise, in the above-entitled action; that he had no knowledge of the appointment of a master to take testimony until after said master had filed his report with this court; that he has a full, complete, and adequate defense as to the claims of the plaintiff in this proceeding."

The master presented the following affidavit:

"Personally appeared William Martin, who, being duly sworn, says that he is a regular master of the Seventh judicial circuit of Florida, and that as master he took testimony in the above-stated cause between December 17 and 31, 1914; that prior to taking testimony he gave notice to the parties by mailing notices of the time of taking testimony, addressed to J. J. Brophy, Pittsburg, Pa., and F. G. Hunt, Greenhill, Pa., more than five days before date set for taking the testimony.

"That on December 31, 1914, he filed the master's report in the clerk's office of the circuit court in and for Orange county, and gave notice of the filing of the said report to the said defendants, J. J. Brophy, Oliver Building, Pittsburg, Pa., and F. G. Hunt, Greenhill, Pa.

"That these notices were plainly written, inclosed in envelopes, plainly addressed as above stated, postage fully prepaid, and mailed through the United States post office."

On February 4, 1915, the following order was made:

"This cause coming on to be heard upon motion to hear the exceptions taken to the report of the master to whom the above cause was referred, and it appearing to the court that the master's report was filed on December 31, 1914, and from the affidavit of the master filed in this cause that notice was given of the filing of the same to the several defendants above named, and it further appearing that no exceptions to the master's report was filed until the 5th day of March, 1915, no application having been made to the court for enlargement of time for

filing exceptions, the report having become confirmed by lapse of time, the motion to hear exceptions is denied, to which Defendant J. J. Brophy excepts."

Final decree for the complainant was rendered, and the defendant Brophy appealed.

Under the circumstances the showing as to notice of the hearing is insufficient, and the lapse of time between the filing of the master's report and the filing of exceptions thereto cannot supply a fatal want of notice. See *Mote v. Morton*, 52 Fla. 548, 41 South. 607; *Ballard v. Lippman*, 32 Fla. 481, 14 South. 154; *Brokaw v. McDougall*, 20 Fla. 212; *Equity Rule 77*.

The decree is reversed.

**BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.**

No. 21487.

(41 La. 81)

**GUILLOT v. GUILLOT et al.**

(Supreme Court of Louisiana. March 12, 1917.)

(*Syllabus by the Court.*)

1. **FRAUDS, STATUTE OF §17—PROMISE TO PAY DEBT OF ANOTHER.**

The prohibition is absolute that parole evidence shall not be received to prove any promise to pay the debt of a third person. Civ. Code, art. 2278.

[Ed. Note.—For other cases, see *Frauds, Statute of, Cent. Dig. §§ 13, 16, 17.*]

2. **FRAUDS, STATUTE OF §17 — PROMISE TO PAY DEBT OF ANOTHER.**

A verbal promise to pay the debt of a third person can have no legal effect.

[Ed. Note.—For other cases, see *Frauds, Statute of, Cent. Dig. §§ 13, 16, 17.*]

Appeal from Eleventh Judicial District Court, Parish of Natchitoches; William T. Cunningham, Judge.

Suit by James P. Guillot against Mrs. Fanny O. Guillot and Breazeale & Breazeale, her attorneys. Suit dismissed as to Breazeale & Breazeale, and plaintiff appeals. Affirmed. See, also, 74 South. 704.

Guilon, Lambremont & Hebert, of Litcher, and J. D. Rusca, of Natchitoches, for appellant. Breazeale & Breazeale, of Natchitoches, for appellee.

**LAND, J.** Plaintiff sued his wife and her attorneys to recover the sum of \$41,699.74, subject to a credit of \$14,172.64 represented by certain cotton held in pledge by H. & C. Newman, on a cause of action which may be briefly stated as follows:

Plaintiff and his wife, Mrs. Fannie Chopin-Guillot, were married under the régime of the community on August 31, 1911, and he immediately assumed the administration of her paraphernal estate, consisting of movables and immovables of great value, and continued such administration until January 1, 1915.

That in the summer of 1914, differences having arisen between the plaintiff and his wife, a contract was drawn up between them, and, after the same had been fully approved by them, was signed by their respective attorneys.

The said contract stipulated:

First. That Mrs. Guillot should resume the full control and administration of her separate property on January 1, 1915.

Second. That there should be legal dissolution of the community between them at the instance of the wife and without resistance on the part of husband after January 1, 1915.

Third. "Mr. J. P. Guillot should have paid to and returned to him by Mrs. Guillot the sum of \$5,000, a manual gift made him by Mrs. Guillot immediately preceding their wedding."

Fourth. The community of acquêts and gains to be settled in the following manner:

An expert accountant to make an investigation and report of the condition of the community, to be assisted in arriving at a valuation of the improvements put on the separate property of Mrs. Guillot by two appraisers, one selected by her, and one selected by Mr. Guillot, the two to call in an umpire in the case of disagreement.

On the basis of such report Mrs. Guillot was to take over and acquire the community interest, assuming all obligations and acquiring all assets, by paying Mr. Guillot 50 per cent. of its net value of the community, if any, in cash.

Fifth. In the event that Mr. Guillot should receive \$5,000 or more in cash for his interest in the community, the payment of the \$5,000 stipulated in article 3, supra, was to be reduced to \$2,500.

Sixth. No suit of any kind was to be filed by Mrs. Guillot against Mr. Guillot prior to January 1, 1915.

And no suit for separation from bed and board was to be filed prior to January 1, 1916.

The respective attorneys representing the parties each personally bound and obligated himself as surety that the agreement of September 10, 1914, would be carried out to the letter.

A public accountant and two appraisers were selected, and an umpire was chosen, pursuant to said agreement, and they began their work about December 7, 1914.

Mrs. Guillot on January 1, 1915, resumed the administration of her paraphernal estate.

After January 1, 1915, Mrs. Guillot sued her husband for a dissolution of the community, and on February 5, 1915, obtained judgment perpetually dissolving the same.

That about January 26, 1915, Mr. Guillot, through his attorneys, sent to the creditors of the community printed copies of the contract of September 10, 1914, accompanied by circular letters, which contained the following statement:

"We inclose you a copy of an agreement entered into by the attorneys representing Mr. and Mrs. J. P. Guillot September 10, 1914, and which said attorneys personally pledged themselves to have carried out in good faith."

That on January 27, 1915, Mr. Guillot's attorneys addressed a letter to Messrs. Breazeale & Breazeale, attorneys for Mrs. Guillot, inclosing them a copy of the said circular letter and printed contract, putting Mrs. Guillot in default on said contract; and said letter contained the following clause:

"You will recall that we, the attorneys, personally pledged ourselves to see that the agreement of September 10, 1914, was carried out to the letter. We certainly expect you to fulfill this agreement."

That in their answer to said letter Messrs. Breazeale & Breazeale said:

"We are perhaps more anxious than you are to close this matter, and are very anxious to carry out the agreement between you and ourselves."

That on February 6, 1915, the public accountant submitted his report and supplemental report on his examination of the affairs of the parties and the community, which reports were filed in court with the petition.

That said report shows that the plaintiff is entitled to recover the sum of \$41,699.74.

That on February 12, 1915, on the receipt of said report, plaintiff made a tender of the entire community to the defendant.

That the defendant since the filing of her petition for a dissolution of the community has taken possession of and assumed the management and control of property belonging to the community, and is thereby "estopped from refusing to comply with her contract of September 10, 1914."

On exception by Breazeale & Breazeale of vagueness, the plaintiff amended his petition as follows:

"The obligation of suretyship in question was not in writing originally, but was verbal; that the petition shows and alleges that said obligation was later acknowledged in writing.

"The letter of Breazeale & Breazeale to Guion, Lambremont & Hebert, annexed to and made part of the petition, is the written acknowledgment alleged in the petition."

Breazeale & Breazeale thereupon excepted that the petition, so far as it concerns them, discloses no right or cause of action against them.

This exception was sustained, and the suit was dismissed. The plaintiff has appealed.

[1] The prohibition is absolute that "parole evidence shall not be received to prove any promise to pay the debt of a third person," and the law is imperative that such a promise to pay shall be proved by written evidence signed by the party, or by his agent or attorney in fact, specially authorized to do so. C. C. art. 2278.

[2] Hence a verbal promise to pay the debt of a third person can have no legal effect.

The subject-matter of the correspondence between the attorneys referred to in the petition was the execution of the agreement

which had been signed by the attorneys for their respective clients.

Plaintiff's attorneys complained of delays on the part of the defendant and her attorneys in the matter of appraisal of the community property and of the institution of the suit for a dissolution of the community.

After writing about the appraisal at some length, and stating that the suit had been filed, Messrs. Breazeale & Breazeale closed as follows:

"We are perhaps more anxious than you are to close this matter, and are very anxious to carry out the agreement between you and ourselves."

The context shows that the "matter" and "agreement" related to the execution of the written contract which the attorneys had signed for their clients, and which was then in course of execution.

Judgment affirmed.

(141 La. 88)

No. 21844.

GUILLOT v. GUILLOT et al.

(Supreme Court of Louisiana. March 12, 1917.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE  $\Leftrightarrow$  286—COMMUNITY PROPERTY—VALIDITY OF CONTRACT.

A contract between husband and wife during the existence of the community by which the wife binds herself to take all the community assets at their appraised value, and assume the payment of all the community debts, and pay her husband in cash one-half of the appraised value of the surplus assets, etc., is in plain violation of codal prohibitions, and therefore absolutely null and void.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 925-928.]

2. HUSBAND AND WIFE  $\Leftrightarrow$  286—CONTRACT—RATIFICATION—ESTOPPEL.

It is well settled that the wife cannot be estopped by any act of recognition or ratification of such a contract during coverture.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 925-928.]

Appeal from Eleventh Judicial District Court, Parish of Natchitoches; W. T. Cunningham, Judge.

Action by James P. Guillot against Mrs. Fanny Chopin-Guillot and others. Judgment for the named defendant dismissing the suit and allowing her demand in reconvention, and plaintiff appeals. Affirmed.

Guion, Lambremont & Hebert, of Litcher, and J. D. Rusca, of Natchitoches, for appellant. Breazeale & Breazeale, of Natchitoches, for appellee.

LAND, J. Breazeale & Breazeale, attorneys for the defendant, were sued with her as sureties, but the suit as to them was dismissed on an exception of no cause of action.

Plaintiff appealed, and the case was filed and docketed in this court under No. 21487, 74 South. 702.

The case as against the other defendant,

Mrs. Guillot, was tried on its merits, and judgment was rendered in favor of the defendant. Plaintiff appealed, and the case was filed and docketed in this court under No. 21844.

In case No. 21487 the judgment has been affirmed by this court.

As the petition, which is quite lengthy, is set forth in substance in our opinion in that case, repetition here would serve no useful purpose.

Plaintiff sued his wife on a contract made between them, and reduced to writing and signed by their respective attorneys on September 10, 1914.

The contract stipulated that the defendant should resume the administration of her separate property on January 1, 1915; that there should be a legal dissolution of the community at the instance of the wife, and without resistance on the part of the husband after January 1, 1915; that the husband should have returned and paid to him the sum of \$5,000, a manual gift made by his wife to him immediately preceding their wedding; that the community should be settled after January 1, 1915, on the report of an expert accountant, after an investigation by him of the condition of the community existing between the "husband and wife," being assisted in arriving at a valuation of the improvements put on the separate property of the wife by two appraisers, one selected by the husband, and the other selected by the wife, the two to call in an umpire in case of disagreement, and on the basis of such a report, the wife was to take over and acquire the community interest, assuming all obligations and acquiring all assets, by paying the husband 50 per cent. of the net value of the community, if any, in cash.

There are a few other stipulations not necessary to mention.

It is alleged in the petition, and not denied, that Mrs. Guillot resumed the administration of her separate property on January 1, 1915, and on February 5, 1915, obtained a judgment dissolving the community existing between her and her husband.

Differences arose between the parties as to the selection of the umpire and the appraisal of the improvements placed by the community on the separate real estate of the wife.

Finally, however, on February 6, 1915, the accountant submitted his report and supplemental report to the parties, signed by two of the three appraisers.

Mrs. Guillot denied the correctness of the report and refused to abide by it.

Whereupon the plaintiff instituted the present suit on March 1, 1915, to recover from the defendant, his wife, the sum of \$41,699.74, less the proceeds of certain cotton pledged to secure a debt of \$14,172.68 due H. & C. Newman.

The amount sued for is made up of the items following, to wit:

Total community liabilities.....	\$27,321.64
One-half of \$5,000.00, manual gift...	2,500.00
One-half of community surplus.....	11,155.75
One-half of advance on cotton.....	250.00
Bill of public accountant.....	472.35

Total ..... \$41,699.74

The last paragraph of the petition reads as follows:

"And petitioner further alleges that the said defendant Mrs. Fannie Chopin-Guillot, since the filing of her petition for a dissolution of the community, has taken possession of and assumed the management and control of property belonging to the community of acquêts and gains formerly existing between her and your petitioner, and she is estopped from refusing to comply with her contract of September 10, 1914."

This suit is therefore one to enforce said contract between husband and wife in all its stipulations.

After filing an exception of no cause of action, which was overruled, the defendant filed an answer, which covers 17 pages of her attorney's printed brief.

The first paragraph of the answer reads as follows:

"She respectfully shows that this suit is predicated on an alleged contract and agreement alleged to have been made and entered into on September 10, 1914, which, if true, is wholly void and null and in violation of a prohibitive statute, and for that reason this suit should be dismissed and the plaintiff's demands against her rejected."

In paragraph 4 the defendant specially denied that she was legally bound by said alleged contract sued upon by the plaintiff in this case.

On the merits the defendant denied any indebtedness whatever to the plaintiff, and, reconvening, prayed judgment against him for at least \$10,000 for the conversion of her separate effects to his own use.

Defendant in her answer also attacked the reports of the public accountant as erroneous and incorrect, and based on false and inflated values of real and personal property made by two appraisers, who had not been sworn, and who had no authority, under the contract, to appraise movables; their power being limited to the valuation of improvements on her separate property.

The case was tried on the merits, and judgment was rendered in favor of the defendant rejecting plaintiff's demand and dismissing his suit, and allowing defendant's demand in reconvention to the extent of overbalancing or paying any claim or charge by the husband contained in his petition for improvements placed upon the wife's separate property.

[1] This suit is by the husband to enforce against the wife a contract made between

them during the existence of the community by which the wife virtually purchased all the community property, assuming the payment of all the community debts, and agreeing to pay over one-half of the surplus above the debts to her husband, the settlement to be based on an appraisement and accounting as stipulated in the contract, which, moreover bound the wife to return and pay to her husband the sum of \$5,000, the amount of a manual gift made by the wife to her husband on the day before their wedding.

As a general rule contracts between husband and wife are forbidden, and the wife is without capacity, even with the assent of the husband, to become security for his debts. C. C. 1790.

"A contract of sale between husband and wife can take place only in the three following cases:

"1. When one of the spouses makes a transfer of property to the other, who is judicially separated from him or her, in payment of his or her rights.

"2. When the transfer made by the husband to his wife, even though not separated, has a legitimate cause, as the replacing of her dotal or other effects alienated.

"3. When the wife makes a transfer of property to her husband in payment of [her] dowry." C. C. 2446.

"The wife must petition for the separation of property, and it can only be ordered by a court of justice, after hearing all parties. It can, in no case, be referred to arbitration.

"Every voluntary separation of property is null, both as respects third persons and the husband and wife between themselves." C. C. 2427.

"The wife whether separated in property by contract or by judgment, or not separated, can not bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage." C. C. 2398.

[2] The husband and wife having no capacity to contract between themselves, their agreement was null under C. C. 1790; and as the parties were not judicially separated at the time, the agreement cannot fall within the exception of C. C. 2446; and as the agreement binds the wife for debts contracted by the husband during the marriage, it is null under C. C. 2398.

"Estoppel has no application to the case of a married woman seeking to be relieved from contracts of security for a debt of her husband." Hamilton v. Moore, 136 La. 634, 87 South. 524.

"It is now well settled that the wife cannot be estopped by any act of recognition or ratification of her contracts, during coverture, or even by a confession of judgment, from subsequently urging the nullity of such contracts." Succession of Andrus, 34 La. Ann. 1065.

As the contract sued on is null, and therefore cannot be judicially enforced, the suit was properly dismissed.

Judgment affirmed.

SOMMERVILLE, J., concurs.

(141 La. 91)

No. 21719.

**SIMS et al. v. VILLAGE OF MER ROUGE.**

(Supreme Court of Louisiana. June 30, 1916. On Rehearing, Jan. 15, 1917. On Second Rehearing, Jan. 23, 1917. Supplementary Opinion March 12, 1917.)

*(Syllabus by Editorial Staff.)***1. TAXATION — 538 — RECOVERY OF TAXES — VOLUNTEER PAYMENT — PRESUMPTION.**

In the absence of any allegation that the payment of a license tax was made under compulsion, such as from an actual seizure of plaintiff's property or from a threat of criminal prosecution actually made, the payment of the tax must be considered to have been made voluntarily.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 999, 1000.]

*(Syllabus by the Court.)*

On Rehearing.

**2. TAXATION — 539 — RECOVERY OF TAXES PAID — LICENSE NOT LEVIED.**

License taxes for the current year cannot be lawfully collected under a municipal ordinance levying taxes for the previous year; but when such collections have been made, and the money paid has been deposited in the municipal treasury, the municipality is obliged to restore the money to the persons from whom it was unduly received. Civ. Code, art. 2301.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1001.]

Appeal from Sixth Judicial District Court, Parish of Morehouse; Ben C. Dawkins, Judge.

Actions by G. M. Sims (No. 9365), by Sims & Ingram (No. 9366), and by Norsworthy & Yeldell (Nos. 9367, 9368), all against the Village of Mer Rouge. Judgment for the defendant on exception of no cause of action was rendered in each action, and the plaintiffs appeal. Judgment reversed as to suits Nos. 9365, 9367, and causes remanded, and judgment affirmed as to suits Nos. 9366 and 9368.

William B. Stuckey, of Mer Rouge, for appellants. Fred M. Odom, of Bastrop, for appellee.

**PROVOSTY, J.** An ordinance of the village of Mer Rouge reads:

"Be it enacted," etc., "that the license tax to sell near beer during the year 1913 shall be \$250."

This ordinance by its very terms applied only to the year 1913, but plaintiff paid the said license for the year 1914, and now sues to recover back the amount thus paid. He alleges that he made the payment through error of law and fact and by mistake and—"involuntarily, under pressure, protest, duress, and fear of criminal prosecution, as provided by both Act 178 of 1912 and the said ordinance."

He alleges further that the money thus paid by him is still in the village treasury—"because the said village was in possession of a large surplus revenue when the money was paid in, and has been in possession of a large surplus ever since that time, and is in possession of a

large surplus of revenue at this time, and this surplus contains the \$250 belonging to your petitioner."

An exception of no cause of action, based on the proposition that a tax voluntarily paid cannot be recovered back, was sustained below.

There can be no moral obligation to pay a license never in fact levied; hence the money thus paid was due in no way, and, such being the case, can be recovered back, if made in error, unless its reimbursement as well as that of similar payments made by others, would cause disturbance to the finances of the village.

[1] In the absence of any allegation that the payment was made under compulsion such as might have resulted from an actual seizure of plaintiff's property or from a threat of criminal prosecution actually made, the payment must be considered to have been made voluntarily. *Simpson v. New Orleans*, 133 La. 384, 63 South. 57; *Fuselier v. St. Landry*, 107 La. 221, 31 South. 678; *Mayor and Board v. Moss Hotel*, 112 La. 525, 36 South. 552; and cases thus cited.

Perhaps the better doctrine might be that a payment made under the compulsion of the alternative of having to either discontinue business or else expose oneself to the annoyance of a criminal prosecution with the attendant danger of conviction is involuntary (*Atchison, Topeka & Santa Fé R. R. Co. v. Timothy O'Connor*, 228 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050); but the settled jurisprudence of this state is the other way. In the numerous cases involving liquor licenses in which the right of recovery has been denied the plaintiff would have exposed himself to criminal prosecution for selling liquors without a license if he had not made the payment, and yet in all of said cases the payment was held to have been voluntary.

Judgment set aside, and case remanded for trial; appellee to pay costs of appeal.

On Rehearing.

**LAND, J.** The four plaintiffs brought separate actions to recover the sum of \$250 each paid under protest, in March 1914, as a license tax for selling near beer in the defendant village during the year 1914.

The petition alleged that said defendant was without authority to collect any such license tax—

"for the reason that no ordinance had been enacted by the governing authorities of the said village authorizing the collection of such an occupation license tax for the year 1914; the only ordinance of the said village on the subject-matter being Ordinance No. 102, enacted on December 26, 1912, which by its own terms applied to and covered only the year 1913."

A copy of said ordinance annexed to the petition shows that it provides for a license tax for the sale of malt liquors with less

than two per cent. alcohol "during the year 1913."

In our former opinion in this case we said in part:

"There can be no moral obligation to pay a license tax never in fact levied; hence the money thus paid was due in no way, and such being the case, can be recovered back if made in error, unless its reimbursement as well as similar payments made by others will cause disturbance to the finances of the village."

As the allegations of the petition negative any such disturbance this court reversed the judgment below, and remanded the cases for trial.

The argument of counsel for the village is based on the false premise that a license tax was levied for the year 1914.

Defendant's exception admits the allegation that the village authorities levied no license tax for the year 1914 on the business of selling near beer.

It is manifest that a license tax not levied by constituted authorities of a village is no tax at all, and imposes upon the citizen no legal, moral, or civic duty to pay the same.

In these cases the collections of money from the plaintiffs were illegal exactions made by the tax collector in error of law; and the proceeds of the collections were deposited in the village treasury, where, it is alleged, they still remain.

[2] As no license tax was levied, the transaction falls within the codal provision that:

"He who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he has unduly received it." C. C. 2301.

"He who has paid through mistake, believing himself a debtor may reclaim what he has paid." C. C. 2302.

Of course, if a license tax had been levied for the year 1914, as it was for the year 1913, a different question would be presented.

It is therefore ordered that our former decree herein be reinstated and made the final judgment of the court.

#### On Second Rehearing.

PER CURIAM. This application is based on the erroneous premise that this court in its opinions and decree handed down considered and adjudicated the two of the four suits involving the question of the legality of the license taxes levied and collected for the year 1913.

Both opinions clearly show that the only question considered was that of the legality of the levy and collection of the license taxes for the year 1914, and that the judgment was set aside for the sole reason that the defendant had failed to levy such license taxes for the year 1914.

In the other two suits license taxes had been levied by the defendant for the year 1913, and the plaintiffs relied on the alleged illegality of the ordinance levying such taxes.

Our decree setting aside "the judgment" must be construed as restricted to the two suits considered and decided by the court.

It follows that the suits of Sims & Ingram, No. 9366, and Norsworthy & Yeldell, No. 9368, v. Village of Mer Rouge, remain on our docket to be disposed of in due course.

It is therefore ordered that defendant's application for a second rehearing or correction of decree be refused.

#### Supplementary Opinion.

PROVOSTY, J. The four suits embraced in the transcript in this case having been submitted as if involving but one and the same issue, the court considered one of them as decisive of all four, and rendered judgment in that one. As a matter of fact, two of the cases are fundamentally different from the two others, in that they involve a license never levied at all, whereas the other two involve a license levied, though perhaps irregularly. The decision heretofore handed down has application only to the two cases involving the license of 1914, namely, No. 9365, G. M. Sims v. Village of Mer Rouge, and No. 9367, Norsworthy & Yeldell v. Village of Mer Rouge. As to what should be the decision in the two cases involving the license of 1913, which was levied, the opinion heretofore handed down clearly indicates.

It is therefore ordered, adjudged, and decreed that as to suits No. 9366, Sims & Ingram v. Village of Mer Rouge, and No. 9368, Norsworthy & Yeldell v. Village of Mer Rouge, the judgment appealed from be affirmed, and that as to the suit No. 9367, Norsworthy & Yeldell v. Village of Mer Rouge, the judgment appealed from be set aside, and the case be remanded to be proceeded with according to law; the appellants to pay the costs in the suits Nos. 9366 and 9368, and the appellee in suit No. 9367.

(141 La. 96)

No. 20871.

DAHLBERG et al. v. SHREVEPORT TRACTION CO.

(Supreme Court of Louisiana. March 12, 1917.)

(Syllabus by the Court.)

#### 1. REVIEW ON APPEAL.

Only a question of fact is presented in this case.

(Additional Syllabus by Editorial Staff.)

#### 2. APPEAL AND ERROR — 933(1)—PRESUMPTION — TRIAL COURT'S APPROVAL OF VERDICT.

Code Prac. arts. 558, 559, makes it the duty of the trial judge to grant a new trial when he is not satisfied with the correctness of the verdict, and the Supreme Court must assume that the trial judge refusing a new trial approved of the verdict, although he said he did not wish case to go up "stamped with his full approval."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3772.]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Action by Mrs. Lola Dahlberg and others against the Shreveport Traction Company. Verdict for plaintiffs for \$1,000, judgment thereon, and defendant appeals. Judgment reversed, and suit dismissed.

Wise, Randolph, Rendall & Freyer, of Shreveport, for appellant. Foster, Looney & Wilkinson, of Shreveport, for appellees.

**SOMMERVILLE, J.** The plaintiff sues the Shreveport Traction Company to recover \$5,000 damages for alleged injuries claimed to have been received by her in attempting to alight from a car operated by defendant company in Shreveport on July 29, 1912. She alleges that the negligence of the defendant consists in the starting of the car with a sudden jerk as she was in the act of alighting, which threw her to the ground, seriously wounding her head and back, shocking her nerves, and impairing her health.

Defendant specially denied any fault, negligence, or carelessness, and averred the sole cause of the accident was the fault and negligence of plaintiff in attempting to alight from the car while in motion, and before it came to a stop.

Trial was had before a jury, and it resulted in a mistrial. On the second trial a verdict was rendered in favor of the plaintiff for \$1,000 by a divided jury; and defendant prosecutes this appeal.

In refusing a new trial, the trial judge said, in part:

"This is the second trial before a jury, the first resulting in a mistrial. The present verdict is plainly a compromise verdict. This can be seen from reading the evidence, and it does not need the attached affidavit to make the same plain. \* \* \*

"While this court has the legal right to set aside the verdict of the jury, it has made it a practice not to do so except in a case where there is a plain and unambiguous denial of justice. Such is not the case here, although this court does not wish the case to go to the supreme court stamped with its full approval. A careful review of the written testimony, with full opportunity to analyze the same, allows the judge to come to a more just conclusion than merely hearing the evidence. This court does not know what its conclusion would be if it had an opportunity to read the evidence in the case, as the Supreme Court will have; but from hearing same it is very doubtful whether plaintiff has any right to recover in this case."

[2] The trial judge would have had full opportunity to have read the evidence if he had waited for it to have been written out,

before he passed upon the motion for a new trial; and this court would then have had the benefit of his judgment on the case. The Code of Practice makes it the duty of a trial judge to grant a new trial when he is not satisfied with the correctness of a verdict (articles 558, 559); and we must assume that he did approve of the verdict in this case, although he says he "does not wish the case to go to the Supreme Court stamped with his full approval."

We shall here repeat what was said in the case of *Anderson v. Texas & Pacific Ry. Co.*, 139 La. 1104, 72 South. 751, under a somewhat similar condition:

"This course we beg our brethren below not to follow, but, on the contrary, to exhaust the possibility of disposing finally of the case below before sending it to this court already burdened with more than its just share of work."

In that case, the judgment was set aside; and the suit was dismissed. A similar disposition will be made of this case.

[1] There is but one question of fact presented for determination.

Plaintiff alleges and testifies that she was on an open, or summer, car of defendant company, and that while she was on the running board, in the act of alighting, the car was suddenly started, after having been brought to a full stop, and she was thereby thrown off and injured. Her testimony is corroborated by two children, who clearly testified to impressions, rather than to facts.

Other witnesses testify in her favor, but their testimony is uncertain and unconvincing.

The trip was being made at night, when it was too dark for the signboard, announcing that cars would stop at the point, to be seen, and where plaintiff wished to alight; and she assumed that the car had reached the point when she attempted to alight, whereas the stopping place had not yet been reached, and the car was slowing up as it neared the point.

The preponderance of evidence is with the defendant company to the effect that plaintiff alighted from the car before it had come to a stop in response to her signal to stop, and she was therefore alone responsible for the accident which befell her. She cannot recover damages from defendant.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be reversed, and that this suit be dismissed, at plaintiff's cost.



(51 La. 99)

No. 22402.

CITY OF BATON ROUGE v. WEIS et al.  
(Supreme Court of Louisiana. March 12, 1917.)*(Syllabus by the Court.)*1. MUNICIPAL CORPORATIONS  $\S$  592(1)—POWER TO DEFINE CRIME—MUNICIPALITIES.

The charter power of the plaintiff city "to close gambling houses" does not include the power to penalize the betting of money on poker and other games which have never been denounced by the laws of the state.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1311.]

2. MUNICIPAL CORPORATIONS  $\S$  594(6)—POWER TO DEFINE CRIME — MUNICIPALITIES — STATUTES.

The power to penalize gambling games was specially conferred by statute on all municipalities created under Act No. 136 of 1898, known as the "General Municipal Incorporation Law."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1328.]

3. MUNICIPAL CORPORATIONS  $\S$  594(6)—POWER TO DEFINE CRIME — MUNICIPALITIES — CHARTER AND STATUTE.

The plaintiff city is not in that category.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1328.]

O'Neill, J., dissenting.

Appeal from City of Baton Rouge; William A. Benton, Judge.

Isidore Weis and others were convicted in the city court in the City of Baton Rouge of the offense of gaming, and they appeal. Sentence set aside, motion to quash the charge sustained, and defendants discharged.

T. Jones Cross, of Baton Rouge, for appellants. L. D. Beale, City Atty., of Baton Rouge (S. G. Laycock, of Baton Rouge, of counsel), for appellee.

LAND, J. On January 23, 1917, the defendants were charged in the city court of the city of Baton Rouge as follows:

"That they and each of them did on the 22d day of January, 1917, in the city of Baton Rouge, La., at a gambling table, bet and wager money and representatives of money at the game of poker in a certain house on Convention street used and occupied for said purpose, against the ordinances of the city of Baton Rouge and in violation of the provisions of Ordinance No. 3 of the Commission Series for the year 1914."

Defendants moved to quash the charge against them on the ground that the said ordinance, quoad such charge, is unconstitutional and illegal, and is unauthorized by any law of the state or by the charter of the city of Baton Rouge.

On the trial of the motion evidence was adduced as follows:

"Isidore Weis, one of the accused, being duly sworn, testified on direct examination: That he was present at the house on Convention street in the city of Baton Rouge on the night of January 22, 1917; that seven or eight men were engaged therein playing an ordinary game of poker with cards and chips stacked before the players. It was just an ordinary game of poker, and nothing else."

"Witness Isidore Weis testified on cross-examination as follows: The house referred to was immediately back of Paulsen's drug store;

this house can be entered and is entered at times through the alley in the rear of the Mayer Hotel, which alley extends to the street as a back entrance to the Mayer Hotel from Convention street; the game referred to as being played is stud poker; this house is used for no other purpose other than gambling; this house is rented by myself and Mr. Louis Arbour; that he is directly in charge of all games played at said house; we get a rake off from the games."

After argument the motion to quash was overruled, to which ruling counsel for defendants excepted.

The defendants thereupon entered pleas of not guilty, and after trial each of them was found guilty as charged, and sentenced to pay a fine of \$50, or in default thereof to serve 20 days in the city jail.

Defendants have appealed to this court.

[1-3] The city of Baton Rouge is authorized by its charter—

"to close all gambling houses, and to expel from the city or imprison all bunco men, lottery dealers, common cheats and swindlers." See Act 169 of 1898, p. 336.

The act confers no other powers on the council over the subject-matter of gambling.

It is to be noted that by section 15, subd. 26, of Act No. 136 of 1898, p. 224, for the creation and government of municipal corporations, each city, town or village is empowered to prohibit and suppress "games, and gambling houses and rooms."

It thus appears that the lawmaker, advisedly it is to be presumed, omitted to empower the city of Baton Rouge to prohibit or suppress gambling games.

The ordinance in question, enacted in the year 1914, bears the following title:

"Prohibiting gambling for money or anything of value in the city of Baton Rouge, and prohibiting the keeping of any place where gambling is carried on or allowed, and providing penalties therefor."

Section 1 of said ordinance penalizes bets or wagers for money or other things of value at any gambling table or bank, etc., or at any gambling game, or at poker, poker dice, etc., or other game that can be played with cards, dice, or dominoes, etc.

Section 2 of the ordinance penalizes the leasing or keeping of any building, room, or place for the purpose of being used as a place to bet or wager or gamble as set forth in section 1.

Defendants were charged with betting and wagering money at the game of poker in a certain house used and occupied for that purpose.

They were not charged with leasing or keeping said house, or having any interest therein. In short, the defendants are charged under section 1 of said ordinance with betting on a game of poker played by themselves.

In *City v. Maloney & Schulsinger*, 107 La. 194, 195, 31 South. 702, this court said:

"To the Legislature alone the power is delegated of legislating against gambling. The intention was, as we judge, to make provision for a

general statute on the subject, and not to leave it to one municipality to adopt ordinances against gambling in all forms.

"Above all, a power having been specially delegated to the Legislature, it is not delegated to one of the subordinate branches of the state government."

In the *Town of Ruston v. Perkins*, 114 La. 851, 38 South. 583, this court held that the Legislature by Act No. 136 of 1898, p. 224, conferred on municipalities organized under that statute the power to prohibit and suppress gambling games such as "draw poker."

In *Town of Marksville v. Worthy et al.*, 123 La. 432, 49 South. 11, 131 Am. St. Rep. 353, the defendants were convicted of playing cards for money within the corporate limits of the town of Marksville.

In that case this court reviewed the jurisprudence on the subject, and held, as stated in the syllabus, as follows:

"Playing cards for money has not been denounced as unlawful by the statutes of this state, except when such gambling is carried on in or in view of a public highway or street. A town charter which contains no delegation \* \* \* to suppress gambling, but confers merely the right 'to remove nuisances,' does not warrant the enactment of an ordinance penalizing the playing of cards for money in any and all places within the corporate limits."

The court in its opinion said, *inter alia*:

"It has been held in several cases that a municipality may pass an ordinance prohibiting gambling games denounced by the statutes of the state. *City of Monroe v. Hardy*, 46 La. Ann. 1232, 15 South. 696; *New Orleans v. Collins*, 52 La. Ann. 976, 27 South. 532.

"The charter confers no powers on the town of Marksville to suppress gambling *eo nomine*.

"Gambling *per se* was not an indictable offense at common law. The municipal police power over gaming and gambling houses is dependent upon the charter or general laws. 28 Cyc. 718, 714."

Defendants are not charged with keeping a gambling house, but with betting on a game of poker in a house used for that purpose. The mere better is not criminally liable for the keeping of such a house by another person.

"All the statutes, of course, aim to reach the actual proprietor of the gaming device or establishment himself, whether he operates or manages it in person, or does so by a servant, clerk, agent, or in any other manner." 12 R. C. L. § 42, p. 738.

We are of opinion that the city of Baton Rouge had no power to penalize the betting of money on games of poker.

It is therefore ordered that the sentence below be set aside; that the motion to quash be sustained; and that the defendants be discharged without day.

SOMMERVILLE, J., concurs.

O'NIELL, J. (dissenting). The court was not called upon in this case to decide whether the municipality of Baton Rouge had the charter power to denounce and suppress gambling *eo nomine*. Hence the decision of this court in *Town of Marksville v. Worthy et al.*, 123 La. 432, 49 South. 11, 131 Am.

St. Rep. 353, is not authority nor a good precedent for the decision rendered by the majority of the members of this court in the present case. On the contrary, certain expressions in the opinion cited are, at least by inference, in conflict with the decision now rendered. I quote the following from the opinion cited, *viz.*:

"The defendants were convicted, as charged, 'for playing cards for money within the corporate limits of the town of Marksville,' and on their admission of the facts as set forth in the charge. Hence there is nothing to show that the defendants were gambling in a public place. All the authorities cited in behalf of the plaintiff refer to gambling houses, or to gambling in public places."

The charge on which the defendants were convicted in the present case was that they and each of them did bet and wager money and representatives of money at the game of poker, at a gambling table, in a certain house used and occupied for such purpose; that is, in a gambling house.

The provision of the ordinance which the defendants were charged with violating makes it unlawful for any person to bet or wager at the game of poker, or at any other gambling game, at any gambling table, in any place where people resort for the purpose of wagering or betting, within the corporate limits of the city of Baton Rouge.

It is conceded that the municipality had authority, under an express declaration in the general welfare clause of its charter, to suppress gambling houses by denouncing as an offense the conducting or operating of a gambling house. I cannot see why the municipality could not enact an ordinance that would reach all persons found guilty of aiding or abetting in the operation or conduct of a gambling house. In fact, as a gambling house cannot be operated without gamblers, the gamblers might well be regarded, not merely as instigators, but as perpetrators, in the offense of operating a gambling house. But in this case we are not called upon to say whether a gambler in a gambling house, not interested as proprietor or representative of the proprietor of the game, could be held guilty of the offense of conducting a gambling house, if the ordinance did not expressly declare that he should be deemed guilty of the offense. As is said in 12 R. C. L. p. 738, § 42, the question as to who is generally liable for keeping or maintaining a gambling house depends upon the wording of the particular statute involved.

At common law there are no accessories in misdemeanors; all who are implicated, whether as instigators or perpetrators, are principals, subject to indictment and prosecution as such. Wharton's *Crim. Law* (9th Ed.) vol. 1, § 223, p. 251. Therefore, unless a statute or ordinance denouncing the commission of a particular act as a misdemeanor declares that those who aid or abet in the commission of the act shall be deemed guilty as principals, an aider or abettor (who would to a

felony at common law be considered an accessory) would not be guilty of the misdemeanor denounced by the statute. *State v. Trapp*, 140 La. 425, 73 South. 255. In the enactment of such penal ordinances as a municipality has authority to enact, it has the same authority that the Legislature has to make the statute or ordinance applicable to instigators as well as perpetrators of the offense denounced.

I cannot concur in the opinion that the municipal legislative authority to suppress gambling houses does not imply and include the authority to prohibit gambling in a gambling house. Hence I respectfully dissent from the opinion and decree rendered in this case.

(141 La. 103)

No. 22181.

REHAGE v. HAYFORD.

(Supreme Court of Louisiana. March 12, 1917.)

(Syllabus by the Court.)

PROCESS — 78 — SERVICE — STATUTE — "HOUSE" — "LIVING IN THE HOUSE."

Code of Practice, art. 187, declares that citations and petitions may be served in either of two ways, to wit, "by being delivered to the defendant in person, or by being left at his domicile," and (article 189) that "it [the service] is made at the domicile when the copies of the citation and petition are left at the usual place of domicile or residence of the defendant, if he be absent, by delivering them to a person, apparently above the age of fourteen, living in the house." It is not to be supposed that it was the intention that a person having a place of residence other than a house, such as a tent, a boat, or an apartment in a house, should be exempted from domiciliary service because such "place" is not a "house," or, upon the other hand, that a person living in apartments should be bound by service of process directed to him, but delivered to a stranger living in the house, but in another of the apartments. If, however, such service can only be made upon a person "living in the house," as provided in the last clause of the article quoted, persons not living in houses and occupying the whole of them are exempt therefrom; and, if any person living in the same house with another may receive service of process for him, then such other person may be bound by the act of a stranger of whose existence he is ignorant. The meaning intended to be conveyed by the word "house," as used in the last clause of the article, is clearly, therefore, "place of domicile or residence," as used in the first clause, since it is at that "place" that the service is to be made, and it cannot be so made upon a person "living in the house" if the "place" be not a house, and it should not be so made if the defendant and the person upon whom it is made, though living in the same house, are strangers to each other.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 90.

For other definitions, see Words and Phrases, First and Second Series, House.]

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by Miss Virginia M. Rehage against Eugene S. Hayford. Judgment against defendant by default, and from a judgment setting aside the default, plaintiff appeals. Affirmed.

E. M. Stafford, Henry W. Robinson, and Daniel Wendling, all of New Orleans, for appellant. Carroll & Carroll, of New Orleans, for appellee.

#### Statement of the Case.

MONROE, C. J. This is an appeal from a judgment setting aside a default on the ground that defendant had not been cited, and that the sheriff's returns purporting to show citation were untrue; the claim sued on having in the meanwhile, it is said, become barred by the prescription of one year.

It appears that the petition in the case, accompanied by interrogatories on facts and articles, was filed on January 27, 1916, that copies of those papers, with citation addressed to defendant, were issued on the same day, and that, on the following day the deputy sheriff made a return to the effect that he had served the citation and copies on defendant in person, the facts, however, as developed on the trial of the rule to set aside the default, being as follows:

There stand at the corner of St. Charles and Julia streets, fronting on St. Charles and extending back on Julia street, an aggregation of buildings that were formerly occupied as a residence, but which, having been leased to a realty company, and added to, divided, and altered, are now subleased by that company to different tenants for different purposes, the divisions on the ground floor, which is rather a half floor, or basement, as garages, bicycle shops, pressing clubs, etc., and the upper floors to defendant, who in turn subleases the apartments into which they are divided, save those in which he and his family reside, to different tenants, as residences. The main building fronts on and bears the number 805 St. Charles street, and defendant's apartments are on the second floor (being the floor above the basement, and sometimes called the first floor) of that building, as are also the apartments of several other tenants. In the rear of the main building, and separated from it by a fire wall, is a building which fronts on and bears the numbers 714 and 716 Julia street, the apartments upon the upper floors of which at the time of the occurrences which concern this case were leased by the fortnight to Mrs. Stenzer, who, with Walter E. Weber, her son, occupied them as their residence.

The Julia street apartments have a separate entrance on that street, but may also be reached by passing through the hall of the main building and crossing the gallery in the rear of the same; the hall being accessible from St. Charles street by means of steps which rise above the basement. Mrs. Stenzer, either by herself or through servants employed by her, attended to her own apartments, received no domestic service in connection

with her lease, paid her rent to defendant, and knew very few of the other tenants.

It is shown beyond dispute that a citation issued on January 27th directed to defendant, and, together with copies of the petition and interrogatories, was served on Weber while he was lying sick in bed in the apartments thus mentioned, and that the name of the defendant was not mentioned by the deputy sheriff who made the return of personal service on defendant to which we have referred. It is also shown that after the rule taken by defendant to set aside the default had been twice fixed for trial, and was then fixed for March 3d, another return of service was made (on March 2d, upon a citation that was issued on February 23d) to the effect that the citation had been received on January 27th, and served on defendant on January 28th, by leaving the same at his domicile, 805 St. Charles street, "in the hands of Walter Weber, a person apparently over the age of 14 years living and residing in said domicile, whose name and other facts" connected with the service were learned by interrogating said Weber, the defendant being absent at the time. The trial of the rule was then continued to March 10th, and defendant in the meantime filed another rule, including the second return in his attack, and on that day the sheriff, through counsel, requested that the return on the citation of February 23d be considered a corrected return of the citation of January 27th. The case was then submitted, and thereafter the sheriff, through counsel, filed a motion alleging that the citation and return filed on March 2d were filed improvidently and through error, asking that it be considered withdrawn, and tendering a supplemental return in the form of an affidavit in its stead. The affidavit made by the deputy sheriff sets forth that he received the citation, petition, and interrogatories on January 27th, and on January 28th, made service thereof on defendant at his domicile, 805 St. Charles street, by handing same to Walter Weber, "a person over the age of 14 years residing on said premises, said defendant being absent therefrom at time of said service, as this affiant found to be the case by going into the said premises and looking for defendant in the building," etc.

The motion and affidavit, having been filed long after the submission of the case and ex parte, cannot be considered in the determination of the issue presented, and need not be, as it would not affect the result if considered.

#### Opinion.

The theory of personal service having no support in the facts, the remaining question is whether there has been domiciliary service, and, though plaintiff's counsel argue in support of the affirmative of that question, we are of opinion that the negative is the better sustained by the law and the reason of the law.

The law declares that citation may be served on a defendant in either of two ways, i. e., by being delivered to him in person, or, by being left at his domicile (C. P. art. 187), and that (C. P. art. 189):

"It is made at the domicile when the copies of the citation and petition are left at the usual place of domicile or residence of the defendant, if he be absent, by delivering them to a person, apparently above the age of fourteen, living in the house."

But the usual place of domicile may not be a house, or all of a house, or, on the other hand, it may be constituted of an aggregation of houses. Thus one person may choose for such purpose a cave, a tent, a boat, a box car, or a particular part of a house, the other parts of which have been chosen by other persons for a like purpose or for purposes of business, and another person may establish his family in several tents, boats, or box cars, or may erect for their accommodation or for the accommodation of his guests, his domestic servants, or others houses apart from that in which he himself may choose to reside, alone.

From which it will be seen that, if the provision of the quoted article to the effect that, in the absence of the defendant, the service is to be made by delivery of the citation to a person "living in the house," be literally interpreted, the main purpose of the enactment—i. e., to provide for domiciliary service—will be defeated in all cases where the defendant does not reside in a house, and in those instances in which he resides in part of a house, while others reside or transact business in other parts, he may be held bound by a citation delivered to a person living in the house, but who is wholly unconscious of and indifferent to his existence. The law requires interpretation, therefore, in order to give it the effect intended, since it is not to be supposed that it was intended that a person having a place of domicile and residence should be exempted from domiciliary service because such a place is not a house, or that a person living in an apartment in a house divided into many apartments occupied by different persons should be bound by service of process directed to him, but delivered to an entire stranger living in the house, but occupying another apartment. The intention to authorize domiciliary service is declared in article 187, and, since article 189 declares that such service is made by leaving copies of the citation and petition at the usual place of domicile or residence of defendant, and, since, as we have seen, a defendant may occupy as his usual place of domicile or residence a place other than an entire house, it follows that the difficulty in the matter arises from the requirement that the copies shall be delivered to a person living in the "house," and we are therefore to consider the reason and meaning of that requirement, and they are not far to seek. Manifestly the reason is because the fact

that one person lives in the same house with another will in most instances authorize the presumption that there exists between the two a relationship, either of blood or amity, or arising from contract or common interest, from which it may be deduced that the one who is found in the common dwelling, in the absence of the other, is vested by such other with authority to receive for him such messages, notices, packages, and papers as may be intended for him and are there delivered. The meaning intended to be conveyed by the word "house," as used in describing the person to whom the citation may be delivered, is clearly, therefore, "place of domicile or residence," as used in the first clause of the sentence, since it is at that "place" that the citation is to be served, and it cannot be so served upon a person "living in the house" if the place be not a house, and it should not be so served if the defendant and the person upon whom the service is made, though living in the same house, are strangers, and bear no more relation to each other than though they lived in different parts of the world.

In *Sparks v. Weatherby*, 16 La. 595, 596, it appeared from the sheriff's return that the citation had been delivered at the usual domicile of the defendant "to C. W. Bibb, a free white person apparently above the age of 14," and this court, after considering some other matters, said:

"But there is another defect in this return. It does not show that the person in whose hands the citation was placed was living in the house. This would be fatal, even if the place was that of the usual abode of the defendant; for the person intrusted with the writ might happen to be an entire stranger accidentally in the house, and likely to have no communication with the defendant."

On the other hand, in *Maxwell v. Collier*, 6 Rob. 86, *Succession of McCalop*, 10 La. Ann. 224, and *Rousseau v. Gayerre*, 24 La. Ann. 355, it has been held that service of process within the inclosure of a plantation upon a person there living, though not in the house occupied by the person to whom the process was directed, was sufficient, a doctrine which we do not at this time find it necessary to affirm, the cases being cited merely because they sustain the theory of a presumed relationship between the person to whom a citation is directed and the person to whom it is delivered, as arising from the fact of a common domicile.

In the instant case the first return made by the deputy sheriff showing personal service on defendant is admitted to have been untrue, as is also the second return, showing the service on January 28th of a citation that was not issued until February 23d following. If the last return, showing service on Weber, "a person over the age of 14, residing on said premises," could be considered at all, we should say: First, that "premises" may include a mill or university settlement,

where there are hundreds of houses; and, second, that the evidence clearly shows that Weber was not living at "the usual place of domicile or residence" of the defendant, nor was he living in the same house, and that he was utterly without authority, actual or presumptive, to represent or bind him in receiving the service.

We therefore find the judgment appealed from to be correct, and it is accordingly affirmed.

SOMMERVILLE, J., concurs.

(141 La. 110)

No. 22189.

RUIZ et al. v. PONS.

(Supreme Court of Louisiana. Oct. 16, 1916.  
On the Merits, March 12, 1917.)

(Syllabus by the Court.)

On Motion to Dismiss the Appeal.

1. APPEAL AND ERROR §780(2)—INTEREST IN PROSECUTING APPEAL—DETERMINATION.

When the question whether an appellant has an interest in prosecuting the appeal depends upon whether the judgment on appeal shall be rendered for or against him, that question cannot be decided on a motion to dismiss the appeal, but belongs to the merits of the case.

On the Merits.

2. INSANE PERSONS §11, 44—INTERDICTION—ABATEMENT—DISMISSAL.

An interdiction suit, being purely personal as to the defendant, is abated if the latter dies before a final judgment is rendered; but, as the account to be rendered by the administrator pro tempore can only be rendered in and through the court that made the appointment, the suit should not be dismissed from the docket of the court until the administrator pro tempore has rendered his account to the representative of the succession of the deceased defendant and is discharged from the trust.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 19, 69, 70.]

3. INSANE PERSONS §28 — INTERDICTION — ABATEMENT—COSTS.

The provision of the Civil Code that the costs incurred in an interdiction suit shall be paid by the petitioner if the interdiction shall not be pronounced has no application to a case in which the defendant dies before a judgment is rendered. In such case the payment of the costs of the suit is governed by the rule pertaining to the abatement of actions; that is, that, when an action is abated by an event over which neither party had control, no judgment can be rendered, and each party must pay his own costs.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 39-41; *Costs*, Cent. Dig. § 379.]

4. INSANE PERSONS §28 — INTERDICTION — ABATEMENT—COSTS.

If the defendant in an interdiction suit dies before a final judgment is rendered, the costs incurred by the defendant or for his or her benefit, such as the compensation to be paid the administrator pro tempore and the latter's attorneys and the fees of expert witnesses appointed or employed by or for the defendant, must be borne by the estate of the defendant.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 39-41; *Costs*, Cent. Dig. § 379.]

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Interdiction suit by Mrs. Josephine Pons Ruiz and others against Mrs. Marie N. Pons, widow, in which the defendant's succession was opened, and in which an attorney who had represented her in the interdiction suit was confirmed and qualified as testamentary executor, and obtained an ex parte order dismissing the suit, and in which the Bank of Orleans, administrator pro tempore for defendant in the interdiction suit, obtained a rule on the testamentary executor and the other attorneys for defendant to show cause why the order dismissing the proceedings should not be rescinded, and in which plaintiffs in the interdiction suit obtained a similar rule on the testamentary executor, and in which the Bank of Orleans filed an account of its administration pro tempore praying that it be approved and homologated, and wherein the account was approved and homologated so far as not opposed, and the exception of testamentary executor was overruled, and the rules to show cause why the dismissal of interdiction proceedings should not be rescinded were dismissed, and the order dismissing the suit was made absolute, and judgment was rendered maintaining the opposition to the account of the administrator pro tempore, and the Bank of Orleans, in its own behalf, and as administrator pro tempore, and Frank N. Butler and others, its attorneys, in their own behalf, appeal. Motion to dismiss the appeals overruled, judgment dismissing the interdiction suit annulled, and judgment on the opposition to the final account of the administrator pro tempore amended by increasing the compensation allowed to it and by increasing compensation allowed its attorneys, and costs ordered and decreed, and case remanded.

Denegre, Leovy & Chaffe, of New Orleans, for appellants Bank of Orleans, Butler, and Lazarus, Michel & Lazarus. Dart, Kernan & Dart, of New Orleans, for plaintiff appellants. Paul L. Fourchy, of New Orleans, for appellee Pons. Woodville & Woodville, of New Orleans, for appellee testamentary executor.

O'NIELL, J. This case was before the court on an appeal from the judgment refusing to interdict the defendant. The judgment appealed from was set aside, because, although we were not satisfied that the defendant was a proper subject for interdiction at the time the suit was filed, we believed that she was, when the judgment was rendered on appeal, a proper subject for interdiction. The case was therefore remanded in order that the trial judge might then determine whether the interdiction should be pronounced. See *Pons v. Pons*, 137 La. 25, 68 South. 201.

[1] Soon after the judgment of this court became final and the case was reinstated on

the docket of the civil district court the defendant died. Her succession was opened in the civil district court, and one of the attorneys who had represented her in the interdiction proceedings was confirmed and qualified as testamentary executor. He and the other attorneys who had represented the defendant as such in the interdiction suit presented a motion to the judge of the civil district court, and, on showing that the defendant had died, obtained an ex parte order dismissing the interdiction suit. Three days thereafter the Bank of Orleans, having been appointed administrator pro tempore for the defendant in the interdiction suit, filed a petition alleging that the order dismissing the interdiction proceedings had been granted improvidently, and obtained a rule on the testamentary executor and the other attorneys who had represented the defendant in the interdiction suit ordering them to show cause why the order dismissing the proceedings should not be rescinded. A few days later the plaintiffs in the interdiction suit obtained a similar rule on the testamentary executor and the other attorneys who had represented the defendant in the interdiction suit ordering them to show cause why the order dismissing the proceedings should not be rescinded. Thereafter the Bank of Orleans filed in the civil district court an account of its administration as administrator pro tempore of the estate of the defendant in the interdiction proceedings, together with a petition praying that notice of the filing of the account be published, that the heirs of the deceased defendant be notified, and that the account be approved and homologated. The testamentary executor filed an opposition to the account, first excepting to the jurisdiction of the court on the ground that the administrator pro tempore had become functus officio by the death of the defendant, and that the account should be rendered to him, the testamentary executor, in the succession proceedings. The account was approved and homologated by the court in so far as it was not opposed. The exception filed by the testamentary executor was overruled. The rules to show cause why the order dismissing the interdiction proceedings should not be rescinded were tried, and judgment was rendered dismissing the rules and making absolute the order dismissing the interdiction suit. On the same day on which that judgment was rendered the district court rendered judgment maintaining in part the oppositions to the account of the administrator pro tempore. The Bank of Orleans, in its own behalf and as administrator pro tempore, and Messrs. Frank N. Butler and Lazarus, Michel & Lazarus, the attorneys of the administrator pro tempore, in their own behalf, appealed from the judgment dismissing the interdiction suit and from the judgment rendered on the oppositions to the account of the administrator pro tempore.

The testamentary executor of the deceased defendant and the other attorneys who had represented her in the interdiction proceedings have filed motions to dismiss the appeals from the judgment dismissing the interdiction proceedings. The motions to dismiss the appeals are founded solely upon the contention that the appellants have no interest in demanding a reversal of the judgment appealed from.

It is not and cannot well be disputed that the appellants have sufficient interest to maintain their appeals from the judgment rendered on the oppositions to the final account of the administrator pro tempore. In order to have the benefit of their appeals from that judgment it was necessary that they should also appeal from the judgment dismissing the interdiction proceedings, because, if they permitted that judgment to become final, it would appear that the proceedings in which they had taken their appeal were at an end.

When the question whether an appellant has an interest in prosecuting the appeal depends upon whether the judgment on appeal shall be rendered for or against him, that question cannot be decided on a motion to dismiss the appeal, but belongs to the merits of the case.

The motions to dismiss the appeals are overruled.

#### On the Merits.

The ex parte order dismissing the interdiction suit referred to in the foregoing opinion on the motions to dismiss the appeals was rescinded by the trial judge, and judgment was rendered on a rule nisi dismissing the proceedings at the cost of the plaintiffs in the interdiction suit. From that judgment the plaintiffs have prosecuted an appeal, which has been consolidated with the appeals taken by the administrator pro tempore and the latter's attorneys. The only part of the judgment rendered on the oppositions to the final account of the administrator pro tempore from which the latter appealed is the reduction of the fee of the administrator pro tempore from \$15,000, the amount placed on the account, to \$4,000; and the only part of the judgment from which the attorneys of the administrator pro tempore appealed is the reduction of their fee from \$15,000, the amount allowed them on the final account, to \$2,000. The testamentary executor, in answer to the appeals, prays that the account of the administrator pro tempore be rejected entirely.

The issues presented by the various appeals therefore are as follows, viz.:

First. Whether the trial judge should have dismissed the interdiction suit without first allowing the administrator pro tempore to render an account of its administration and be discharged from the trust.

Second. Whether the costs of the interdiction proceedings, the suit having abated at the death of Mrs. Pons, should be imposed

upon the plaintiffs, or each party should bear his or her own costs.

Third. What compensation should be allowed the administrator pro tempore, and what should be allowed the latter's attorneys for their services respectively?

#### Opinion.

[2] Before the interdiction proceedings could be terminated and dismissed from the docket of the civil district court, it was necessary that the Bank of Orleans should render an account of its administration as administrator pro tempore of the property and funds of the defendant whose interdiction had been sought. That account could only be rendered in and through the court in which the appointment had been made. If a final judgment had been rendered in favor of the defendant, declaring her sane and rejecting the demand for her interdiction, the account would have been rendered to her. If a final judgment had been rendered against her, pronouncing the interdiction, the account would have been rendered to the curator of the interdiction. The interdiction suit abated by the death of the defendant, but it was nevertheless necessary that an account should be rendered by the administrator pro tempore to the heirs or executors of the estate of the defendant. The method of administration and of rendering an account by a curator of an interdicted person is governed by the same rules which govern tutors of minor children; and we think the same rules regarding the rendering of an account must apply to an administrator pro tempore in a suit for interdiction. R. C. C. 415; Interdiction of Onorato, 46 La. Ann. 73, 14 South. 299.

Our conclusion is that an orderly administration of the affairs of the defendant whose interdiction was sought, and of her succession at her death, demanded that the interdiction suit should not have been dismissed until the administrator pro tempore had rendered an account and had been discharged from the trust. Analogous and appropriate rulings on that subject are found in the cases of Gibbs v. Lum & Co., 29 La. Ann. 526; Cawthorn v. Cawthorn, Administrator, 30 La. Ann. 1181; Succession of Melina Webre, 36 La. Ann. 312; and Eby v. McLain, 123 La. 138, 48 South. 772.

[3, 4] As to who should pay the costs of the interdiction proceedings, the appellants concede that the plaintiffs should not be reimbursed any costs paid by them, and that they should bear such costs as they have incurred for stenographer's fees, etc. Their complaint is that the defendant should bear the costs incurred by her or for her benefit, such as the compensation to be paid the administrator pro tempore and the latter's attorneys, the fees of expert witnesses employed by the defendant, etc.

Article 897 of the Civil Code provides that the costs of an interdiction suit shall be

borne by the interdict if the defendant be interdicted, and by the petitioner if the interdiction prayed for be not pronounced.

The executor of the estate of the deceased defendant in this case demands a strict construction and application of that article of the Code; and the district judge has so interpreted and applied it.

Our conclusion is that the framers of the Code intended that a petitioner for interdiction should pay the costs of the suit if a final judgment should be rendered refusing to pronounce the interdiction, but that they did not contemplate, or intend to provide for, a case where the interdiction suit would abate by the death of the defendant whose interdiction was sought. Hence we are of the opinion that the disposition of the costs in this case must be governed by the fact that the defendant died before a final judgment was rendered for or against her, rather than by the fact that it was an interdiction suit. Article 551 of the Code of Practice provides that the costs of any lawsuit are due to the party in whose favor the judgment has been rendered, whether the court rendering the judgment has or has not decreed that the party cast should pay the costs.

When an action that is purely personal to one of the parties is abated by his death, no judgment can be rendered for or against the survivor, and there is no decree on which to base the costs of the suit. An interdiction suit, being purely personal as to the defendant, is abated if the defendant dies before a final judgment is rendered, and the payment of the costs of the suit is governed by the rules pertaining to the abatement of actions. That is what this court decided in *Re Jones*, 117 La. 106, 41 South. 481, where the defendant against whom a judgment of interdiction was pronounced died pending his appeal from the judgment of interdiction. It was held that, the suit having abated by the death of the appellant, no judgment could be rendered except to dismiss the appeal, and that each party to the suit should pay his own costs. The same rule, regarding the payment of costs, was applied in the case of *Doss et al. v. Board of Commissioners*, 117 La. 450, 41 South. 720, in which the only question involved was the constitutionality vel non of a statute of this state, and the statute in question was repealed by an act of the Legislature pending the appeal from the judgment of the district court. It was held that the action abated by the repeal of the statute attacked, and that each party to the suit should pay his own costs. In fact, the rule that each party to a suit that is abated by an event over which neither party had control must pay his own costs appears to be universally recognized. See list of decisions cited in 11 Cyc. 69 and 70. Our conclusion is that the costs incurred by or for the benefit of the defendant in the interdiction proceedings, such as the compensation to be paid the

administrator pro tempore and the latter's attorneys and the fees of expert witnesses appointed or employed by or for the defendant, must be borne by the estate of the defendant.

The compensation to be allowed the administrator pro tempore and the latter's attorneys is not fixed by statute, but must be determined by the court from the various elements of the employment, such as the responsibility incurred and the skill and volume of the work done. The services rendered in this case extended over a period of two years, nine months, and seventeen days. That is much longer than the law contemplates that an administrator pro tempore should have to serve. The inventory of the estate of the defendant amounted to nearly \$350,000, consisting principally of real estate that was heavily mortgaged, and on which rents amounting to more than \$61,000 were collected and disbursed by the administrator pro tempore under orders of the court during the administration. The administrator pro tempore succeeded in avoiding a foreclosure of a mortgage of \$80,000 on one piece of property belonging to the estate during the administration, and thereby rendered a valuable service. Several bankers testified that the compensation demanded by the administrator pro tempore was fair and reasonable, and several lawyers testified that the compensation demanded by the attorneys for the administrator pro tempore was not unreasonable.

It would serve no useful purpose to incur the report of this opinion with a review of the voluminous mass of evidence pertaining to the compensation to be allowed the administrator pro tempore and to the latter's attorneys. Our conclusion is that the compensation allowed by the district judge is inadequate, but that the amount demanded is somewhat excessive. We have concluded from all of the evidence in the case that the administrator pro tempore should be allowed \$10,000, and that the attorneys for the administrator pro tempore should be allowed \$5,000 as compensation for the services rendered by them, respectively.

For the reasons assigned, the judgment dismissing the interdiction suit is annulled. The judgment on the oppositions to the final account of the administrator pro tempore is amended by increasing the compensation allowed the administrator pro tempore from \$4,000 to \$10,000, and by increasing the compensation allowed the attorneys for the administrator pro tempore from \$2,000 to \$5,000. It is further ordered, adjudged, and decreed that, as the interdiction suit abated at the death of the defendant, each party thereto shall bear his or her own costs, and that the costs incurred by or for the benefit of the defendant, such as the compensation allowed the administrator pro tempore and the latter's attorneys, the fees of expert wit-



nesses appointed or employed for or by the defendant, be borne by her estate. The case is therefore remanded to the civil district court to be proceeded with and disposed of accordingly.

(141 La. 120)

No. 21468.

GREEN et al. v. NEW ORLEANS, S. & G. I. R. CO.

(Supreme Court of Louisiana. March 12, 1917.)

(Syllabus by the Court.)

1. EVIDENCE §178(3) — MARRIAGE §46 — CONTRACT OF MARRIAGE—PROOF—RECORD.

It would seem to be an elementary proposition under the law as it now stands (since the amendment, in 1855, of Civ. Code, art. 107 [now article 105], whereby the duplicate act of marriage, for which the article provides, is required to be returned, with the duplicate license, to the officer issuing the license, and by him recorded), that, in any case in which it is sought to prove a contract of marriage, the proponent should be required to produce a certified copy of the public record, which the law declares shall be made, of the contract, and that, until it be shown that the record has been lost or destroyed, no secondary, or inferior, evidence thereof, offered to create a presumption that such contract had been entered into, should be received.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 583; Marriage, Cent. Dig. § 74.]

2. MARRIAGE §50(5) — PRESUMPTION — PAROL EVIDENCE — SUFFICIENCY.

Parol evidence, when admissible, to establish a presumption of marriage, arising from the fact that the persons concerned have lived together, held themselves out, and been received as man and wife, should be strong enough to carry conviction that they entered into that relation with the bona fide intention of permanently assuming the obligations and responsibilities of marriage, and carried that intention into effect.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 86, 87.]

3. DEATH §31(5) — WRONGFUL DEATH — RIGHT OF ACTION — STATUTE.

Article 2315 of the Civil Code (as amended) applies to actual and legitimate relatives, and its provisions cannot be extended to reach other persons to whom they do not expressly apply; hence illegitimate children have no right of action in damages for injury resulting from the alleged wrongful killing of a brother from the same bed.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 40.]

Appeal from Twenty-Ninth Judicial District Court, Parish of Plaquemine; R. Emmet Hingle, Judge.

Action by Rachael Green, wife of Caesar Frederick, and Mary Green, wife of James Woodfork, against the New Orleans, Southern & Grand Isle Railroad Company. Judgment for plaintiffs, and defendant appeals. Reversed, with judgment in favor of defendant, rejecting plaintiffs' demand and dismissing the suit.

E. Howard McCaleb, of New Orleans, for appellant. Edrington & Edrington (L. Fred Andry, of New Orleans, of counsel), for appellees.

Statement of the Case.

MONROE, C. J. This is an appeal by defendant from a judgment awarding the two

plaintiffs (Rachael Green, wife of Caesar Frederick, and Mary Green, wife of James Woodfork), as the surviving sisters of Elijah Green, deceased, \$2,000 as damages alleged to have been sustained by them in consequence of his death, said to have been caused by an assault made upon him by the conductor of one of defendant's trains, upon which he was a passenger.

Defendant denies, among other things, that decedent was the legitimate brother of plaintiffs, and we shall first consider that question.

It is alleged that plaintiffs and the decedent were born of a marriage between William Green and Martha Tillman, but no written or oral evidence (save as will be here mentioned) has been offered to prove that such marriage was ever actually solemnized, and circumstantial evidence alone is relied on for its establishment.

Mary (Green) Woodfork testifies that her mother died in 1908, at the age of 42 years, 6 months, and 1 day; that she had lived with her, in New Orleans, for the 15 years preceding her death, during which period, and until his death, in March, 1912, her father had lived in Gretna; and that she was 17 years old when her mother died. She admits that she has no recollection of what occurred when she was 2 years old, and when, according to her theory, her mother separated from her father and came to New Orleans, from which it follows that her parents never lived together within her recollection, and that she does not know whether they had ever done so. She also testifies that she had seen a "license," in her mother's possession, but had been unable to find it after her mother's death.

Ed. Coleman testifies that he is a minister of the gospel (and it is otherwise shown that he succeeded Charles Matthews in the pastorate of a negro Baptist church in Gretna); that he was an officer of the church about 28 years ago (meaning 28 years prior to June, 1914, or say in 1886), and was present when Wm. Green and Martha Tillman were married by Matthews.

On his cross-examination, he gives the following testimony:

"Q. Do you know where they were married, of your own knowledge? A. No, sir; I don't know exactly; they were living on the railroad with their mother. \* \* \* Q. You weren't present at the marriage, and don't know that they were married, except from what you were told? A. No, sir. Q. According to the rules of your church, you don't permit any one but people who are married, or single, to be members of your church, and you deduce from that fact that Martha Tillman and William Green were man and wife? A. Yes, sir."

He repeats, on re-examination, that they were married "about 28—between 28 and 27—years ago"; but he also testifies that a certain race trouble occurred in 1886, or about that time, and that they separated, Martha coming to New Orleans, and leaving

William in Gretna, and that he never saw her afterwards. Again, he testifies that they lived together, as man and wife, in Gretna, for 11 years, prior to 1886, and that she, during that period, gave birth to two children, Rachael and Elijah (otherwise called William Green, Jr.), and possibly a third child, according to which testimony those children must have been born before the marriage and while the mother was between  $3\frac{1}{2}$  and  $14\frac{1}{2}$  years of age, and the plaintiff Mary must have been born quite a number of years after her parents had effected a separation, which lasted until they died.

Viola Johnson knew Martha Tillman in childhood, and William Green "a considerable time." They were married "28 years ago" by Charley Matthews, lived together after the marriage, and had three children (to the knowledge of the witness), Rachael, Elijah, and Mary. They separated "a good while" ago; does not remember how many years.

"Q. In other words, they had four children, and the last child had died when they separated? A. Yes, sir. Q. Where did she live after they separated? A. Right on the Morgan Railroad [in Gretna]. Q. Where did she live after that? A. On the main street [also in Gretna]. Q. All that you know about the marriage is what they told you? A. Yes, sir; and I know that she was received into the church, and she had to be married to join the church."

Lottie Cole knew Martha Tillman a long time; did not know whether she was married to William Green, but she was baptized with witness, "and she had to get married, because they won't baptize you unless you are married." Witness was not married when she was baptized. Martha and William Green lived together in Gretna, and she was considered the wife of Green; does not know how long they so lived, nor how many children they had; thinks she was baptized as Mrs. Green.

"Q. You don't know anything about any children that were born? A. No; I don't think she had any. Q. I mean when she joined the church? A. I can't say, positive. Q. How many years ago was it when you joined the church? A. I don't know."

John Tillman (brother of Martha Tillman) testifies that, according to his information, his sister and William Green were married "about 28 or 29 years ago"; he being on Red river at that time, and 11 or 12 years of age. Being asked (the leading question) whether he had ever seen a certificate, "given by the preacher," of the marriage, he answered that he had, but he supposes that it was misplaced when his mother died. Thereafter, on cross-examination, he was asked by whom the certificate was signed, and he answered, "If I ain't mistaken, Judge Gardere was supposed to be the justice of the peace and running that court." He was then asked, "Married by a judge?" and he replied, "Got the license from the judge and married by the preacher." He testifies that he received a letter from his sister, just before her marriage, as follows:

"Q. You read that letter? A. I read a portion of it; after I found out she was married, it suited me."

He had previously given the following testimony:

"Q. After they were married, how soon after that, did you come back to Gretna? A. I came back just about 4 or 3 months after. Q. And was it after they had these children? A. She had one; yes, sir. Q. How long did they live together as man and wife? A. Oh, I couldn't tell how long; quite a while. Q. During that time they had these three children? A. Yes, sir. Q. They were always considered as man and wife by the people of the community? A. Yes, sir."

#### Opinion.

[1] The law declares that marriage is considered in no other view than as a civil contract, and that such marriages only are recognized by law as are contracted and solemnized according to the rules which it prescribes. C. C. arts. 86, 88. It further declares (Act 25 of 1882, amending and re-enacting C. C. art. 99) that licenses to celebrate marriages, in the other parishes of the state (than the parish of Orleans), shall be granted by the clerks of the courts, unless the clerk himself should be a party to the marriage, when the license shall be granted by the district judge; that, before granting the license, the person authorized to issue the same shall require a bond of the intended husband (C. C. art. 101); that any minister of the gospel, or priest, of any religious sect, may celebrate marriages, upon complying with the regulations of the law (C. C. art. 102); that no minister shall celebrate a marriage without having obtained a license (C. C. art. 104); that the marriage must be celebrated in the presence of witnesses and evidenced by an act signed by the parties and witnesses, a duplicate of which, appended to the license, issued in duplicate, must be returned, within 30 days, to the person who granted the license, who shall file and record the same in his office (C. C. art. 105).

The provision of article 105 (formerly article 107) requiring the return and registry of the act was added, by amendment in 1855 (R. S. 2205). Prior to that time, in *Holmes v. Holmes*, 6 La. 467, 26 Am. Dec. 482 (decided in 1834), the following contention had been urged in this court, to wit:

"The fact of marriage should be proved by the act or certificate contemplated in article 107 of the Civil Code, nor should inferior evidence be allowed, unless it were proved that this act had been lost or destroyed. The marriage license should also be produced, since without it the person celebrating the marriage was not authorized to do so."

In passing upon that contention, and deciding the case, the court, speaking through Mr. Justice Bullard, said:

"Our Code does not declare null a marriage not preceded by a license, and not evidenced by an act signed by a certain number of witnesses and the parties; nor does it make such an act exclusive evidence of a marriage. These laws relating to forms and ceremonies, here regarded as directory to those alone who are authorized

to celebrate marriages, are intended to guard against hasty and inconsiderate marriages in defiance of parental authority. Like all other contracts, it may be proved by any species of evidence, not prohibited by law, which does not presuppose a higher species of evidence within the power of the party; and cohabitation as man and wife furnishes presumptive evidence of a preceding marriage. \* \* \* If a different rule of evidence prevails in France, it is because the Code, as well as previous ordinances, provided for public registries of marriages, births, and deaths, under the care of special officers, called 'officiers de l'état civil.' Extracts from these registers are declared to be full evidence until proved to be forged; and, second, any evidence is inadmissible without first proving that no such register was kept, or that it has been lost or destroyed. Merlin's Repertoire, verbo Etat Civil. Our law has not enacted such a registry of marriages. We think the court erred in rejecting the evidence offered."

Whatever may be said of the application to a case such as this of C. C. art. 88 (formerly C. C. art. 89), it would appear, since the amendment to article 107 (now article 105), requiring the return and registry of the act of marriage, to be a plain, elementary proposition that, in any case in which it is sought to prove a contract of marriage, the proponent should be required to produce a certified copy of the public record which the law declares shall be made of the contract, and that, until it be shown that such record has been lost or destroyed, no secondary or inferior evidence, offered to create a presumption that such contract had been entered into, should be received.

If that be not true, then there can be no reason why any contract, whether of sale, mortgage, or otherwise, which the law requires to be reduced to writing and recorded, or any instrument, such as a will, required to be in writing, should not be proved by parol evidence, without an attempt to show either its original existence or its loss or destruction.

The requirement thus stated is fully recognized in the matter of Powers v. Executors of Charbmury, 35 La. Ann. 632, 633, in which the question under consideration is, perhaps, more thoroughly considered than elsewhere in our jurisprudence. It is there said:

"As plaintiff has been unable to prove the celebration of the marriage, she was compelled to have recourse to evidence, parol and documentary, for the purpose of showing long cohabitation as man and wife, the birth of children from their union, and general reputation of marriage among their neighbors, acquaintances, and friends. \* \* \* Although our jurisprudence fully recognizes the doctrine and the rule that marriage will be presumed from reputation and long cohabitation, we cannot lose sight of the fact that, under our law, marriage is a contract, and that the best proof of that contract is the evidence of some act, as prescribed in the Civil Code, showing at least the consent or agreement of the parties to enter into the contract of marriage. \* \* \* Among other provisions, we find the solemn declaration that 'such marriages only are recognized by law as are contracted and solemnized according to the rules which it prescribes.' C. C. art. 88. In the interest of persons who were the issue of marriages

of which no direct proof could be adduced, and in the interest of legitimacy, courts have somewhat relaxed the rigor of the precept, and have sanctioned the rule which allows the proof of marriage by reputation, long cohabitation, and by other circumstantial evidence. But such evidence must show that the beginning of the relations between the parties must have been characterized by the free consent of the parties to contract the obligations and to assume the responsibilities of marriage; and the evidence must exclude the idea that the union began and that the parties were drawn together merely through the promptings of sensuality. Such conditions, even when followed by long cohabitation, although openly or publicly acknowledged, can result in nothing but concubinage, the parent of bastardy, the immoral impediment to marriage, and the fruitful source of shame and dishonor."

In McConnell, Adm'r., et al. v. City of New Orleans, 15 La. Ann. 410, it was said of the plaintiffs, who were seeking to establish a marriage in order to recover property:

"They allege the marriage to have taken place in this city, yet they produce no written or oral proof that such marriage was actually solemnized. They rely, exclusively, upon circumstantial evidence. The weight of this circumstantial evidence will be best considered by observing what was required by the laws in force at the supposed period of said marriage."

The court then recapitulates the various provisions of the law, pertinent to the question at issue, which were in force in 1832, when the marriage under consideration was said to have taken place (and which did not include the requirement of registry, subsequently enacted), and the opinion proceeds:

"Not a trace of any of these formalities has been discovered, neither has it been shown that the records of the parish judge have either been lost or destroyed. The plaintiffs start out, therefore, with the presumption against them which arises from article 88, C. C., which says such marriages only are recognized by law as are contracted and solemnized according to the rules it prescribes. They propose to overcome this presumption by the production of five witnesses, a letter, and the inscription on the tomb of the deceased."

The testimony of the five witnesses, to the effect that the couple whose marriage was at issue were regarded and received as man and wife, with other testimony to the contrary effect, was then considered, and it was held that the marriage had not been established.

[2] In the instant case, it is not shown (otherwise than by the somewhat casual references that Mary Green and John Tillman made to the "license," said to have been in the possession of Martha Tillman) that the slightest effort was made to find any written trace or record of Martha Tillman's alleged marriage to William Green. It may be said that, by not objecting, upon the trial, to the introduction of parol evidence, defendant waived its right to object in this court, and that may be true; but that does not relieve the plaintiffs of the obligation to prove that their parents were legally married, and, as the best evidence on that subject would have been a copy of the recorded act, certified by the clerk of the court, it is to be presumed

that they would have produced such a copy, if the original had been recorded, as it is also to be presumed that an original act would have been executed and recorded, if the marriage had taken place, since the law so required, and it is always presumed, until the contrary be shown, that a public official has discharged the duty imposed upon him. If, however, it be conceded that such a presumption can be destroyed, and a presumption of marriage created by parol evidence, of a convincing character, to the effect that the two persons concerned entered into their relations with the bona fide intention of permanently assuming the obligations and responsibilities of marriage, and that they carried that intention into effect, we are constrained to say that the evidence offered in this case falls considerably short of producing that conviction. We are unable to determine when the two parties, here said to have been married began to live together, or when they separated, whether they entered the church before marriage, or after, nor are we informed of the steps that were taken by the church to ascertain whether applicants for admission were married, or single; that is to say, whether the mere assurances of the applicants were accepted, or it was required that the formalities prescribed by law should have been observed. One of the plaintiffs testified that she had been married shortly after the death of her mother, but had separated from her husband at the end of a month, and we should hardly feel authorized to hold that an experiment of that duration would be sufficient, of itself, though the couple might have been recognized and received as married, to establish the marriage. There are some persons who change their mates with great facility, and find a new wife or husband on every plantation upon which they are employed.

In *Casimir v. Blanc*, Executor, 10 Rob. 448, the fact that the parties, whose marriage was sought to be established, did not remain together, but separated and entered

into other relations, was regarded as a strong circumstance to defeat the presumption of marriage arising from their having, for a time, lived together as man and wife and having a son, to whom the father had given a copy of a certificate of baptism containing the recital that he was legitimate. On the other hand, in *Blasini v. Succession of Blasini*, 30 La. Ann. 1390, the fact that the parties, from the time of their first appearing in the community in which they made their permanent domicile, lived together as man and wife, "without separation or interruption until death intervened," was regarded as a strong circumstance in the establishment of the presumption of marriage arising from their so living.

[3] It has been settled by several decisions of this court that article 2315 (as amended and re-enacted by Act 71 of 1884 and Act 120 of 1908), under which this suit is brought, applies to actual and legitimate relations, and that its provisions cannot be extended to reach other persons to whom they do not expressly apply; hence, as plaintiffs have not established for themselves the required status, of legitimate sisters of the decedent, by reason of whose death they allege that they have sustained injury, they are not entitled to recover. *Lynch v. Knoop*, 118 La. 611, 43 South. 252, 8 L. R. A. (N. S.) 480, 118 Am. St. Rep. 391, 10 Ann. Cas. 807; *Vaughan v. Dalton-Lard Lumber Co.*, 119 La. 61, 43 South. 926; *Landry v. American Creosote Works*, 119 La. 231, 43 South. 1016, 11 L. R. A. (N. S.) 387; *Mount v. Tremont Lumber Co.*, 121 La. 64, 46 South. 103, 16 L. R. A. (N. S.) 199, 126 Am. St. Rep. 312, 15 Ann. Cas. 148; *Flash v. Louisiana Western R. Co.*, 137 La. 352, 68 South. 636, L. R. A. 1916E, 112. It is therefore ordered and decreed that the judgment appealed from be reversed, and that there be judgment in favor of defendant, rejecting plaintiffs' demand and dismissing this suit at their cost.

SOMMERVILLE, J., concurs.

(15 Ala. App. 584)

## BRITTON v. STATE. (1 Div. 217.)

(Court of Appeals of Alabama. March 23, 1917.)

1. CRIMINAL LAW  $\S$  1066, 1066(14) — APPEAL — PRESENTATION FOR REVIEW — NEW TRIAL.

Under the express provisions of Code 1907,  $\S$  2846, as amended by the act approved April 5, 1911 (Acts 1911, p. 198), and again amended by the act approved September 22, 1915 (Acts 1915, p. 722), it is essential to the right to review the ruling on a motion for new trial in a criminal case that an exception be reserved, and that such exception with the evidence and ruling on the motion be incorporated in the bill of exceptions; the act approved September 18, 1915 (Acts 1915, p. 598), which dispenses with the reserving of exceptions to rulings on certain motions, not applying to motions for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  2686.]

2. CRIMINAL LAW  $\S$  752—MOTION TO EXCLUDE EVIDENCE — FAILURE TO PROVE VENUE.

A motion made by accused after the prosecution had offered the evidence in chief and rested to exclude the evidence on the ground that the venue had not been proven was appropriate and timely.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  1725, 1726.]

3. INDICTMENT AND INFORMATION  $\S$  166 — PROOF OF VENUE—NECESSITY.

Under Code 1907,  $\S$  7140, providing that the offense must be proved to have been committed within the jurisdiction of the court in which the indictment is proved, proof of venue is jurisdictional, and without same a conviction cannot be sustained.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig.  $\S$  527-530, 532, 533.]

4. CRIMINAL LAW  $\S$  737(2)—VENUE—QUESTION FOR JURY.

Venue may be shown by circumstantial evidence, and where the state's evidence tends to show commission of the crime within the court's jurisdiction, venue becomes a question for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  1706.]

5. CRIMINAL LAW  $\S$  1168(4)—CURE OF ERROR — MOTION TO EXCLUDE EVIDENCE — PROOF OF VENUE.

Error, if any, in refusing a motion when the State had rested, to exclude the evidence on the ground that the venue had not been proven by the prosecution, was rendered harmless by subsequent evidence establishing venue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  3144.]

6. CRIMINAL LAW  $\S$  737(2)—VENUE—QUESTION FOR JURY.

Under Code 1907,  $\S$  7229, providing that, where an offense is committed within a quarter of a mile of the county line, the jurisdiction is in either county, the question whether the animal in question was stolen within the jurisdiction of the county of the court was for the jury, where the evidence was conflicting as to the identity of the animal taken in charge at a certain place with the animal stolen, and the undisputed evidence showed that such place was within a quarter of a mile of the county line.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  1706.]

7. CRIMINAL LAW  $\S$  737(2) — PROOF OF VENUE—AFFIRMATIVE CHARGE.

Where in a prosecution for larceny of a steer the evidence was conflicting as to the identity of the steer "roped" at defendant's house, a place within a quarter of a mile from the county line, the court properly refused the affirmative charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  1706.]

8. CRIMINAL LAW  $\S$  351(8), 517(2) — EVIDENCE—CONVERSATION WITH ACCOMPLICE.

Where in a prosecution for larceny of a steer there was evidence tending to show that one jointly indicted with defendant was an accomplice, evidence was properly admitted to show repeated efforts by defendant to see the prisoner and the conversations between them; such conversations being in the nature of a confession tending to inculpate defendant, and being prima facie voluntary, and also in the nature of an effort of accused to manufacture exculpatory evidence and suppress the truth.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  782.]

9. CRIMINAL LAW  $\S$  1172(6)—INSTRUCTIONS—GROUND FOR REVERSAL.

The mere statement of an abstract proposition of law to the jury in a larceny case is not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  3159.]

Appeal from Circuit Court, Washington County; Ben D. Turner, Judge.

Daniel F. Britton was convicted of the larceny of a steer, and he appeals. Affirmed.

After conviction and judgment, defendant moved the court to set aside the verdict and grant defendant a new trial on the usual ground, and on the ground that defendant was entitled to the affirmative charge, and there was no proof of venue sufficient to carry the case to the jury and on the further ground that both defendant and Arthur Wright were jointly indicted of this offense, but were granted a severance, and were tried separately, and that the jury which tried Arthur Wright made up most, if not all, the panel to which defendant's case was submitted, and that they were not in position to try the case impartially and fairly, as they were and would be naturally prejudiced and influenced by the testimony they had heard in the other case, etc. The motion was overruled by the court, and no exceptions seem to have been then and there taken to the action of the court, nor does it appear in the record that any evidence was offered in support of the motion. The excerpt from the oral charge excepted to is as follows:

Then there is testimony as to a conversation had with Arthur Wright. I charge you that, if you believe that Arthur Wright was one of the interested parties in this case, and if you believe from the evidence that Arthur Wright had been called before the grand jury to give evidence in this case, and if you believe this defendant knew that Arthur Wright could do him detriment in his testimony, and if you believe that his talk with Arthur Wright was to conceal the truth, then that is a circumstance that you may consider against him. But I charge you that, unless you find that his desire or action was to conceal the truth, a mere conver-

sation with the witness who had been before the grand jury would not bear on the guilt or innocence in this case.

Armbrecht, McMillan & Caffey, of Mobile, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

BROWN, P. J. Section 2846 of the Code of 1907, as amended by the act approved April 5, 1911 (Acts 1911, p. 198), was again amended by an act approved September 22, 1915, and as thus amended reads:

"Whenever a motion for a new trial shall be granted or refused by the circuit or city court or county court of law and equity, or probate court, in any civil or criminal case at law, either party in a civil case or the defendant in a criminal case may except to the decision of the court and shall reduce to writing the substance of the evidence in the case, and also the decision of the court on the motion and the evidence taken in support of the motion and the decision of the court shall be included in the bill of exceptions which shall be a part of the record in the cause, and the appellant may assign for error that the court below improperly granted or refused to grant a new trial, and the appellate court shall have power to grant new trials, or to correct an error of the circuit court," etc. Acts 1915, p. 722.

[1] It is manifest from the provisions of this statute that it is essential to the right to review the ruling of the trial court on a motion for new trial that an exception should be reserved, and that this, with the evidence and the ruling of the trial court on the motion, should be incorporated in the bill of exceptions, and that the act approved September 18, 1915 (Acts 1915, p. 598), does not apply to motions for new trial. *Mitchell v. State*, 72 South. 507.

The act amendatory of this section of the Code was passed subsequent to the act of September 18th, and to give the act amending the Code any other construction would be contrary to the legislative will as expressed in this statute. It does not appear from the record in this case that an exception was reserved to the ruling of the trial court on the motion for new trial, nor is the motion or decision of the court shown by the bill of exceptions, and hence cannot be reviewed.

[2] After the prosecution had offered the evidence in chief and rested, the defendant made a motion to exclude the evidence on the ground, among others, that the venue had not been proven. This motion was appropriate and timely and presents the question sought to be raised. *Taylor v. State*, 72 South. 557; *Randolph v. State*, 100 Ala. 139, 14 South. 792.

[3, 4] Proof of venue is jurisdictional and without such proof a conviction cannot be sustained. Code 1907, § 7140; *Randolph v. State*, supra. While proof of venue is essential to a conviction, it, like any other fact in the case, may be established by circumstantial evidence; and when the state offers evidence tending to show that the crime was committed within the jurisdiction of the court, the question becomes one for the jury.

*Pounds v. State*, 73 South. 127; *Powell v. State*, 5 Ala. App. 75, 59 South. 530.

[5] And, though it be conceded that no such evidence was offered by the prosecution in chief, and that the motion was erroneously overruled, injury resulting therefrom was averted by the evidence subsequently offered. The state's witness W. J. Britton testified that:

"Witness lived about a quarter of a mile from Dan Britton. Mr. McRae's home and witness' home is in Washington county and Dan Britton's home is in Choctaw county, just across the line. The steer ranged in Choctaw and Washington counties."

[6] The defendant's witness Walter Britton testified that the defendant and Wright "roped the steers" at defendant's house on the morning they were carried to Wainsboro, and, while this witness testified that the Christopher steer was not one of the three carried to Wainsboro, the witness Ben Stone testified that one of the steers being driven by defendant and Wright on the road to Wainsboro was the "Mary steer" belonging to Clements and Christopher; so it was for the jury to say whether one of the steers "roped" at defendant's house was the steer in question, and the evidence shows without dispute that defendant's house was within one-quarter of a mile of the Washington and Choctaw county line, and hence within the jurisdiction of the court. Code 1907, § 7229; *Granberry v. State*, 184 Ala. 5, 63 South. 975; *Taylor v. State*, 131 Ala. 36, 31 South. 371.

[7] This evidence also justified the refusal of the affirmative charge.

[8] There was evidence tending to show that Arthur Wright was an accomplice of the defendant in the crime for which the defendant was on trial. In connection with this evidence it was permissible for the state to show that defendant had made repeated efforts to see Wright while he was confined in jail, and the conversation between them when defendant was allowed to see him and talk to him. This conversation was in the nature of a confession, and tends to inculpate the defendant, and was prima facie voluntary. *Cauley v. State*, 72 South. 271; *Patton v. State*, 72 South. 401. It also has some tendency toward an effort on the part of the accused to manufacture exculpatory evidence and to suppress the truth. *Smith v. State*, 183 Ala. 10, 62 South. 864; *Piano v. State*, 161 Ala. 88, 49 South. 803.

[9] The excerpt from the oral charge was not entirely abstract. As we have said, the evidence tended to show that Wright was defendant's accomplice, and the conversation between them was with reference to Wright's testimony before the grand jury and defendant's indictment. Moreover, the statement of an abstract proposition of law to the jury would not constitute reversible error.

We find no reversible error in the record, and the judgment is affirmed.

Affirmed.

(15 Ala. App. 538)

**GILBREATH v. STATE. (7 Div. 371.)**

(Court of Appeals of Alabama. March 23, 1917.)

**1. ARSON — 12—CRIMINAL RESPONSIBILITY—PUBLIC BUILDINGS — "BUILDING ERECTED FOR PUBLIC USE"—"EJUSDEM GENERIS."**

Under a statute providing that any person who willfully sets fire to or burns any church, meeting house, courthouse, townhouse, college, academy, jail or other building erected for public use, shall be guilty of arson in the second degree, a dwelling house occupied as a school building is not, under the rule of "ejusdem generis," a building erected for public use. (Citing Words and Phrases, *Ejusdem Generis*).

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 26, 27.]

**2. ARSON — 12—CRIMINAL RESPONSIBILITY—STATUTES.**

A statute, providing that any person who willfully sets fire to or burns any uninhabited dwelling house shall be guilty of arson in the second degree, manifests a legislative intent to protect the property rather than the habitation or person.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 26, 27.]

**3. ARSON — 12—CRIMINAL RESPONSIBILITY—STATUTES.**

A dwelling house, temporarily used for school purposes, held an uninhabited dwelling house within a statute providing that the burning of an uninhabited dwelling house shall be arson in the second degree.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 26, 27.]

**4. ARSON — 22—CRIMINAL RESPONSIBILITY—OWNERSHIP.**

In a prosecution for burning an unoccupied dwelling house used as a school building, an indictment, laying the ownership of the property in the owner of the fee held sufficient.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 45-49; Indictment and Information, Cent. Dig. § 282.]

**5. ARSON — 25—CRIMINAL RESPONSIBILITY—INDICTMENT—VARIANCE.**

In a prosecution for burning an uninhabited dwelling house used as a school building, an indictment, alleging the ownership thereof in a certain person, was not at variance with proof that such person and his son were interested in the property and had joint control thereof.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 52-54.]

Appeal from Circuit Court, De Kalb County; W. W. Haralson, Judge.

William S. Gilbreath was convicted of arson, and he appeals. Reversed and remanded.

Isbell & Scott and Hunt & Wolfes, all of Ft. Payne, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

**BROWN, P. J.** The indictment charges in three counts that the defendant: (1) Willfully set fire to or burned an uninhabited dwelling house of George Reece in which there was at the time no human being; (2) that he "willfully set fire to or burned an academy"; and (3) that he "willfully set fire to or burned a schoolhouse, a building

erected for public use." The court instructed the jury that the defendant could not be convicted under the second count, and submitted the case to the jury on the first and third counts of the indictment.

[1] The building in question, as the undisputed evidence showed, was constructed for habitation, and had been recently used as a dwelling by a son of the alleged owner, but had been left vacant for a short time, and up to the time it was burned it was being used by consent of the person who had last occupied it as a dwelling for a schoolhouse. The language of the statute, so far as pertinent, is:

"Any person who willfully sets fire to, or burns any church, meeting house, courthouse, townhouse, college, academy, jail, or other building erected for public use \* \* \* or burns any uninhabited dwelling house," etc.

—Is guilty of arson in the second degree. When the rule of *ejusdem generis* is applied, and it is applicable, we hold that the building in question is not a building erected for public use. 36 Cyc. 1119; 3 Words and Phrases, 2328, 2455; *McGrary v. People*, 45 N. Y. 153. There is no evidence showing that the building was permanently dedicated to the public for use as a schoolhouse, and whether such dedication would bring the building within the statute is not presented.

As has been often announced:

"At common law, arson was the malicious and voluntary, or willful burning of another's house, or, as is sometimes stated, the willful and malicious burning of the dwelling house of another. It was an offense against the security of the habitation, and had reference to the possession, rather than the property. For the reason that the crime related to the habitation, it was considered an aggravated felony and of greater evil than any other unlawful burning, because it manifested in the perpetration a greater recklessness and contempt of human life than the burning of other buildings in which no human being was presumed to be." 2 R. C. L. 496, § 1.

Hence for one to be guilty of arson at common law it was necessary that the building alleged to have been burned was an inhabited dwelling house; and, the purpose of the law being to protect the habitation and the lives of the inhabitants, it was necessary to a good indictment that the ownership of the building be laid in the actual occupant. 2 R. C. L. 511, § 15.

[2] The statute provides: "Any person \* \* \* who willfully sets fire to, or burns any uninhabited dwelling house" is guilty of arson in the second degree. (Code 1907, § 6296.) The word "uninhabited" employed in the statute excludes the idea that the sole purpose of the statute is to protect the habitation or person, and manifests a legislative intent to protect the property of the owner in the "uninhabited dwelling house." The same legislative intent is manifest in the provisions of section 6301, Code 1907. *Williams v. State*, 4 Ala. App. 92, 58 South. 925; *Garrett v. State*, 109 Ind. 527, 10 N. E. 570; *State v. Shaw*, 79 Kan. 396, 100 Pac. 73, 21

L. R. A. (N. S.) 27, 131 Am. St. Rep. 298; 2 R. C. L. 496, § 1.

[3, 4] The house in question, under the evidence, was none the less "an uninhabited dwelling house" because it was temporarily used for another purpose. *Thomas v. State*, 116 Ala. 461, 22 South. 666. Under such circumstances it would seem that it is sufficient to lay the ownership of the property in the owner of the fee. All that is required is to exclude the ownership of the defendant. *Emmonds v. State*, 87 Ala. 12, 6 South. 54.

[5] The evidence tended to show that both George Reece and his son Jim Wiley were interested in the property and had joint control of it. Hence the objection that there was a variance between the allegation and proof was not well taken. *Johnson v. State*, 1 Ala. App. 148, 55 South. 268.

Some of the rulings of the court were not in accord with the principles above stated, and the judgment will be reversed and the cause remanded for new trial.

Reversed and remanded.

(15 Ala. App. 591)

#### DOBY v. STATE. (6 Div. 126.)

(Court of Appeals of Alabama. March 23, 1917.)

#### 1. CRIMINAL LAW §364(2)—EVIDENCE—RES GESTÆ.

Where the prosecuting witness contended that accused and another negro whom he allowed to ride in his wagon robbed him at the point of a pistol, testimony as to the request by the negroes for permission to ride is admissible as part of the *res gestæ*.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 808, 813.]

#### 2. CRIMINAL LAW §1144(12)—APPEAL—PRESUMPTIONS.

Where the record did not affirmatively show no proper predicate for the admission of testimony was laid, it will on appeal be presumed that the predicate was sufficient.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2901, 3029, 3030.]

#### 3. CRIMINAL LAW §407(2)—EVIDENCE—ADMISSIBILITY.

Silence in the face of accusation of crime partakes of the nature of confession, and is admissible as a circumstance to show guilt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 899.]

#### 4. WITNESSES §267—EXAMINATION—CROSS-EXAMINATION.

Where defendant was accorded full right of cross-examination as to a certain issue, and the court correctly stated the evidence of the witness, the refusal of further cross-examination as to what the court said was not error; it being for the jury to determine what the witness had stated.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 923-930.]

#### 5. CRIMINAL LAW §1063—APPEAL—EXCEPTIONS.

Where no exception was reserved, the action of the court in commanding accused's counsel to resume his seat cannot be reviewed on appeal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2661, 2665.]

#### 6. CRIMINAL LAW §1166½(13)—APPEAL—HARMLESS ERROR.

Where the record did not show that accused was deprived of any rights when his counsel was commanded by the court to take his seat, but on the contrary disclosed that counsel continued to insist on his contention, the action of the court, if improper, was harmless.

#### 7. CRIMINAL LAW §763, 764(1)—TRIAL—INSTRUCTIONS.

Charges clearly on the effect of the evidence are properly refused, being in violation of Code 1907, § 5362.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1731, 1737, 1742, 1743, 1746.]

#### 8. CRIMINAL LAW §778(8)—TRIAL—INSTRUCTIONS—ALIBI.

Where defendant relied on alibi, a charge that the law placed on him the burden of reasonably establishing the defense, and of so accounting for all of his time on the night of the offense as to have made it out of the question for him to have committed it, is erroneous.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1848, 1852, 1960, 1967.]

#### 9. CRIMINAL LAW §761(18)—TRIAL—INSTRUCTIONS.

That portion of the charge which assumed that testimony offered by accused to establish his defense of alibi was perjured was erroneous.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1731, 1764, 1853.]

Appeal from Criminal Court, Jefferson County; A. H. Alston, Judge.

Will Doby was convicted of highway robbery, and he appeals. Reversed and remanded.

The facts sufficiently appear. The following portions of the oral charge noted in the opinion are as follows:

E. Now, gentlemen, the question that is in this case, the pivotal point in it, I might say, is the identity of this man by Mr. Taylor, as being one of the two who robbed him upon the night that he said he was robbed.

S. Now, did he have time, from the time he left the barber shop to the time he was seen around the barroom, as testified to by some of these witnesses, to have gone to the place and committed the robbery, and have returned, I mean committed the robbery at the time Mr. Taylor testifies it was? Well, if he has not satisfied you of that fact, or if he has not accounted for all of this time, then I charge you he has failed in establishing the defense that he sets up here when he says—or starts in on this alibi.

V. I charge you that there is no testimony that has been offered in this case to impeach any one of these witnesses.

W. Every witness for the state, and every witness for defendant, stands before you to-day without any impeaching testimony.

X. There have been some contradictions as to the details of statements of those from some of the others, but this is not impeachment.

Y. There is nothing down there that has come to show that either witness for the state or witness for defendant has had his testimony impeached, or has been shown to be unworthy of belief.

O. Law puts upon this defendant the burden of reasonably establishing the defense of an alibi. It puts upon him the burden of so accounting for all of his time on that night up to the time of the robbery, as to have made it out of the question for him to have committed the offense.

N. But the law says where an alibi is interposed and sought to be maintained by perjury,



then it is a circumstance of great weight that the jury can consider in determining the guilt or innocence of the party who interposed it.

R. Beddow and L. Berkowitz, both of Birmingham, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

**BROWN, P. J.** [1] The evidence offered by the state shows that the witness Taylor, while driving along the public road on the way home in a wagon, was accosted by two negroes, who requested witness to allow them to ride in his wagon. After they had gotten in the wagon and the witness had driven for some distance, one of the negroes got off of the wagon and drew a pistol, commanding witness to hold up his hands, and the other negro searched Taylor and took from his person about \$64 in money; and the evidence tends to show that the defendant and Jessie Breedlove were the guilty parties.

The request made by these negroes, whether by the defendant or Breedlove, was so intimately connected with the robbery as to make it a part of the *res gestæ*, and it was permissible for the witness to state that, "They asked me to let them ride." *Lundsford v. State*, 2 Ala. App. 38, 56 South. 89.

[2] Before admitting the testimony of the witness Taylor relative to what occurred at the city hall when he was called to identify the defendant and Breedlove while they were in custody, the record shows that the jury was excused and the court, in the absence of the jury, "made investigation as to the admissibility of this testimony"; but it is not shown what evidence as a predicate for the admissibility of the testimony was offered. The record does not affirmatively show that a proper predicate for the admission of the testimony was not laid, and this court will assume that the predicate was sufficient. *Whatley v. State*, 144 Ala. 75, 39 South. 1014; *Price v. State*, 117 Ala. 113, 23 South. 691; *Fortner v. State*, 12 Ala. App. 179, 67 South. 720.

[3] Whatever may be the rule elsewhere (see 1 R. C. L. p. 478, § 15), with us "silence in the face of pertinent accusation of crime partakes of the nature of a confession, and is admissible as a circumstance to be considered by the jury as tending to show guilt," even though the person charged is in custody on the charge. *Spencer v. State*, 20 Ala. 24; *Raymond v. State*, 154 Ala. 1, 45 South. 895. The rule is stated in *Rowlan v. State*, 14 Ala. App. 17, 70 South. 953.

[4] It appears from the record that the defendant was accorded his full right to cross-examine the witness Taylor as to the position the defendant occupied in the wagon; and it further appears that the court correctly stated the evidence of the witness on this point; and the refusal of the court to allow further cross-examination as to what

the court said to the jury was not error. *Swope v. State*, 4 Ala. App. 83, 58 South. 809; *Wray v. State*, 2 Ala. App. 139, 57 South. 144. The jury had heard the evidence, and it was their province to determine what the witness had said.

[5, 6] No exception was reserved to the action of the court commanding defendant's counsel to resume his seat, and nothing is presented for review on this account. *Woodson v. State*, 170 Ala. 87, 54 South. 191. Furthermore, while it appears that the court ordered the defendant's counsel to resume his seat, it does not appear that the order was obeyed, or that the defendant was deprived of any right by this action of the court. To the contrary, the record shows that counsel continued to insist and made clear that it was his purpose to offer evidence impeaching the witness Saunders by showing contradictory statements with reference to immaterial matters. This was not permissible. *Hickman v. State*, 12 Ala. App. 22, 67 South. 775.

[7] The exceptions to the oral charge indicated by the letters E, S, V, W, X, and Y are sustained. These portions of the charge are clearly on the effect of the evidence and in violation of the statute. Code 1907, § 5362; *Mayer v. Thompson-Hutchison & Co.*, 116 Ala. 634, 22 South. 859; *L. & N. R. R. Co. v. Godwin*, 191 Ala. 498, 67 South. 675.

[8] The portion of the oral charge indicated by the letter O and to which exception was reserved does not correctly state the law as to the burden on the defendant to prove an alibi, but imposed on him "the burden of so accounting for all his time on the night up to the time of the robbery as to have made it out of the question for him to have committed the offense. *Prince v. State*, 100 Ala. 144, 14 South. 409, 46 Am. St. Rep. 28; *Pellum v. State*, 89 Ala. 28, 8 South. 83; *Pate v. State*, 94 Ala. 14, 10 South. 665; *Albritton v. State*, 94 Ala. 76, 10 South. 426; *Hurd v. State*, 94 Ala. 100, 10 South. 528.


[9] The portion of the oral charge indicated by the letter N is open to the criticism that it assumes that the testimony offered by the defendant to establish his defense of alibi was perjured testimony, and was erroneous. *Prince v. State*, supra.

Reversed and remanded.

(15 Ala. App. 596)

**ABERNATHY v. STATE.** (8 Div. 508.)

(Court of Appeals of Alabama. March 23, 1917.)

**INTOXICATING LIQUORS**  **—POLICE POWERS—STATUTES.**

Acts 1915, p. 13, § 16, providing that it shall be unlawful for one engaged in the business of selling beverages to keep or store on the premises where such business is conducted any prohibited liquors or beverages, the sale, offering for sale, or other disposition of which is prohibited by law, etc., was intended to prevent an evasion of the laws prohibiting the sale of intox-

icating liquors, and its enactment was a legitimate exercise of the police power of the state.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 21-23.]

Appeal from Circuit Court, Colbert County; C. P. Almon, Judge.

E. G. Abernathy was convicted of violation of the law prohibiting the storing of prohibited liquors on premises where beverages are sold, and he appeals. Affirmed.

James Jackson, of Tuscumbia, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

BROWN, P. J. The defendant was tried before the court without a jury on an indictment charging that the defendant "was engaged in the business of selling beverages and kept or stored on the premises where said beverage business was conducted prohibited liquors or beverages, the sale, offering for sale, or other disposition of which was prohibited by law." This indictment is in the language of the statute, and charges the offense denounced by section 16 of the act approved January 23, 1915 (Acts 1915, p. 13).

The evidence shows that the defendant was engaged in selling Coca-Cola and other beverages at his place of business in Sheffield, Ala.; that such beverages were kept in an ice box. In the same building and in a compartment thereof separated from the soft drink stand by a curtain, the officers found a half gallon jug containing about one quart of whisky, and the defendant testified that he kept this liquor there for his own personal use, and that it had been there for three or four days. The purpose of this statute is to prevent an evasion of the laws prohibiting the sale of intoxicating liquors, and its enactment was a legitimate exercise of the police powers of the state.

There was evidence to support the finding of the trial court, and the judgment will be affirmed. *Mulligan v. State*, 72 South. 761; *Stout v. State*, 72 South. 762.

Affirmed.

(15 Ala. App. 596)

GARRISON v. STATE. (7 Div. 420.)

(Court of Appeals of Alabama. March 23, 1917.)

KIDNAPPING — 1 — DECOYING AWAY CHILD — "CHILD."

Under Code 1907, § 6212, providing that any person who unlawfully takes or decoys away any "child" from its parents shall be guilty, etc., girls 13, 15, and 16 years in custody of father are children within the protection of the statute.

[Ed. Note.—For other cases, see *Kidnapping*, Cent. Dig. §§ 1-7.

For other definitions, see *Words and Phrases*, First and Second Series, Child.]

Appeal from Circuit Court, Cleburne County; Hugh D. Merrill, Judge.

Steve Garrison was convicted of decoying

from custody of father his minor children, and appeals. Affirmed.

Hugh Walker, of Anniston, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

BROWN, P. J. The appellant was convicted of the offense denounced by section 6212 of Code 1907. The evidence shows that the girls alleged to have been decoyed away from their father's custody were 13, 15, and 16 years of age; and appellant's only contention is that neither of these girls was a child within the meaning of this section of the Code. Its language is that:

"Any person who unlawfully takes or decoys away any child with intent to detain or conceal it from its parents, guardian, or other person having the lawful charge of it, or who unlawfully detains any child from its parents, guardian, or other person having lawful charge of it, must, on conviction, be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than two years."

The purpose of this statute, as its language clearly imports, is to protect the custody of the "parents or guardian or other person having the lawful custody."

The law imposes on the parent the duty of maintenance, education, and moral training of his offspring; and in order that he may perform this duty, ordinarily, the law guarantees him their custody and control during their minority. 29 Cyc. 1583, 1584. The lawful custody of the parent, guardian, or other lawful custodian of any young person that has not reached his or her majority is within the protection of this statute. The word "child" or "children," when used irrespective of parentage, may denote that class of persons under the age of majority. *Miller v. Finnegan*, 26 Fla. 29, 7 South. 140, 6 L. R. A. 813.

This disposes of the only question presented adverse to appellant's contention, and the judgment of the trial court will be affirmed. Affirmed.

(15 Ala. App. 597)

WADDELL v. STATE. (5 Div. 247.)

(Court of Appeals of Alabama. April 3, 1917.)

CRIMINAL LAW 1092(13)—APPEAL—SIGNING BILL OF EXCEPTIONS—STATUTE.

Under Code 1907, § 3019, providing that bills of exception may be presented at any time within 90 days from the day on which judgment is entered, and not afterwards, and that the judge must indorse thereon, and as a part of the bill, the true date of presenting, and the bill of exceptions must if correct be signed by him within 90 days thereafter, where what purports to be a bill of exceptions was presented within the time prescribed by law, and was so indorsed by the trial judge, but the bill was never signed by him at any time, it must be stricken on request of the state.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2836, 2842, 2845.]

Appeal from Circuit Court, Elmore County; Gaston Gunter, Judge.

Coy Waddell was convicted of assault with intent to murder, and he appeals. Affirmed.

Frank W. Lull, of Wetumpka, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

BRICKEN, J. The appellant was tried and convicted of assault with intent to murder. The bill of exceptions in this case was not signed by the trial judge as required by law (Code 1907, § 3019), and therefore cannot be considered by this court. Section 3019 of the Code 1907 provides that bills of exception may be presented at any time within 90 days from the day on which the judgment is entered, and not afterwards. The judge must indorse thereon and as a part of the bill the true date of presenting; and the bill of exceptions must, if correct, be signed by him within 90 days thereafter. In this case, what purports to be a bill of exceptions was presented within the time prescribed by law and was so indorsed by the trial judge; but the bill of exceptions was never signed by the judge at any time, and therefore must be stricken on request of the state.

As the errors insisted upon on this appeal are raised only by the alleged bill of exceptions, they are not before us for review. There appearing no error in the record, the judgment of the lower court is affirmed. Box et al. v. South. Ry. Co., 184 Ala. 600, 64 South. 69; Hartselle & Co. v. Wilhite et al., 3 Ala. App. 612, 57 South. 129.

Affirmed.

(15 Ala. App. 598)

#### WARD v. STATE. (2 Div. 164.)

(Court of Appeals of Alabama. March 23, 1917.)

#### 1. ANIMALS ⇨36—QUARANTINE—VIOLATION—AFFIDAVIT—SUFFICIENCY.

Where the affidavit on which defendant was tried and convicted of violating the quarantine laws of the State Live Stock Sanitary Board followed the form prescribed by the Code 1907, § 6703, for proceedings in the county court, without undertaking to set out the constituents of the offense, it was sufficient to sustain the judgment.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 95, 96.]

#### 2. CRIMINAL LAW ⇨1088(4)—PRESENTATION FOR REVIEW—DEMURRERS.

Where the record on appeal in a criminal case did not show a judgment of the court on demurrers to the complaint, nor on the demurrers to defendant's plea of misnomer, the clerk's entries in the transcript "that said demurrers were sustained by the court" did not authorize a review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2746-2748, 2750, 2751, 2785.]

#### 3. CRIMINAL LAW ⇨1090(14)—APPEAL—REFUSAL OF SPECIAL CHARGES—BILL OF EXCEPTIONS.

The refusal of special charges to accused cannot be reviewed without a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2818, 3204.]

Appeal from Wilcox County Court; J. N. Stanford, Judge.

Isaac S. Ward, alias, was convicted of violating the quarantine laws of the State Live Stock Sanitary Board, and he appeals. Affirmed.

The affidavit charges that the offense of driving, moving, carrying, or transporting, or causing to be driven, moved, or transported in violation of the quarantine laws of the State Live Stock Sanitary Board cattle from Monroe county, Ala., a tick-infested area, into Wilcox county, Ala., has been committed in said county by Irvin S. Ward, alias I. S. Ward, on or about May 23, 1916. Defendant first interposed plea of misnomer that his true name was Isaac S. Ward, and not Irvin S. Ward as alleged, and that he had never been known or called by the name of Irvin S. Ward, etc. Demurrers were interposed, and in the transcript, but not in the judgment of the court, it is noted that said demurrers were sustained by the court, and defendant duly and legally excepted. Demurrers were also interposed to the complaint, but are not necessary to be here set out. The record contains the charges, but none of the evidence on which the trial was had.

Godbold & Godbold, of Camden, for appellant. W. L. Martin, Atty. Gen., for the State.

BROWN, P. J. [1] The affidavit on which the defendant was tried and convicted follows the form prescribed by the statute for proceedings in the county court, without undertaking to set out the constituents of the offense, and is sufficient to sustain the judgment of the court. Code 1907, § 6703; Malloy v. State, 185 Ala. 117, 50 South. 1027; Miles v. State, 94 Ala. 106, 11 South. 403; Wilson v. State, 115 Ala. 129, 22 South. 567.

[2] The record does not show a judgment of the court on the demurrers to the complaint, nor on the demurrers to the defendant's plea of misnomer; and the entries of the clerk in the transcript that "said demurrers were sustained by the court," etc., will not authorize a review. Alabama Co. v. Brown, 129 Ala. 286, 29 South. 548; 5 Mayf. Dig. 566, § 51.

[3] The appeal is on the record without a bill of exceptions; and the refusal of special charges to the defendant, as has been repeatedly held, cannot be reviewed without such bill.

Affirmed.

(15 Ala. App. 500)

#### STRAMLER v. STATE. (6 Div. 181.)

(Court of Appeals of Alabama. March 23, 1917.)

#### 1. JURY ⇨109—DRAWING JURY—QUALIFICATIONS BY COURT.

In criminal prosecution for conducting unlawful drinking place, it was not error for the court on its own motion to say to the jury in

qualifying it: "Are you, or any of you, opposed to a conviction for selling liquor? If so, stand up."

[Ed. Note.—For other cases, see *Jury, Cent. Dig.* §§ 524-540.]

**2. CRIMINAL LAW** ⚡855(1) — **TRIAL — REMARKS OF COURT.**

In prosecution for keeping unlawful drinking place, where defendant was smiling, making signs and faces at the witness, it was not error for the court to tell him to quit looking at the witness and smiling.

[Ed. Note.—For other cases, see *Criminal Law, Cent. Dig.* §§ 1520, 1535.]

**3. INTOXICATING LIQUORS** ⚡230 — **ILLEGAL SALE—EVIDENCE—ADMISSIBILITY.**

In view of *Acts Sp. Sess. 1909, p. 91, § 31½*, where defendant was indicted for maintaining an unlawful drinking place, prosecution was not limited to showing one sale, but it was competent to prove any act constituting the keeping of an unlawful drinking place.

[Ed. Note.—For other cases, see *Intoxicating Liquors, Cent. Dig.* § 290.]

**4. INTOXICATING LIQUORS** ⚡230 — **ILLEGAL SALE—EVIDENCE—ADMISSIBILITY.**

In prosecution for keeping unlawful drinking place, it is competent to show that liquor was sold at defendant's residence by his daughter.

[Ed. Note.—For other cases, see *Intoxicating Liquors, Cent. Dig.* § 290.]

**5. INTOXICATING LIQUORS** ⚡233(1) — **ILLEGAL SALE—EVIDENCE—ADMISSIBILITY.**

In such prosecution it was competent to show that people had gone in the direction of defendant's house sober and come away from there drunk.

[Ed. Note.—For other cases, see *Intoxicating Liquors, Cent. Dig.* §§ 293, 294, 296, 297.]

**6. INTOXICATING LIQUORS** ⚡233(1) — **ILLEGAL SALE—EVIDENCE—ADMISSIBILITY.**

In prosecution for keeping unlawful drinking place, evidence tending to show that liquor had been sold continuously for a period beyond that within the statute of limitations and up to the time of the indictment was admissible.

[Ed. Note.—For other cases, see *Intoxicating Liquors, Cent. Dig.* §§ 293, 294, 296, 297.]

**7. INTOXICATING LIQUORS** ⚡143 — **ILLEGAL SALE—NUMBER OF SALES.**

In prosecution for maintaining unlawful drinking place, a sale or sales are ingredients, but not the statutory misdemeanor for which the defendant is on trial.

[Ed. Note.—For other cases, see *Intoxicating Liquors, Cent. Dig.* § 152.]

**8. INTOXICATING LIQUORS** ⚡230 — **ILLEGAL SALE—EVIDENCE—ADMISSIBILITY.**

In prosecution for keeping unlawful drinking place, testimony of witness that she gave a boy money and sent him to buy liquor and he soon returned with it is competent in connection with the boy's testimony that he bought the liquor at defendant's house.

[Ed. Note.—For other cases, see *Intoxicating Liquors, Cent. Dig.* § 290.]

Appeal from Criminal Court, Jefferson County; A. H. Alston, Judge.

Cap Stramler was convicted of conducting an unlawful drinking place, and he appeals. Affirmed.

While the case was in preparation for trial and before any witnesses had been ex-

amined, the court of its own motion asked the jury this question:

"Are you, or any of you, opposed to a conviction for selling liquor? If so, stand up."

The other facts sufficiently appear.

J. B. Aldred, of Birmingham, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

**BROWN, P. J.** [1] On the principles declared in *Watson v. State*, 72 South. 569, and *O'Rear v. State*, 188 Ala. 75, 66 South. 82, the action of the court in qualifying the jury for the trial of this case was free from error.

[2] During the cross-examination of the state's witness Edgar Riley, a small boy, the court said to the defendant in the presence of the jury, "Cap, you quit looking at this witness and smiling." The record recites, "The defendant at the time being smiling, making signs and faces at the witness." Under the circumstances here shown, the remark of the court was proper, and the defendant has no grounds to complain.

[3] The defendant was indicted for maintaining an unlawful drinking place, and the prosecution was not limited to showing one sale; but it was "competent to prove any act of the defendant which under the law of the state constitutes the keeping of an unlawful drinking place." *Acts Sp. Sess. 1909, p. 91, § 31½*.

[4-7] The evidence against the defendant was purely circumstantial, and it was competent to show that liquor was sold at defendant's residence by defendant's daughter, and that people had gone in the direction of defendant's house sober and come away from there drunk; and evidence tending to show that this condition of affairs had existed continuously for a period beyond the period within the statute of limitations and up to the time of the indictment or within the period covered by the indictment was admissible. *Allison v. State*, 1 Ala. App. 206, 55 South. 453; *Lane v. City of Tuscaloosa*, 12 Ala. App. 599, 67 South. 778. A sale or sales are ingredients, but not the statutory misdemeanor for which the defendant was tried. *Snider v. State*, 59 Ala. 64.

[8] The testimony of Mrs. Holcombe that she gave the boy money and sent him to buy the liquor, and that soon thereafter he returned with the liquor, was competent in connection with the boy's testimony that he bought the liquor at defendant's house. *Spigener v. State*, 11 Ala. App. 296, 66 South. 896.

This disposes of all the questions discussed in able brief of counsel for appellant, and we find nothing further requiring discussion.

Affirmed.

(15 Ala. App. 602)

**NORWOOD v. STATE.** (8 Div. 472.)

(Court of Appeals of Alabama. March 23, 1917.)

**CRIMINAL LAW** ¶1086(2)—**APPEAL—RECORD—SUFFICIENCY.**

In a prosecution under an indictment preferred at special term, it is not necessary for the record to show the order for the special term.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2738.]

Appeal from Circuit Court, Limestone County; W. W. Haralson, Judge.

Joe Norwood was convicted of an offense, and he appeals. Affirmed.

W. L. Martin, Atty. Gen., for the State.

**BROWN, P. J.** This is an appeal on the record without a bill of exceptions. The indictment was preferred at a special term of the circuit court, and the order convening the court is not made a part of the record. No question was raised as to the regularity of the proceedings or the organization of the special term, and it was not necessary for the record to show the order for the special term. *Keith v. State*, 72 South. 602.

Affirmed.

(15 Ala. App. 602)

**CORBIN v. STATE.** (6 Div. 160.)

(Court of Appeals of Alabama. April 3, 1917.)

**1. INDICTMENT AND INFORMATION** ¶147—**DEMURDER—QUESTION OF FACT.**

The question of whether defendant, accused of embezzlement, was a notary public or a notary public and ex officio justice was one of proof, and could not be raised by demurrer to indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 490-494.]

**2. CRIMINAL LAW** ¶202(1)—**EMBEZZLEMENT—JUSTICES OF THE PEACE—STATUTES.**

Code 1907, § 7488, providing fines for justices' failure to keep docket and make settlement for fines collected, is no bar to prosecution for embezzlement under section 6838, the former statute merely penalizing him for neglect, oversight, ignorance, etc., while the latter is for corruption and dishonesty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 386-403.]

**3. EMBEZZLEMENT** ¶35 — **JUSTICES OF THE PEACE—SUFFICIENCY OF PROOF.**

Before a justice can be convicted of embezzlement under Code 1907, § 6838, all material elements of the offense must be alleged and proven, namely, that defendant was a notary public and ex officio justice of the peace, that he received money in his official capacity, and he knowingly converted it, and that the conversion was unlawful.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 55-59.]

**4. CRIMINAL LAW** ¶304(17)—**JUDICIAL NOTICE—JUSTICES OF THE PEACE.**

In prosecution of a justice for embezzlement, the court will take judicial notice of the fact that defendant was a notary public and ex officio justice of that county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 712.]

**5. JUSTICES OF THE PEACE** ¶17—**COMPENSATION—STATUTE—CONSTRUCTION.**

Although Code 1907, § 7488, providing penalty for justices' failure to report and pay over amount of fines collected "after deducting therefrom the amount due for fees in cases in which the defendant was acquitted," does not expressly authorize justices to apply fines to payment of fees in which the state failed to convict, since this has been the practice since 1875 implying approval of this interpretation, it will be adopted, and the statute so construed.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 28.]

**6. EMBEZZLEMENT** ¶23 — **JUSTICES OF THE PEACE—DEFENSE—EVIDENCE.**

In prosecution of justice for embezzling fines, defendant could show that fees were due him in cases where state had failed to convict equal to amount of his appropriations, and that he had so applied the money.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 31-35½.]

**7. EMBEZZLEMENT** ¶47 — **JUSTICES OF THE PEACE—QUESTION FOR JURY.**

The fact that a justice accused of embezzling fines did not make settlement as required, by law, although a strong circumstance upon the question of his guilt, was for the jury's consideration.

Appeal from Criminal Court, Jefferson County; A. H. Alston, Judge.

Jim Corbin was convicted of embezzlement as notary public and ex officio justice of the peace, and appeals. Reversed and remanded.

The facts necessary for a decision of this case are as follows: The defendant was indicted under section 6838 of the Code; and the indictment in two counts charged that the defendant, as a notary public and ex officio justice of the peace, embezzled money received by him in his official capacity; and in two counts charged that the defendant, as a notary public, embezzled, etc.

The evidence for the state tended to show that the defendant, acting as a justice of the peace, fined numerous persons for various offenses and collected and appropriated the fines; that the cases did not appear on his docket presented to the grand jury, and that he did not account for the money to the county treasurer, as required by law; that when he was before the grand jury, he denied ever having some of the defendants before him. On the trial it was shown that the docket had been delivered to the solicitor and was lost, proof of the loss being made so as to authorize secondary evidence of its contents. On the trial of the case, the defendant did not deny having fined the persons alleged; did not deny that some of the cases were not on his docket; but offered evidence tending to show that he, as justice of the peace, had tried a great many cases besides the ones alleged by the state, in which the state had failed to convict, and in which cases he was entitled to certain fees allowed by law, to be paid out of the fines collected by him in cases tried in his court. The court refused to allow the defendant to make this

proof, to which action the defendant legally reserved exception.

R. D. Coffman and J. B. Aird, both of Birmingham, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

**SAMFORD, J.** 1. The indictment in all of its counts follows the Code form, and is not subject to demurrer. *Marsh v. State*, 3 Ala. App. 83, 57 South. 387; *Hankinson v. State*, 2 Ala. App. 110, 57 South. 61.

[1] 2. The question of whether the defendant was a notary public or a notary public and ex officio justice of the peace was one of proof, and this could not be raised by demurrer to the indictment.

[2] 3. The contention of the defendant is that, under the facts, if guilty at all, it is of a violation of section 7488 of the Code, fixing a penalty for a failure to keep a docket and make settlement as required. We cannot agree to this. A justice or notary may be guilty under section 7488 without being involved morally; neglect, or even ignorance, might render him subject to the penalty; but this section was never intended to be a bar to a prosecution under section 6838, or to render justices of the peace and notaries immune from a prosecution for the graver offense denounced in that section. In the one case the penalty is for mere neglect, oversight, ignorance, etc., while in the other it is a penalty for corruption and dishonesty. The distinction is too apparent to admit of argument or to require citation of authority.

[3, 4] 4. But before a conviction can be had under section 6838, all of the material elements of the offense must be alleged and proven—I. e., that the defendant was a notary public and ex officio justice of the peace; that he had money paid him in his official capacity; that he knowingly converted that money to his own use; that the conversion was wrongful. In this case, the fact that the defendant was a notary public and ex officio justice of the peace of Jefferson county was a fact of which the courts take judicial knowledge; that he had received money from various sources in payment of fines imposed in his court, which he had not paid over or accounted for, is abundantly shown by the evidence. But did he wrongfully convert this money to his own use? In other words, was there enough money due him for fees in other cases where the state had failed to convict to consume the amount collected if it had been so applied?

[5] The act authorizing justices of the peace and ex officio justices of the peace to apply fines to the payment of fees in which the state failed to convict was approved March 19, 1875. Acts 1874-75, p. 178. This act was carried into the Code of 1876, and comes down to us as section 7488 of Code 1907; and while the language of the present

section does not specifically say that justices of the peace and notaries public with ex officio powers shall have the right to apply fines collected by them to the payment of their insolvent costs, such has been the practice since 1875, and the continuance of the section in the same language through all these years and the action of the state officials in approving this construction necessarily implies approval of this interpretation. This view was held in the case of *State ex rel. Turner v. Henderson*, Governor, 74 South. 344, with regard to an appropriation claimed to have been made in violation of the Constitution; and if that is correct, it will apply with equal force here. We therefore hold that under authority of section 7488 of the Code, a justice of the peace or notary public and ex officio justice of the peace has a right to apply fines collected in his court to the payment of his insolvent fees and costs.

[6] This being the law, the defendant had a right to show by competent evidence that he was due fees and costs in cases where the state had failed to convict in his court in an amount equal to or greater than the amount of fines shown to have been collected and appropriated and that he so applied them. This the defendant offered to do; the court refused to allow the testimony, and the defendant excepted. In this the court committed error, and for this error the judgment is reversed, and the cause is remanded.

[7] That the defendant did not report them to the grand jury, and did not make settlement with the county treasurer as required by law, are strong circumstances to go to the jury upon the question of his guilt; but he nevertheless had the right to have the jury pass upon it.

It is not necessary for the purposes of another trial to pass upon the other assignments of error.

Reversed and remanded.

(15 Ala. App. 606)

**CITY OF MONTGOMERY v. DAVIS.**  
(3 Div. 278.)

(Court of Appeals of Alabama. Feb. 10, 1917.  
Rehearing Denied March 22, 1917.)

**MUNICIPAL CORPORATIONS §120 — ORDINANCE—ADOPTION BY REFERENCE.**

Under Code 1907, § 1251, conferring authority on municipal governing bodies to enact ordinances within the scope defined, an ordinance of a city providing that any person, etc., committing an offense in the city, or within its police jurisdiction, declared to be a misdemeanor by any prohibition law or laws of the state, etc., shall, upon conviction, be fined, and may also be imprisoned, was valid under the doctrine of the adoption of ordinances by reference.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 274-280.]

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Arthur Davis was convicted in the recorder's court of a violation of the prohibition laws, and he appealed to the city court of Montgomery, which ordered his discharge, and from the judgment the City appeals. Reversed and remanded.

W. E. Andrews, of Montgomery, for appellant. L. A. Sanderson, of Montgomery, for appellee.

**PELHAM, P. J.** The only question raised on the record is the validity of an ordinance of the city of Montgomery upon which the defendant was convicted in the court of original jurisdiction for a violation of the prohibition laws of the state. After conviction in the recorder's court the defendant (appellee) took an appeal to the city court of Montgomery, and that court held the ordinance in question invalid, and ordered the discharge of the defendant. From that judgment the city prosecutes this appeal.

Section 1 of the ordinance adopted by the municipality January 6, 1916, that the trial court held to be invalid and refused to allow admitted in evidence, is as follows:

"Section 1. That any person, firm or corporation or association committing an offense in the city of Montgomery, or within the police jurisdiction thereof, which is declared to be a misdemeanor by any prohibition law or laws of the state of Alabama, enacted to promote temperance and to suppress the evils of intemperance shall upon conviction be fined not less than fifty, nor more than one hundred dollars, and may also be imprisoned or sentenced to hard labor for a period not exceeding six months, one or both at the discretion of the court."

Under the doctrine of the adoption of ordinances by reference, as fully discussed in the opinion of the Supreme Court by Justice McClellan in the case of *Sloss-Sheffield Steel & Iron Co. v. Smith*, 175 Ala. 260, 57 South. 29, and on the authority of that case and cases therein cited, we think that the ordinance adopted by the city was valid, and that it was a proper and authorized exercise of its power to adopt ordinances under the general grant of powers by the state to municipalities to adopt ordinances. Code 1907, § 1251. Under this section the amplest authority is conferred on municipal governing bodies to enact ordinances within the scope defined. *Borok v. City of Birmingham*, 191 Ala. 75, 67 South. 389, Ann. Cas. 1916C, 1061. As said in the opinion in the case of *Sloss-Sheffield Steel & Iron Co. v. Smith*, supra, the ordinance here under consideration is different in terms from the ordinance considered in the case of *Kreulhaus v. City of Birmingham*, 164 Ala. 623, 51 South. 297, 26 L. R. A. (N. S.) 492, and that case is clearly distinguishable from the case in hand.

From what we have said, it follows that it is our holding that the trial court was in error in holding the ordinance invalid, and refusing to admit it in evidence.

Reversed and remanded.

(15 Ala. App. 607)

# HALL v. STATE (6 Div. 170.)

(Court of Appeals of Alabama. March 23, 1917.)

## 1. HOMICIDE $\S$ 800(13) — TRIAL — INSTRUCTIONS.

In a homicide case, charges pretermittting defendant's freedom from fault, where there was evidence to show that she was not free from fault, were erroneous and properly refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 628.]

## 2. HOMICIDE $\S$ 300(4) — TRIAL — INSTRUCTIONS — SELF-DEFENSE.

In a homicide case, a requested charge that the jury might consider if it be a fact that deceased had made threats against defendant and had threatened at different times to take the life of defendant, and if such threats had been communicated, then such facts might alone, or might not, be sufficient to create in defendant's mind a bona fide belief at the time of the killing that her life was in danger, is argumentative; defendant not being entitled to invoke the doctrine of self-defense unless she was entirely free from fault.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 618.]

## 3. HOMICIDE $\S$ 116(6) — SELF-DEFENSE — THREATS.

Previous threats alone will not justify aggressive defensive measures, in the absence of an overt act or hostile demonstration of the party who made the threats.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 163.]

## 4. CRIMINAL LAW $\S$ 763, 764(23) — TRIAL — INSTRUCTIONS.

In a homicide case, a charge, assuming that deceased was making a hostile demonstration against the defendant at the time of the killing, is properly refused, where under the evidence that question was for the jury because invading the jury's province.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1731.]

## 5. HOMICIDE $\S$ 800(6) — TRIAL — INSTRUCTIONS.

In a homicide case, a requested charge on self-defense, which gave undue prominence to evidence of alleged threats made by deceased, is properly refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 620.]

## 6. CRIMINAL LAW $\S$ 763, 764(1) — TRIAL — INSTRUCTIONS.

In a homicide case, requested affirmative charges are properly refused as invading the jury's province, where the evidence presented a question for their determination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1737, 1742, 1743, 1746.]

## 7. HOMICIDE $\S$ 297 — TRIAL — INSTRUCTIONS.

A requested charge that homicide is excusable when the person committing the same is in some degree in fault, but the circumstances are such that no punishment is deserved, is manifestly bad.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 611.]

## 8. CRIMINAL LAW $\S$ 829(1) — TRIAL — INSTRUCTIONS.

The refusal of requested charges covered by those given is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

Appeal from Criminal Court, Jefferson County; Wm. E. Fort, Judge.

Mary Hall, alias, etc., was indicted for the killing of Dalia Turner, convicted of manslaughter, and she appeals. Affirmed.

The evidence tended to show the killing was done with a pistol in the hallways or doorway of a room on Fourth avenue in the city of Birmingham, that for the state tending to show an unprovoked killing, and that for defendant tending to show that defendant was living in the room near where the killing occurred, and was occupying the room as a home, and that at the time the Turner woman was walking toward her, making certain remarks, and with something in her hand, which later developed to be a handkerchief. The evidence also tended to show a former difficulty between the two women, and the fact that deceased had threatened to kill defendant. The following charges were refused to defendant:

(B) "If you believe from all the evidence in this case that at the time deceased met her death, defendant was in her own room, or in a room occupied by her as a home, then in such event, and under such circumstances, she would not be required to retreat, the theory of the law being that every man's home is his castle, and under no circumstances is he under the duty to retreat therefrom."

(J) "You should find defendant not guilty if you believe from all the evidence in this case that defendant shot deceased, under a bona fide belief that she was in impending danger of life or limb; and that she had, under all the circumstances, reasonable cause to believe that she was in imminent danger at the time the shooting was done, it would be immaterial whether there was actual danger or not."

(C) "You may look to the fact, if it be a fact, that deceased had made threats against defendant, and had threatened at different times to take the life of defendant; and, if you further believe from all the evidence that these threats had been communicated to defendant prior to the time of the difficulty, then these facts alone may or may not be sufficient to have generated in defendant's mind the bona fide belief at the time of the killing that her life was in danger, or she was in danger of great bodily harm."

(D) Same in legal effect as C.

(E) "If you believe from all the evidence in this case that defendant was reasonably free from fault in bringing on the difficulty, and that defendant had no reasonable or convenient mode of escape without increasing her peril, and that if from the threats which had been communicated to her, if it be a fact that such threats had been communicated to her, there was generated in the mind of defendant a reasonable and bona fide belief that her life was in great danger, and that the threats were going to be carried out, then in such a case this defendant had the right, under the law, to act on the reasonable appearance of same, and under such circumstances would have been authorized to anticipate the deceased, and fire the shot to preserve her own life, if you believe from all the evidence in this case that this state of fact existed, and the killing occurred under such circumstances, you should find defendant not guilty."

(F) "Previous threats made against and communicated to defendant may be sufficient to indicate to a reasonable mind that at the time of the killing, defendant's life was in great danger, and such threats alone might be sufficient to

generate a reasonable belief that it was absolutely necessary to fire the fatal shot to save her life, or prevent great bodily harm to defendant."

(G) Sufficiently appears.

(H) "If you believe from the evidence that deceased sought or provoked the difficulty for the purpose of executing a design previously formed to take the life of this defendant, and that defendant had no reasonable mode of escape without increasing her peril, and that from threats which had been made by deceased against defendant, and communicated to defendant, defendant honestly believed that her life was in great danger, then I charge you that under those circumstances defendant had a right to anticipate defendant, and fire the shot to protect her own life or prevent great bodily harm."

(I) Affirmative charge as to murder in either degree.

(10) Same as 1.

(15) Affirmative charge of any offense higher than manslaughter in the second degree.

(9) "Homicide is excusable when the person committing the same is to some degree in fault, but the circumstances are such that no punishment is deserved."

Burgin & Brown, of Birmingham, for appellant. W. L. Martin, Atty. Gen., for the State.

BROWN, P. J. The defendant was convicted of manslaughter. The only matter complained of is the refusal of certain special charges requested by the defendant.

[1] There was evidence tending to show that the defendant was not free from fault in provoking the difficulty. The first charge complained of, which we have designated for convenience as charge B, and charge J pretermitted the defendant's freedom from fault. *Daniel v. State*, 71 South. 79; *Andrews v. State*, 159 Ala. 29, 48 South. 858.

[2] Charges C and D were properly refused because argumentative.

It is not enough that the defendant was "reasonably free from fault." Before she could invoke the doctrine of self-defense, she must have been entirely free from fault. *Langham v. State*, 12 Ala. App. 46, 68 South. 504. This doctrine justifies the refusal of charge E.

[3] Previous threats alone will not justify aggressive defensive measures, in the absence of an overt act or hostile demonstration of the party against whom such aggressive measures are taken. *Jones v. State*, 116 Ala. 468, 23 South. 135; *Langham v. State*, supra. This doctrine justified the refusal of charge F.

[4] Charge G assumes that the deceased was making a hostile demonstration against the defendant at the time of the fatal shot. Under the evidence this was a question for the jury, and the charge was properly refused as invasive of the jury's province.

[6] Charge H pretermitted defendant's freedom from fault and gives undue prominence to evidence of alleged threats.

[8] Charges 1, 10, and 15 were invasive of the jury's province.

[7] Charge 9 is manifestly bad.



[8] The proposition of law embodied in charge 11 was given to the jury in given charges 2, 12, and 16.

This disposes of the only questions presented for review, and the judgment is affirmed.

Affirmed.

(15 Ala. App. 611)

BROWN v. STATE. (8 Div. 520.)

(Court of Appeals of Alabama. March 23, 1917.)

1. CRIMINAL LAW  $\S$  1104(4) — APPEAL AND ERROR — TRANSMITTING INDICTMENT TO COURT OF APPEALS.

Under Supreme Court rule of practice 24 (Code 1907, p. 1511), authorizing transmission of original papers to the Supreme Court, the trial court may transmit an original indictment to the Court of Appeals for inspection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  2776.]

2. INDICTMENT AND INFORMATION  $\S$  79—SUFFICIENCY.

An indictment, charging that accused "cornally" knew another contrary to the order of nature is not defective because misspelling the word "carnally."

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig.  $\S$  209-214.]

3. CRIMINAL LAW  $\S$  822(16)—INSTRUCTIONS—REASONABLE DOUBT.

Instruction in criminal case that a reasonable doubt is one based upon a reasonable foundation is not reversible error, especially where a preceding portion of the instruction stated that such doubt was not a whimsical, possible, or speculative doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  1990, 1991, 1994, 3153.]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Herman Brown was convicted of crime, and appeals. Affirmed.

W. T. Lowe, of Decatur, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

BROWN, P. J. [1] The judge of the trial court, at the instance of appellant, has caused the original indictment, duly authenticated by the clerk, to be transmitted to this court for inspection under Supreme Court rule of practice 24. Code 1907, p. 1511. This practice has been approved. *Watkins v. State*, 89 Ala. 82, 8 South. 134; *Griffith v. State*, 90 Ala. 583, 8 South. 812; *Sanders v. State*, 2 Ala. App. 13, 56 South. 69; *Flowers v. State*, 2 Ala. App. 65, 56 South. 98.

[2] The indictment, omitting the caption and the signature of the solicitor, is in these words:

"The grand jury of said county charge that before the finding of this indictment Herman Brown, against the order of nature *cornally* knew Felix Taylor, against the peace and dignity of the state of Alabama."

The defendant demurred to the indictment, assigning the grounds: "(1) Charges no offense against this defendant." "(2) It fails to aver that the defendant *carnally* knew Felix Taylor." There is no such word in the

English language as "cornally." This combination of letters, when the letter "o" is given the short sound as in "not," is capable of being sounded or pronounced much like the word "carnally"; and, on the authority of the following cases, we hold that the misspelling of this word in the indictment does not render the indictment misleading or subject to demurrer. *Griffith v. State*, supra; *Flowers v. State*, 2 Ala. App. 65, 56 South. 98; *Sanders v. State*, supra.

[3] The court charged the jury in the oral charge, among other things:

"The law requires the defendant to be proven guilty beyond a reasonable doubt and to a moral certainty before a conviction can be had; but that does not mean the state must prove the defendant guilty beyond all doubt, or prove it to a mathematical certainty. It is not a whimsical doubt or possible doubt or speculative doubt; but it is a doubt based upon a reasonable foundation."

The defendant excepted to that part of the charge italicized, and insists that the court said no more than that "a reasonable doubt is a reasonable doubt." If we concede this contention, it would not be reversible error. *Malchow v. State*, 5 Ala. App. 99, 59 South. 342. When that portion of the charge excepted to is construed in connection with what precedes it, the utterance excepted to is, in effect, the same as that, "A reasonable doubt is a doubt for which a reason can be given," or "A doubt founded upon a reason," and these definitions have been approved. 1 Mayf. Dig. 764,  $\S$  1.

The proceedings of the trial court appear to be free from reversible error, and the judgment will be affirmed.

The clerk of this court is ordered to transmit to the clerk of the trial court the original indictment.

Affirmed.

(15 Ala. App. 613)

WARD v. STATE. (2 Div. 143.)

(Court of Appeals of Alabama. April 3, 1917.)

1. HOMICIDE  $\S$  190(3)—EVIDENCE—SELF-DEFENSE—PREVIOUS THREATS—SHOWING OF SELF-DEFENSE.

Evidence of previous threats and hostile demonstrations by deceased toward accused was not admissible in the absence of evidence tending to show self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig.  $\S$  401.]

2. CRIMINAL LAW  $\S$  390—EVIDENCE—UNDISCLOSED INTENTION OF WITNESS.

Objection to the question to accused, "Were you carrying that pistol for deceased?" as calling for the undisclosed intention of the witness, was properly sustained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  858.]

3. CRIMINAL LAW  $\S$  382—EVIDENCE—COLLATERAL ISSUES.

In a murder trial, a question whether accused apprehended an attack from another other than deceased was wholly immaterial, and, if permitted, would have injected a collateral issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  847-864.]

#### 4. HOMICIDE $\Leftrightarrow$ 190(5)—EVIDENCE—SELF-DEFENSE—PREVIOUS THREATS—REMOTENESS.

A statement attributed to deceased, "I guess I will have to get somebody or they will have to get me," made two weeks before the homicide, was properly excluded.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 403.]

Appeal from Circuit Court, Wilcox County; B. M. Miller, Judge.

Lee Ward was convicted of crime, and appeals. Affirmed.

Bonner & Miller, of Camden, and W. W. Quarles, of Selma, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

**BROWN, P. J.** The defendant, a man 35 years of age, killed John Bass Steen, 18 years of age, by shooting him with a pistol. The killing occurred between 6 and 7 o'clock in the evening on the public road leading out of Pineapple toward Forest Home; the evidence showing that the deceased at the time was on his way home. Between 2 and 3 o'clock of the same day, the defendant and the deceased met on the road, and a fuss ensued between them. There was evidence tending to show that about the time deceased was preparing to leave town on his way home, the defendant preceded him, traveling the same road, and at the place of the killing, between one-half and one-quarter of a mile from the stores in Pineapple, stopped in wait for his victim.

[1] With evidence of these tendencies before the jury, and before the defendant offered any evidence tending to show self-defense, the defendant proposed to show threats and hostile demonstrations made by the deceased toward him in the previous difficulty. Such evidence was not admissible in the absence of some evidence tending to show self-defense. *Gafford v. State*, 122 Ala. 54, 25 South. 10.

[2, 3] The objection to the question asked the defendant by his counsel while testifying as a witness, "Were you carrying that pistol for deceased, Bass Steen?" was properly sustained. This question called for the undisclosed intention of the witness. *Fuller v. Whitlock*, 99 Ala. 411, 13 South. 80. And the question eliciting testimony for the defendant as to whether he apprehended an attack from another than deceased was wholly immaterial, and, if permitted, would have injected a collateral issue.

[4] The statement attributed to the deceased by the witness Hawkins, "I guess I will have to get somebody or they will have to get me," made two weeks before the homicide, was properly excluded. *King v. State*, 89 Ala. 146, 7 South. 750; *Knight v. State*, 160 Ala. 58, 49 South. 764; *Bullington v. State*, 13 Ala. App. 61, 69 South. 319. The holding in *Burton's Case*, 115 Ala. 1, 22 South. 585, is distinguished by the fact stated in the opinion:

"The declarations of the deceased, as he was leaving home on the afternoon of the homicide, having a gun and pistol, that he was going out to shoot some."

These were "verbal acts indicating a present purpose and intention." *Burton v. State*, 115 Ala. 1, 22 South. 585.

The defendant requested 85 special charges, 82 of which were given and 13 refused. The oral charge of the court was very elaborate, and covered every phase of the case, and the written charges refused to defendant, in so far as they stated correctly any proposition of law applicable to the case, were substantial duplicates of those given.

We find no error in the record, and the judgment of the trial court is affirmed.

Affirmed.

**BRICKEN, J.**, not sitting.

(15 Ala. App. 615)

#### LOVELADY v. STATE. (6 Div. 261.)

(Court of Appeals of Alabama. April 3, 1917.)

#### 1. STATUTES $\Leftrightarrow$ 102(4) — LOCAL AND SPECIAL LAWS—FEES OF PUBLIC OFFICERS.

Local Acts 1911, p. 227, conferring additional jurisdiction on the county court of Winston county and regulating the fees of such court, is not violative of Const. 1901, § 96, prohibiting the enactment of any law not applicable to all counties regulating the fees of public officers, since in so far as it fixes fees it is but a reaffirmation of Code 1907, § 6856, which fixes in the same amount the fees of like character, and is applicable to all counties of the state.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 114.]

#### 2. STATUTES $\Leftrightarrow$ 64(3)—INVALIDITY IN PART—EFFECT.

To hold that the provision of such statute which fixes fees is unconstitutional would not invalidate the remainder of the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 60, 195.]

#### 3. STATUTES $\Leftrightarrow$ 124(1) — TITLE IN SUBJECT-MATTER—COUNTY COURTS.

Loc. Acts 1911, p. 227, entitled an act to confer additional jurisdiction upon the county court of Winston, Ala., and to regulate proceedings therein, is not violative of Const. 1901, § 45, requiring that each law contain one subject, which shall be clearly expressed in its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 184.]

#### 4. STATUTES $\Leftrightarrow$ 61 — ENACTMENT — PRESUMPTION.

An act of the Legislature is of itself a record of its own existence and integrity, and is presumptively correct, unless the contrary affirmatively appears.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 56, 196.]

#### 5. CRIMINAL LAW $\Leftrightarrow$ 304(9) — JUDICIAL NOTICE—LEGISLATIVE JOURNALS.

The courts take judicial notice of the contents of the House and Senate Journals, which by Const. 1901, §§ 63, 64, are required to be kept.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 706.]

#### 6. WEAPONS $\Leftrightarrow$ 17(1)—COMPLAINT—"KNUCKLES"—"KNUCKLES."

A complaint charging the carrying of concealed knuckles was not demurrable because the

word "knucks" was used instead of "knuckles"; the two words being used interchangeably, and meaning the same thing.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. §§ 20, 22-25.]

For other definitions, see Words and Phrases, First and Second Series, Knucks—Knuckles.]

**7. CRIMINAL LAW** **§ 696(1) — OBJECTION TO TESTIMONY—WAIVER.**

The right to object to a question calling for illegal, irrelevant, and immaterial testimony was waived where timely objection was not made, though counsel for accused was engaged in other matters, and did not hear the question propounded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1651, 1653.]

**8. CRIMINAL LAW** **§ 327—BURDEN OF PROOF.**

The burden is on the state to prove beyond a reasonable doubt that accused is guilty of the offense charged, but it need not prove the impossibility of his innocence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 720.]

Appeal from Winston County Court; John S. Curtis, Judge.

Marshall Lovelady was convicted of carrying concealed upon his person a pair of brass or metal knucks, and appeals. Affirmed.

Z. McVay, of Double Springs, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

**BRICKEN, J.** The defendant was convicted of the offense of carrying concealed about his person a pair of brass or metal knucks. The defendant objected to going to trial, on the ground that the act conferring additional jurisdiction upon the county court of Winston county (Local Acts 1911, p. 227) was unconstitutional, and undertook to raise this question by what was termed a motion (but in fact a demurrer); the points insisted upon being: (1) That it violates section 96 of the Constitution, in that said act undertook to regulate fees of the county court of Winston county which were not applicable to all the counties of the state; (2) that said act was repugnant to section 45 of the Constitution because the subject of said act is not clearly expressed in its title; (3) that the passage of said act was not in conformity with sections 63 and 64 of the Constitution. The defendant also demurred to the complaint filed in this case on the ground that said complaint failed to charge any offense known to the law, this contention being based upon the fact that the complaint used the word "knucks," instead of following literally the word of the statute, "knuckles."

[1, 2] The act referred to is not unconstitutional, and the objections thereto upon these grounds are not well taken, and are without merit. In the first instance, objection (1), the provision of said act in fixing the county court fee of \$3 is but a reaffirmation of Code 1907, § 6656; which fixes the fees of like character, applicable to all counties of the state at the same amount. However, if this could not be taken as a complete answer to said

objection, and if, from a most liberal construction, it could be held that in this particular the act was in violation of section 96 of the Constitution, under the uniform decisions in this state, this part of said act could be disregarded and still the validity of the act be sustained, for to reject this section of the act entirely, it would still leave the act complete, and would not have the effect to emasculate or change the law. In this state it has been repeatedly held that where a statute contains valid and invalid provisions, and the invalid parts can be stricken from the act and leave the enactment complete within itself, sensible, capable of being executed, and wholly independent of that which is rejected, the enactment will be upheld and enforced as to valid parts. Harper v. State, 109 Ala. 28-33, 19 South. 857; Davis v. State, 130 Ala. 148, 30 South. 344, 89 Am. St. Rep. 23; Ex parte Cowert, 92 Ala. 94, 9 South. 225.

[3] The next objection, (2), to the effect that the subject of the act is not clearly expressed in the title thereof, is wholly without merit. We are of the opinion that the title to this act, which is as follows: "To confer additional jurisdiction upon the county court of Winston county, Ala., and to regulate the proceedings therein"—is a full, fair, and comprehensive expression of the subject-matter contained in said act, and that the provisions thereof are referable and cognate to the general subject as embraced in the title, and therefore do not violate section 45 of the Constitution. Local Acts 1911, p. 227; Clark v. State, 4 Ala. App. 107, 58 South. 682; Lindsay v. U. S. Savings & Loan Association, 120 Ala. 156, 24 South. 171, 42 L. R. A. 783; Hubbard v. State, 172 Ala. 374, 55 South. 614.

[4, 5] With reference to objection (3), it need only be said that the long-established rule in this state has been that an act of the Legislature is of itself a record of its own existence and integrity, and is presumptively correct, unless the contrary affirmatively appears. The Constitution of the state requires that each house of the Legislature shall keep a journal of its proceedings, and courts take judicial notice of the contents of the record thus kept. State ex rel. Crenshaw v. Joseph et al., 175 Ala. 593, 57 South. 942, Ann. Cas. 1914D, 248, and authorities cited therein. A careful examination of the House and Senate Journals with reference to the passage of the act in question here discloses the fact that the passage of said act was in all things regular, and was in conformity with sections 63 and 64 of the Constitution, and therefore there is no merit in the objection raised in this connection.

[6] The demurrer to the complaint was properly overruled. The words "knucks" and "knuckles" are used interchangeably, and mean the same thing (see Century Dic-

tionary), and the use of either is a following of the statute (*Mills v. State*, 36 Tex. Cr. R. 71, 35 S. W. 370).

[7] In assignment of error (C) it is contended that the court erred in overruling defendant's motion to exclude certain parts of the testimony of defendant's witness Vest Still on cross-examination as having been irrelevant, incompetent, inadmissible, and because the character of state witness Bervil Williams had not been put in issue, predicating his motion upon the fact that defendant's counsel was engaged in other matters, and did not hear the question propounded, the answer to which was responsive, and upon which the motion was based. No objection was made to the question; the answer there-to being responsive, the court did not err in overruling the motion of the defendant to exclude same, it being a long-settled rule that a timely objection to a question calling for illegal, irrelevant, and immaterial testimony must be made; otherwise it comes too late. A party cannot speculate on the answer of a witness, responsive to a question, and claim the benefit of it, if favorable, and discard it if prejudicial. *Downey v. State*, 115 Ala. 108, 22 South. 479. Counsel engaged in the trial of a case should ask for a cessation thereof, should it become necessary to divert his attention to some other matter at hand, and no exception to the rule above announced could be allowed under the facts as shown in the instant case.

[8] Assignments of error (d) and (e) are without merit. The testimony of the state was properly submitted to the jury for its consideration, and the weight and sufficiency thereof was a question for the jury to decide. The burden upon the state in a criminal case is to prove beyond a reasonable doubt that the defendant is guilty of an offense embraced in the charge against him. It is not incumbent upon it to prove the impossibility of his innocence. *Lovett v. State*, 10 Ala. App. 72, 64 South. 643. There was, therefore, no error in overruling the motion to exclude the evidence of the state, and in requiring the defendant to make his defense after the state had closed its case. For the same reasons and under authorities *supra* the court did not err in overruling defendant's motion for a new trial.

There being no error of a reversible nature in the record, the judgment of the lower court will be affirmed.

Affirmed.

(15 Ala. App. 619)

**JERNIGAN v. COX.** (4 Div. 419.)

(Court of Appeals of Alabama. April 3, 1917.)

**CHATTEL MORTGAGES — FRAUD — QUESTION FOR JURY — EVIDENCE.**

Where, in detinue to recover two mules under descriptions in chattel mortgages reading, "all our live stock and increase \* \* \* also all other personal property not herein specifically named owned by me or us now or at the ma-

turity of this paper," there was evidence to show that defendant signed the mortgages without reading them, on the representations that they were only to cover the property specifically described, and that they did not include any other property, the question of fraud was for the jury.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 142.]

Appeal from Circuit Court, Coffee County: H. A. Pearce, Judge.

Action in detinue by Joe Jernigan against D. C. Cox for the recovery of two mules. From a judgment for defendant, plaintiff appeals. Affirmed.

Riley & Carmichael, of Elba, for appellant. W. W. Sanders, of Elba, for appellee.

**SAMFORD, J.** The appellant, Joe Jernigan, plaintiff in the court below, held two mortgages, one dated March 21, 1908, and one dated January 15, 1909, signed by the defendant, and describing certain specific personal property, and in addition thereto containing the following general descriptions:

"All our live stock and increase," and, "Also all other personal property not herein specifically named owned by me or us now or at the maturity of this paper."

The first quotation above set out preceded the description of the specific property and was a part of the printed form, and the second quotation followed the description of the specific property and was also a part of the printed form. The description of the specific property was written into the printed form. It is not contended that the property sued for was described specifically, but that it is covered by the general descriptions embraced in the two quotations above referred to.

There was evidence tending to show that the defendant could read, that he signed the mortgages without reading them on the representations that they were only to cover the mules specifically described, and that they did not include any other property. As said in the case of *B. R., L. & P. Co. v. Jordan*, 170 Ala. 530, 54 South. 280:

"It is well settled that a person who signs an instrument without reading it, when he can read, cannot, in the absence of fraud, deceit, or misrepresentation, avoid the effect of his signature, because not informed of its contents; and the same rule would apply to one who cannot read, if he neglects to have it read, or to inquire as to its contents. \* \* \* But the rule is otherwise where its execution is obtained by a misrepresentation of its contents; the party signing a paper he did not know he was signing and really did not intend to sign. It is immaterial in the latter aspect of the case that the party signing it had an opportunity to read the paper, for he may have been prevented from doing so by the very fact that he trusted to the truth of the representation made by the other party with whom he was dealing." *B. R., L. & P. Co. v. Jordan*, 170 Ala. 535, 536, 54 South. 282, and authorities there cited.

It was contended on the trial of this case that such representations had been made to

the defendant, and that he trusted to the truth of such representations to his prejudice; and there was evidence sufficient for this question of fraud to be submitted to the jury; and the court made no error in so doing.

The testimony of Cox was relevant, and the court properly overruled the plaintiff's motion to exclude it.

We find no error in the record, and the judgment of the lower court is affirmed.

Affirmed.

(15 Ala. App. 620)

WOODS v. STATE. (7 Div. 447.)

(Court of Appeals of Alabama. March 23, 1917.)

INTOXICATING LIQUORS  $\Leftrightarrow$  236(4)—CRIMINAL PROSECUTIONS—AIDING SALE.

In a prosecution for aiding a liquor law violation, evidence that the defendant aided and abetted the principal in procuring an unlawful sale of prohibited liquors, and that he aided in transporting the liquors to the state's witness, was sufficient to justify a conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 305, 306.]

Appeal from Circuit Court, St. Clair County; J. E. Blackwood, Judge.

Frank Woods was convicted of aiding a liquor law violation, and appeals. Affirmed.

J. W. Inzer and Embry & Embry, all of Ashville, and O. R. Robinson, of Pell City, for appellant. W. L. Martin, Atty. Gen., for the State.

BROWN, P. J. This is a companion case to *Hugh Rogers v. State*, 73 South. 994, disposed of January 30, 1917. The undisputed evidence shows that the defendant aided and abetted Rogers in procuring an unlawful sale of prohibited liquors, and that he aided in transporting the liquors to the state's witness Crump.

The case is governed by the principles declared in *Bridgeforth v. State*, 74 South. 402; and *Rogers v. State*, supra, and authorities there cited.

There is no error in the record, and the judgment is affirmed.

Affirmed.

(15 Ala. App. 621)

HAYES et al. v. HAYES. (8 Div. 415.)

(Court of Appeals of Alabama. April 3, 1917.)

1. TRIAL  $\Leftrightarrow$  253(8)—INSTRUCTIONS—IGNORING ISSUES.

In an action for assault by a wife against a husband arising from a struggle for the possession of their child, an instruction that, if the jury believed the evidence, they must find for defendants was properly refused, since, though the father had rightfully taken the child in the first instance, he could not use excessive force in retaining it; and, there being evidence on that point, the question was one for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 620.]

2. TRIAL  $\Leftrightarrow$  260(1)—INSTRUCTIONS—REQUESTED INSTRUCTIONS.

Requested instructions covered by others given are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651.]

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

Action by Maggie Hayes against J. Berry Hayes and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Street, Isbell & Bradford, of Guntersville, for appellants. John A. Lusk & Son, of Guntersville, and A. E. Hawkins, of Albertville, for appellee.

SAMFORD, J. The appellee (plaintiff below) brings her suit to recover damages for an alleged assault and battery upon her person. The following are the facts necessary to a decision: The appellee and Jno. Arthur Hayes were husband and wife, and were living apart. Jno. Arthur was the father, and the appellee was the mother, of a child about seven years old. On the day of the alleged assault, the father came near the house where the appellee was then living, and called the child to come to him, which it did without protest, either from the child or its mother. When the child reached its father, he took it in his arms and began to run. The mother then ran after them, and undertook to repossess herself of the child, which she was prevented from doing by the other defendants, evidently acting in concert, in such manner as to make the act of one the act of all. There is a slight conflict in the testimony as to just how much force was used by the defendants. The defendants asked three charges in writing, which the court refused, and which refusal is now assigned as error, as follows:

"(1) The court charges the jury that if they believe the evidence in this case, they must find for the defendants.

"(2) The court charges the jury that the law recognizes the primary right of the father to the custody of the child, even as against the mother, unless it is shown that the father is an unfit or unsuitable person to have custody of his own child.

"(3) The court charges the jury that if the father of the child picked it up peaceably in front of the mother's home, without the employment of any more force than was involved in raising the child into his arms, he thereby became lawfully in possession of the child, and the fact that he understood the mother might attempt to retake the child would not make the father's act in picking up the child wrongful, and would give the mother no right to attempt to re-take the child by force."

[1] The court did not err in refusing to give charge No. 1. Even if the father had the right to take the child in the first instance, he would not have the right to use excessive force in retaining it, and there was evidence to go to the jury on this point, and the court did not err in submitting it.

[2] Charges 2 and 3 assert correct proposi-

tions of law, but are covered by given charges A, B, and C.

We find no error in the record, and the judgment of the lower court is affirmed.

Affirmed.

(15 Ala. App. 623)

**CONSOLIDATED MERCANTILE CO. v. WARREN.** (4 Div. 401.)

(Court of Appeals of Alabama. Jan. 30, 1917. On Rehearing, April 3, 1917.)

**1. EXECUTORS AND ADMINISTRATORS**  $\Leftrightarrow$  437(1) — ACTIONS—STAT.

Code 1907, § 2803, providing that no suit shall be commenced against an administrator until 6 months, and that no judgment shall be rendered against him until 12 months after the grant of the letters of administration, does not protect a defendant from being forced to trial before the expiration of 12 months from a grant of letters of administration to an administrator of a deceased plaintiff in whose name the cause has been revived.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1729-1734.]

**2. DETINUE**  $\Leftrightarrow$  18 — EVIDENCE — OWNERSHIP OF PROPERTY.

Where in detinue under a mortgage to recover cotton the question whether the relation between the mortgagor and his son was that of tenants in common in the cotton so that the mortgage covered only the father's interest was in issue, evidence that the son was under age and lived in the same house with his father as a member of the father's family, and of other circumstances tending to support plaintiff's theory, was properly admitted.

[Ed. Note.—For other cases, see Detinue, Cent. Dig. §§ 34-36.]

**3. LANDLORD AND TENANT**  $\Leftrightarrow$  326(3) — TENANCY IN COMMON—CROPS.

An agreement made in December, 1911, between father and son whereby the father rented land to his son agreeing to furnish a team and one-half the fertilizer, while the son was to furnish the labor and time for cultivating the crop, the crop to be equally divided between them, fixed the relation between them as that of tenants in common in the crop.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1369.]

**4. TENANCY IN COMMON**  $\Leftrightarrow$  46 — PRIORITY OF RIGHTS—CHATEL MORTGAGES.

Where a mortgage is given on a crop owned by the mortgagor and another as tenants in common, the rights given by such relation are superior to those of the mortgagees.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 138.]

**5. WITNESSES**  $\Leftrightarrow$  159(13) — COMPETENCY — TRANSACTIONS WITH PERSONS SINCE DECEASED.

In detinue under a mortgage to recover cotton from a purchaser from the mortgagor, the mortgagor is incompetent to testify that he paid the mortgage debt to the deceased mortgagee.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 681.]

**6. DETINUE**  $\Leftrightarrow$  18 — EVIDENCE — OWNERSHIP OF PROPERTY.

In detinue under a mortgage to recover cotton, plaintiff's testimony that the mortgagor's son never claimed the crop until "the cotton began to move" was competent to rebut defendant's testimony that the father had no interest in the crops raised by his son.

[Ed. Note.—For other cases, see Detinue, Cent. Dig. §§ 34-36.]

**7. EXCEPTIONS, BILL OF**  $\Leftrightarrow$  26 — CONSTRUCTION.

A bill of exceptions will be construed most strongly against the appellant.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 33.]

On Rehearing.

**8. APPEAL AND ERROR**  $\Leftrightarrow$  908 — PRESENTATION FOR REVIEW—BILL OF EXCEPTIONS.

Where in detinue under a mortgage the mortgage offered in evidence does not sustain plaintiff's claim, defendant on appealing should incorporate the mortgage in its bill of exceptions; otherwise it will be presumed that the trial court properly ruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3677.]

**9. APPEAL AND ERROR**  $\Leftrightarrow$  927(6) — PRESENTATION OF REVIEW—PRESUMPTION.

Where the refusal of an affirmative charge is complained of on appeal, and it affirmatively appears that all the evidence offered below is not set out in the record, it will be presumed that there was evidence authorizing the court to refuse the affirmative charge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3748.]

Appeal from Circuit Court, Henry County; *vs.* Sollie, Judge.

Detinue by Delphie Warren against W. M. Mitchell for a bale of cotton and certain cotton seed. Defendant Mitchell interposed a sworn affidavit denying any claim to the property, and setting up that it was owned and claimed by the Consolidated Mercantile Company. During the progress of the cause Mrs. Delphie Warren died, and the cause was revived in the name of R. L. Warren as administrator. Judgment for plaintiff, and defendant appeals. Affirmed.

Plaintiff claimed under a mortgage given by J. M. Dansey, to Delphie Warren, and that the cotton in controversy was conveyed by the mortgage. The other facts sufficiently appear.

Farmer & Farmer, of Dothan, for appellant. W. O. Long, of Abbeville, for appellee.

**BROWN, J.** [1] The manifest purpose of section 2803, Code 1907, providing, "No suit must be commenced against an executor or administrator, as such, until six months, and no judgment rendered against him, as such, until twelve months after the grant of letters testamentary or of administration," is to protect the estate and to prevent claims being established against it by judicial proceedings until the personal representative has had ample opportunity to ascertain the condition of the estate and the true status of the claims against it; and suits by the personal representative to recover the assets of the estate are not within the influence of this statute. *Alabama State Bank v. Glass*, 82 Ala. 278, 2 South. 641. The defendant's insistence that this statute protected him from being forced to trial until the expiration of 12 months from the grant of letters of administration was without merit.

The plaintiff's theory of the case, as we gather it from the record, was that the cotton in controversy was grown by John Dansey, and that the alleged claim of Grady Dansey was a subterfuge designed to defeat the plaintiff's rights.

The theory of the defendant seems to have been that the debt secured by the mortgage had been paid, and that the plaintiff had no right in the cotton, and, further, that the relation between John Dansey and Grady Dansey was that of tenants in common, and, the relation having been established before the execution of the mortgage by an agreement between John and Grady Dansey, that the mortgage only covered the interest of John Dansey.

[2] These being the issues, any evidence tending to show that the claim of Grady Dansey was not in good faith, or the true relation between the parties, was relevant to the issues and admissible. On this theory the court properly allowed the plaintiff to show that Grady Dansey was under age, that he lived in the same house with his father as a member of the father's family, and such other circumstances having a tendency to support the plaintiff's theory.

[3] The evidence offered by the appellant shows that the agreement between John and Grady Dansey, father and son, was made in December, 1911; that the agreement was that the father rented Grady a crop on the place he had rented from Warren; that the father was to furnish the land, the team, and one-half the fertilizer for the crop, while the son was to furnish the labor, and the time for the cultivation of the crop, the crop to be equally divided between them. This agreement (having been made in 1911, and before the amendment of Code 1907, § 4743, by Acts 1915, p. 112) fixed the relation between the parties as that of tenants in common in the crop. *Hendricks v. Clemmons*, 147 Ala. 590, 41 South. 306; *Haynes Merc. Co. v. Bell*, 163 Ala. 326, 50 South. 311.

[4] The plaintiff's mortgage, as some of the evidence tends to show, was not given until April, 1912, after the relation between the Danseys, if that phase of the evidence is to be believed, became fixed, and therefore Grady Dansey's interest in the crop, if the relation of tenants in common existed between the Danseys, was superior to that of the mortgagee. *Hairslip v. Brannum*, 73 South. 464; *Kilgore v. Jones*, 73 South. 832; *Mayer v. Taylor*, 69 Ala. 403, 44 Am. Rep. 522.

[5] The only theory on which the evidence of payment of the mortgage debt could be material is that the mortgage vested in the mortgagee the title to the cotton in controversy, and if the suit was against the mortgagor instead of his vendee, if defendant was a vendee of the mortgagor—and this was for the jury—the mortgagor would, beyond question, be incompetent to testify that he

paid the mortgage debt to the deceased mortgagee. This being true, he cannot, by assigning his interest in the property, remove his incompetency. *Moore v. Williams*, 129 Ala. 329, 29 South. 795; *Glover v. Gentry & Moore*, 104 Ala. 222, 16 South. 38.

[6] The testimony of the plaintiff, Warren, to the effect that Grady Dansey never laid any claim to the crops until "the cotton began to move" was competent to rebut the testimony offered by the defendant that John Dansey had no interest in the crops raised by Grady Dansey. *Humes v. O'Bryan & Washington*, 74 Ala. 64.

[7] The bill of exceptions will be construed most strongly against the appellant. *Massey v. Smith*, 73 Ala. 173; *Dudley v. Chilton County*, 66 Ala. 593; *McGehee v. State*, 52 Ala. 224. While the mortgage is not set out in the bill of exceptions, it sufficiently appears from the record that it was offered and received in evidence.

The contested questions in the case were properly left to the jury.

Affirmed.

On Rehearing.

BROWN, P. J. [8] The burden is on the appellant to show error. *Smith v. State*, 183 Ala. 10, 62 South. 864. In meeting this burden, if the mortgage offered in evidence by appellee did not sustain the claim, it was the duty of the appellant to incorporate the mortgage in his bill of exceptions; and, having failed in this, the presumption prevails that the court properly ruled. *Carland v. Burke*, 73 South. 10.

[9] Furthermore, where it affirmatively appears that all the evidence offered on the trial is not set out in the record, it will be presumed on appeal that there was evidence on the trial which authorized the court to refuse the affirmative charge for appellant. *South. Ry. Co. v. Herron*, 12 Ala. App. 415, 68 South. 551.

Application overruled.

(15 Ala. App. 626)

HAWKINS v. STATE. (8 Div. 390.)

(Court of Appeals of Alabama. March 23, 1917.)

LARCENY § 75(1)—TRIAL—INSTRUCTION.

In a prosecution for larceny of a cow, where the defense was that defendant had won the cow in a gambling game, the court erred in refusing the charge requested by defendant that if, after considering all the evidence, the jury had a reasonable doubt whether defendant took the cow unlawfully, or whether he purchased it in good faith, they would find defendant not guilty.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 198.]

Appeal from Circuit Court, Lauderdale County; C. P. Almon, Judge.

Charlie Hawkins was convicted of larceny of a cow, and he appeals. Reversed and remanded.

The contention of the appellant is that the indictment read "Jim Yank," instead of "Jim Tank," in laying the possession of the property, and that the proof showed the property to be that of Jim Tank. The defense was that defendant had won the cow from another party in a gambling game, and did not steal the cow from the prosecuting witness.

James Jackson, of Tuscumbia, and Mitchell & Hughston, of Florence, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

BROWN, P. J. The court has inspected the original indictment transmitted to the court under the rule, and finds that the name of the person alleged to be the owner of the property as laid in the indictment is "Jim Tank." This disposes of the appellant's contention that there was a variance between the averments and proof.

Under the evidence in the case the court erred in refusing the following charge requested by defendant:

"If, after considering all the evidence, the jury have a reasonable doubt whether defendant took the cow unlawfully, or whether he purchased it in good faith from Hardin, they will find the defendant not guilty."

We have examined the oral charge of the court, and hold that it does not render harmless the refusal of this charge.

Reversed and remanded.

(15 Ala. App. 627)

CONS福德 v. STATE (4 Div. 460.)

(Court of Appeals of Alabama. Feb. 6, 1917. On Rehearing, March 23, 1917.)

1. HOMICIDE  $\S$  171(2)—MURDER—EVIDENCE—ADMISSIBILITY.

Evidence that witness followed tracks to the place of the killing from near defendant's home was admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig.  $\S$  352.]

2. HOMICIDE  $\S$  268—MURDER—QUESTION FOR JURY.

The question whether the tracks were those of the two defendants was for the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig.  $\S$  562.]

3. CRIMINAL LAW  $\S$  528—EVIDENCE—CONFESSIONS.

In prosecution of two persons for murder, testimony of a voluntary confession of one of them was admissible when properly limited to affect the author.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  1002-1010.]

4. CRIMINAL LAW  $\S$  423(1)—EVIDENCE—DECLARATIONS OF CONSPIRATOR—ADMISSIBILITY.

Where a conspiracy is established, any act or declaration of a conspirator made or done in furtherance of the common design is admissible in evidence against a coconspirator.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  989, 999.]

5. HOMICIDE  $\S$  165—MURDER—EVIDENCE—ADMISSIBILITY.

Where defendant had had trouble with deceased over deceased's alleged illicit relations

with defendant's daughter, evidence that deceased was a married man was immaterial and inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig.  $\S$  319.]

6. CRIMINAL LAW  $\S$  364(3)—EVIDENCE—ADMISSIBILITY—RES GESTÆ.

Acts and statements of one accused of murder immediately after the killing and constituting res gestæ are admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  808, 816.]

7. WITNESSES  $\S$  370(6)—EXAMINATION—BIAS.

Defendant's question of state's witness whether he ran with deceased a good deal about the time of the murder was properly excluded.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig.  $\S$  1189.]

8. HOMICIDE  $\S$  188(6)—MURDER—SELF-DEFENSE—EVIDENCE—ADMISSIBILITY.

Evidence that deceased habitually carried a pistol was inadmissible in the absence of evidence that defendant knew of such habit.

[Ed. Note.—For other cases, see Homicide, Cent. Dig.  $\S$  396.]

9. HOMICIDE  $\S$  169(6)—MURDER—EVIDENCE—ADMISSIBILITY.

Evidence of trouble accused had with deceased a week prior to the offense over deceased's alleged illicit relations with defendant's daughter was inadmissible as too remote, and not of such character as to palliate the offense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig.  $\S$  346.]

10. CRIMINAL LAW  $\S$  390—EVIDENCE—ADMISSIBILITY.

Where defendant sought to show deceased's alleged illicit relations with his daughter, where counsel stated that if a witness was permitted to answer he would state that deceased carried the daughter to a certain house, and intended to keep her there for an immoral purpose, the answer was properly excluded, since no witness could testify what another party intended to do.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  858.]

11. WITNESSES  $\S$  236(6) — EXAMINATION—SEPARATION OF GOOD AND BAD PARTS OF ANSWER TO QUESTION.

Where both competent and incompetent testimony is called for by a single question, the court is not bound to separate the admissible from the inadmissible and will not be put in error for excluding the answer to the entire question.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig.  $\S$  823.]

12. WITNESSES  $\S$  321—VOUCHING FOR—CREDIBILITY OF WITNESSES.

Where the accused introduces a witness, he vouches for the truth of his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig.  $\S$  1094, 1099, 1100.]

13. HOMICIDE  $\S$  244(1)—EVIDENCE—PROVOKING DIFFICULTY—SUFFICIENCY.

Evidence held to preclude theory of self-defense, since it showed that accused was not free from fault.

[Ed. Note.—For other cases, see Homicide, Cent. Dig.  $\S$  507.]

On Rehearing.

14. HOMICIDE  $\S$  276—SELF-DEFENSE—QUESTIONS FOR COURT.

It is not an invasion of the province of the jury for the court to determine whether, under



the facts proved, defendant may set up self-defense.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 569.]

Appeal from Circuit Court, Geneva County; H. A. Pearce, Judge.

Will C. Consford and Gertrude Consford were indicted for murder. Gertrude Consford was acquitted, and the other defendant was convicted, and appeals. Affirmed. On rehearing, application denied.

Farmer & Farmer, of Dothan, and W. O. Mulkey, of Geneva, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

BRICKEN, J. The defendant Will C. Consford, together with Gertrude Consford, his daughter, were jointly indicted for murder in the first degree. Upon the trial of this case the defendant Gertrude Consford was acquitted by the verdict of the jury. Will C. Consford, the other defendant, was convicted for the offense of murder in the second degree, and was sentenced to ten years' imprisonment in the penitentiary.

The state's theory of the case was to the effect that a conspiracy was entered into by and between the two defendants above named to take the life of the deceased, Clayton Goulding; that Gertrude, at the request of her father, wrote to deceased to meet her at a certain place (the place of killing) on a certain night; and that Will C. Consford accompanied her armed, with a double-barreled shotgun, and concealed himself nearby, and shot the deceased practically without warning when he came in response to the request contained in the letter above mentioned. There was no dispute that the defendant's daughter did write the letter which was introduced in evidence and admitted by her. No exceptions were reserved during the progress of the trial, except as to the ruling of the court upon the evidence.

[1, 2] The first ruling insisted upon as constituting reversible error was as to the court's permitting witness Pate to testify that he saw and followed tracks of a man and a woman at and near the place of the shooting; that in tracing the tracks, both of which were going in the same direction and from a fence near defendant's home toward the place of killing, he could see where the woman's track stepped upon the man's track occasionally, etc. There was no error in allowing proof of tracks near the place of killing. All surroundings and circumstances are admissible, and the question as to whether the tracks were those of the two defendants, a man and a woman, was for the jury to decide; hence the court committed no error in overruling the objection to, and in refusing to exclude, the testimony of witness Pate as to tracks. *Ragland v. State*, 178 Ala. 59, 59 South. 637; *Ethridge v. State*, 124 Ala. 106, 27 South. 320.

[3] The court properly permitted witness

Pate to testify to the confession made by defendant Gertrude, as it was first affirmatively shown by this witness that the statement or confession so made was wholly voluntary, and the required rule as to the admissibility of this character of testimony had been complied with and fully met. Furthermore, the court, at the time this evidence was received, confined the consideration by the jury of this evidence to Gertrude Consford, and in its oral charge the court expressly placed the same limitation upon said testimony.

[4] The objection to the testimony of state witness May Adams was without merit, and not well taken. The facts testified to by this witness pertained to matters which happened before the killing, and may have had the tendency to assist in establishing a conspiracy between the defendants in line with the state's contention. It is a well-settled principle of law that where a conspiracy is established, any act or declaration of a conspirator made or done in furtherance of the common design is admissible in evidence against a coconspirator. *West v. State*, 168 Ala. 4, 53 South. 277.

[5] In this case it would appear that it was immaterial as to whether the deceased was a married man or not; therefore there was no error of a reversible nature in the court's having sustained the objection of the state to question propounded to witness Alf Black which sought to prove that the deceased was a married man. Also, this matter was already in evidence, and was without dispute on the part of the state.

[6] There was no error in permitting the state to show what the defendant did immediately after he shot deceased; it having been shown by the testimony of witness Marvin Dunn that the acts and statements of the defendant were clearly a part of the res gestæ. *Pate v. State*, 150 Ala. 10, 43 South. 343.

[7] Neither was there error in sustaining the objection by the state to the question as propounded to witness Marvin Dunn, which question was as follows: "You run with Clayton Goulding down there a good deal, didn't you, about that time?" It was not error, for clearly this question did not call for the answer which was stated would be given to it, and a responsive answer to the question as framed could not have reasonably elicited that character of testimony which is permissible in order to test the credibility of the witness on the grounds of bias or prejudice. *Storey v. State*, 71 Ala. 329.

[8] The next assignment of error insisted upon is that the court improperly sustained the objection to the questions seeking to show the habit of deceased in regard to carrying a pistol. There was no error in this ruling of the court, for it has been repeatedly held in this state that such questions were improper, unless coupled with proof that the defendant knew of said habit. *Sims v. State*, 139 Ala. 74, 86 South. 138, 101 Am. St. Rep.

17; *Rodgers v. State*, 144 Ala. 32, 40 South. 572.

[9] The next insistence of error was in the court's refusal to allow the defendant to show that illicit relations had existed between the deceased and the defendant's daughter, who was a codefendant in this case. Repeated efforts to show the particulars of such alleged illicit relations were not allowed by the court, and it is insisted that the court erred in this connection. The dual or twofold defense interposed by the defendant in answer to the indictment—i. e., not guilty, and not guilty by reason of insanity—appears to have been abandoned during the progress of the trial, and it appears that self-defense alone was relied upon. Whether this is true or not, we are of the opinion, after a careful reading of the record, that the conduct of the deceased in connection with defendant's daughter, sought to be shown by the defendant, and which had happened a week before, was too far removed from the time of the killing, and was too remote, and had no immediate connection with the fatal attack on the deceased by the defendant, to be germane to the issue formed by the defendant's second plea, and was not of such character as to justify or palliate the defendant's act complained of in the indictment; nor could it shed any legitimate light on the transaction that would be admissible. *Jimmerson v. State*, 133 Ala. 18, 32 South. 141; *Rogers v. State*, 117 Ala. 9, 22 South. 666; *Ragland v. State*, 125 Ala. 12, 27 South. 983. Under this principle of law, the court did not err in its rulings on this question.

[10, 11] The objections to these questions were properly sustained, for the further reason that when counsel stated to the court the answer he expected to these questions, he said that the witnesses would testify, if permitted to answer:

"That the deceased carried Gertrude Consford to a house of ill fame, and there had sexual intercourse with her, and intended or expected keeping her there for that purpose."

If, upon a most liberal construction under the facts of this case, any part of such testimony could have been held to be legal and competent, it cannot be seriously contended that it is competent for a witness to testify what another party intended to do; and if there was any legal or competent testimony in this connection, and also illegal and incompetent testimony, the court was not bound to separate the good from the bad, sustaining the one and ruling out the other. *Ragland v. State*, 125 Ala. 12, 25, 27 South. 983. This brings us, then, to the proposition, Was the defendant entitled to this testimony as tending to show a motive for the deceased being the aggressor in the fatal difficulty? *Gafford v. State*, 122 Ala. 54, 25 South. 10. In *Gafford's Case*, supra, it was held that testimony of this character was admissible for this purpose; but this doctrine has been limited strictly to where the testimony showed

that the defendant claimed self-defense, and was entitled under the evidence to urge it as a defense. It has been further held that if the defendant is not in a position to invoke self-defense, such testimony is not admissible. *McWilliams v. State*, 178 Ala. 68, 60 South. 101.

"A slayer of a human being must not be unmindful of his words or acts on the occasion of the homicide, which are likely to produce the deadly combat. And if by his acts, words or conduct he shows a willingness to enter the conflict, or if by his words or acts he invites it, he must be held to have produced the necessity for slaying his adversary, and cannot invoke the doctrine of self-defense." *Stallworth v. State*, 146 Ala. 15, 41 South. 186.

[12, 13] In the instant case, the evidence is without conflict that the defendant Will C. Consford stated to witness Alf Black several hours before the killing, "I am going to kill the god damned son of a bitch" (speaking of and meaning the deceased). There was also evidence that deceased had threatened the defendant, which threats had been communicated to him, and, notwithstanding this information, the defendant himself testified that when he first started to the scene of killing, he remembered the threats of the deceased against him, and thereupon turned back, and went in the house and got his gun, and went at once to the scene of killing, and waited there for some time for the deceased to arrive; that he shot and killed deceased with a double-barreled shotgun after deceased had shot at him with a pistol, etc. The defendant proved by his witness John Goulding that a pistol belonging to deceased was found the next morning 10 or 15 steps from where deceased was shot, but this witness also testified that the pistol when found was fully loaded; that there were six cartridges in the gun, and "none of them had been shot out of it." This was the testimony of defendant's own witness, and the truthfulness of this witness was vouched for by the defendant when he offered him as his witness. It appears from the undisputed evidence in this case that the defendant was not in a position to invoke self-defense, for that he was not entirely free from fault in provoking or bringing on the difficulty, or contributing to the situation out of which the difficulty grew. Under these conditions, it is clear that the court committed no error in its rulings upon the admissibility of the evidence in this case; and, there being no other errors assigned, and as there is no other error in the record of a reversible nature, the judgment and sentence of the court below are affirmed.

Affirmed.

On Rehearing.

In the application for rehearing in this case it is contended that the decision therein contains a misstatement of facts, and also that the refusal of the trial court to admit testimony showing the illicit relations be-

tween the deceased and the defendant's daughter some time prior to the killing was reversible error. It is not contended that this testimony was admissible for the purpose of reducing the crime from murder to manslaughter, as it was too far removed from the time of the killing to serve to engender such passion as would rebut malice. After a careful consideration of the matters thus brought to our attention, we are of the opinion that the criticism of the court's statement of facts is not well taken. While the quotation complained of is not in the exact words as testified to by the defendant, it is so nearly the same that it would in no wise change the application of law, and we do not consider that it calls for a correction. We are of the opinion that the testimony as to illicit relations between the deceased and the daughter of the defendant was not admissible for the purpose of showing a motive for the deceased to be the aggressor at the time of the killing, for the undisputed testimony in this case, under the rule laid down in *McWilliams v. State*, 178 Ala. 68, 60 South. 101, clearly shows that the defendant by his own actions and words was not free from fault in bringing on the difficulty; and this being true, he could not invoke the doctrine of self-defense. The defendant testified that when he started to the place of killing he knew that the deceased had made threats against him; that he had been told this by Mr. Quick, Mr. Daughtry, and Mr. Quattlebaum. Their testimony was to the effect that deceased stated that he would kill the defendant if he approached him about the matter, or at least this was a reasonable inference from his statement. The defendant testified that in view of these threats, he armed himself with a shotgun before he went to the scene of the killing. He further testified that he was advised by his daughter that she was expecting the deceased to meet her at that place, and that she had sent for him for the purpose of breaking off with him. He also admitted that he heard his daughter send for the deceased. He further testified that his daughter endeavored to persuade him to leave the scene where the difficulty took place, and thereby avoid meeting the deceased; but instead of doing so and going with her as requested, he sat down on the ground with his gun in his hand and in readiness. It thus appears that the defendant deliberately and intentionally waited for the deceased without any excuse (inasmuch as his daughter desired to leave the place with him), for the purpose of approaching the deceased on the very subject which he anticipated he would need his gun to defend himself from an attack by the deceased when he approached him on this subject.

[14] There is no merit in the argument to the effect that the trial court invaded the province of the jury and determined that the

defendant could not set up self-defense under the facts. This is a question for the court to determine when evidence of this character is sought to be admitted. These views are in line with those expressed by the Supreme Court in *McWilliams' Case*, supra, and necessarily must govern in the instant case.

After a careful examination of the application for a rehearing and of the well-prepared briefs of the able counsel, we are of the opinion that no question has been raised which has not been fully considered and discussed in the opinion, the conclusions whereof we deem to be sound, and for these reasons, and under the authority of *McWilliams v. State*, 178 Ala. 68, 60 South. 101, *Scroggins v. State*, 120 Ala. 369, 25 South. 180, and *Brewer v. State*, 160 Ala. 66, 49 South. 336, the application for rehearing is denied.

Application denied.

(15 Ala. App. 636)

# QUINN v. STATE. (6 Div. 178.)

(Court of Appeals of Alabama. April 3, 1917.)

## 1. CRIMINAL LAW §444—ADMISSION OF EVIDENCE—ACCOUNT BOOK.

Where defendant was accused of furnishing witness liquor to be sold for their mutual benefit, defendant's account book, showing the transactions, was admissible, where witness testified to seeing the identical entries made by defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1028.]

## 2. CRIMINAL LAW §510—TESTIMONY OF ACCOMPLICE—MISDEMEANOR—STATUTE.

Code 1907, § 7879, requiring corroboration of an accomplice's testimony, applies only to felonies, and in misdemeanors a conviction may be had upon an accomplice's testimony without corroboration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124-1126.]

## 3. CRIMINAL LAW §1170(3)—ADMISSION OF EVIDENCE—WAIVER OF OBJECTION.

Objection to introduction of entries in account book, showing defendant's sales of intoxicating liquors, was rendered harmless by defendant subsequently asking that the whole book be introduced.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3147.]

## 4. INTOXICATING LIQUORS §230—VIOLATION OF PROHIBITION LAW—ADMISSION OF EVIDENCE.

Where defendant was accused of furnishing witness liquor to be sold for their mutual benefit, it was proper to ask witness where he got the liquor; such testimony being relevant and material under the charge.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 290.]

## 5. CRIMINAL LAW §452(4) — OPINION EVIDENCE—HANDWRITING.

Witnesses who had often seen accused write and had frequently seen his handwriting were competent to express opinion that an account book, showing his sales of intoxicating liquors, was in defendant's writing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1055.]

**6. CRIMINAL LAW §385 — COMPETENCY OF EVIDENCE.**

Wherever evidence is pertinent and tends to prove the issue in a criminal case it is competent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 861, 865-868, 870, 878.]

**7. CRIMINAL LAW §741(1) — QUESTION FOR JURY—SUFFICIENCY OF EVIDENCE.**

It is the province of the jury in a criminal case to determine weight and sufficiency of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1705, 1713, 1727, 1728.]

**8. CRIMINAL LAW §742(1)—QUESTION FOR JURY—CREDIBILITY OF WITNESSES.**

It is the province of the jury in a criminal case to determine the credibility of witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1719.]

**9. WITNESSES §337(3) — IMPEACHMENT OF ACCUSED AS WITNESS—CHARACTER.**

Where accused testified in his own behalf, and thereby subjected himself to impeachment as other witnesses, it was proper to allow state to show his bad character for truth and veracity.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1130.]

**10. CRIMINAL LAW §741(1)—SUBMISSION OF ISSUES — REFUSAL OF AFFIRMATIVE CHARGE FOR DEFENDANT.**

A general affirmative charge in defendant's favor is properly refused, where there is any evidence tending to show or affording an inference of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1705, 1713, 1727, 1728.]

**11. CRIMINAL LAW §561(1) — ACQUITTAL — REASONABLE DOUBT.**

If, after considering all evidence, the jury does not believe beyond a reasonable doubt that defendant is guilty, they should acquit; consequently an instruction requiring the jury to believe all of the evidence before convicting was improper, since this would render it impossible to convict if there was any conflict of evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267.]

**12. CRIMINAL LAW §561(1) — ACQUITTAL — REASONABLE DOUBT.**

An acquittal cannot be predicated upon the reasonable doubt of defendant's guilt by one juror.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267.]

Appeal from Criminal Court, Jefferson County; H. P. Heslin, Judge.

O. Evans Quinn was convicted of violating the prohibition law, and he appeals. Affirmed.

The facts sufficiently appear. The following charges were refused to defendant:

(1) Under the law and evidence in this case if you believe it, you will acquit.

(2) I charge you that you must believe beyond a reasonable doubt, all of the evidence in this case before you can convict for defendant.

(3) I charge you that if any one member of this jury has a reasonable doubt of the guilt of defendant, they must acquit defendant.

(4) I charge you that under the testimony of the negro, Joiner, said Joiner was an accomplice of defendant, and under the law no man can be convicted on the uncorroborated testimony of an accomplice.

R. D. Coffman, of Birmingham, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

BRICKEN, J. The defendant was convicted of violating the prohibition law, and appeals. The evidence of the state tended to show that the defendant engaged or employed state witness Joiner to sell spirituous, vinous and malt liquors for him; that he furnished to said witness from time to time large quantities of liquors for this purpose, and kept an account of said liquors so furnished in a book which defendant delivered to said witness Joiner, the items therein being made by the defendant; that said liquors so delivered were sold and kept for sale in a house belonging to the defendant, and in which the witness Joiner lived; that on many occasions the defendant was present when the prohibited liquors were sold to numerous named parties and when it was being drunk by them in the house belonging to defendant and on his place in Jefferson county.

[1] There were several exceptions to the rulings of the court upon the evidence, the first insistence of error being that the court erred in allowing the state to introduce in evidence, in connection with the testimony of the witness Joiner, a book produced by said witness, which contained charge items for several hundred dollars worth of spirituous and vinous and malt liquors alleged to have been delivered by defendant to state witness Joiner, and sold by him for their mutual benefit to numerous named parties. The grounds of objection to the introduction of this book were "that the items contained therein were not self-proving, and had not been sufficiently identified and connected with defendant; and, further, that they were incompetent, in that they were produced and testified to only by an accomplice whose testimony was uncorroborated." There was no merit in either contention, for, in the first instance, the witness Joiner had testified to the defendant's having given him the book which he had kept in his possession, and that he actually saw the defendant make the identical entries in the book which were objected to. The effect of this testimony may have been to positively identify the items as having been made by the defendant, and the court, under this testimony, committed no error in letting it go to the jury.

[2, 3] The second ground of objection is palpably without merit, in that the law as to the corroboration of an accomplice applies only in felony cases (Code 1907, § 7879); in misdemeanors, a conviction may be had on the evidence of an accomplice without corroboration, if the jury credit him. His complicity goes only to his credibility, and of that the jury must judge, as they judge the credibility of other witnesses. *Moses v. State*, 58 Ala. 117. Therefore there was no error in the ruling of the court in allowing the book to be introduced in evidence in connection with the testimony of witness Joiner. The objection and exception in this instance were rendered harmless also by the defend-

ant subsequently asking that the whole book be introduced. 4 Ency. Dig. Ala. Rep. 579, § 777 (3).

[4] The court properly overruled the objection of defendant to the question propounded to witness Joiner as to "where he got the whisky and beer that he sold." This witness had testified without objection:

"I kept whisky there all the time, which whisky was supplied to me by Mr. Quinn [the defendant], and which I sold when any one came for it."

This testimony was highly relevant and material under a charge for the violation of the prohibition law, and was but another way of saying that the defendant sold or otherwise disposed of the prohibited liquors as charged in the indictment to the witness Joiner.

[5] There was no error in the ruling of the court in connection with the testimony of witnesses Alexander and Skelton, both of whom had testified that they had seen the defendant write on many occasions, and had seen his handwriting frequently. Under this testimony, these witnesses were qualified to give it as their opinion that the handwriting in the book which contained numerous charge items of whisky, beer, etc., was that of the defendant, and that the writing and figures looked like his writing and figures. When there is a question as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the supposed writer that it was or was not written or signed by him is deemed a relevant fact. Reynolds' Stephens on Evidence, art. 51; Lawson on Expert and Opinion Evidence, pp. 299, 300; Karr v. State, 106 Ala. 1, 17 South. 328.

[6-8] The defendant made a motion to exclude the evidence offered by the state on the ground "that it was insufficient upon which to base a conviction, and on the further ground that the same was insufficient to sustain or make out any illegal sale by or connected with the defendant," which motion was overruled. In this the court committed no error; for wherever evidence is pertinent and tends to prove the issue, it is competent. Its sufficiency is a question exclusively for the determination of the jury. Alsobrooks v. State, 52 Ala. 24. It is the province of the jury to determine the weight and sufficiency of the evidence, including the credibility of the various witnesses. 1 Greenleaf, Evidence, § 49; Storey v. State, 71 Ala. 329, 336.

[9] The defendant testified as a witness in his own behalf, and thereby subjected himself to impeachment in the same manner as other witnesses; therefore the court committed no error in allowing the state to show the defendant's bad character for truth and veracity, and that from the defendant's character in this respect the witness Hartsfield would not believe him on oath; neither did

the court err in overruling the motion of the defendant to exclude this testimony.

[10] Charge 1 was properly refused. The general affirmative charge in favor of the defendant is properly refused, if there is any evidence tending to show, or affording an inference of, guilt. Finney v. State, 10 Ala. App. 39, 44, 65 South. 93; Turner v. State, 97 Ala. 57, 12 South. 54; Hargrove v. State, 147 Ala. 97, 41 South. 972, 119 Am. St. Rep. 60, 10 Ann. Cas. 1126.

[11] Charge 2 was bad, in that it required the jury to believe all of the evidence in the case beyond a reasonable doubt, etc. The rule is that if, after considering all of the evidence in the case, the jury does not believe beyond a reasonable doubt that the defendant is guilty, they should acquit. The rule laid down in charge 2 would require the jury to believe beyond a reasonable doubt all of the evidence both of the state and of the defendant, and would, practically in every case to be tried in the courts, render it impossible to arrive at a verdict of guilt if there was any conflict in the testimony. The proposition of law which, doubtless, was intended to be covered by this charge was given in written charge C. There was no error in the refusal of charge 2.

[12] Refused charge 3 was patently bad, in that it predicates an acquittal upon the reasonable doubt of the guilt of the defendant by one juror.

There was no error in refusing charge 4, for the law as to corroboration of an accomplice applies only in felony cases. Code 1907, § 7897.

There is no error in the record, and the judgment of the court below is affirmed.

Affirmed.

(15 Ala. App. 639)

SHIVER v. PHILLIPS-BOYD PUB. CO.  
(4 Div. 490.)

(Court of Appeals of Alabama. March 28, 1917.  
On Rehearing, April 10, 1917.)

1. APPEAL AND ERROR  $\S$  356—SCOPE OF REVIEW—PERFECTION OF APPEAL—TIME.

Where the appeal was taken 11 months and 29 days from the rendition of the judgment, the court was without jurisdiction other than to dismiss the appeal in view of Code 1907, § 2868, and Acts 1915, p. 711, § 1, requiring an appeal to be taken within six months.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927.]

On Rehearing.

2. APPEAL AND ERROR  $\S$  347(1)—SCOPE OF REVIEW—PERFECTION OF APPEAL—TIME.

Code 1907, § 2868, required appeals to be taken within six months from rendition of judgment. Acts Sp. Sess. 1909, p. 165, required appeals to be taken within one year from the rendition of the judgment. A judgment was rendered on September 21, 1915, and appeal taken on the 20th day of September, 1916. Acts 1915, p. 711, effective September 22, 1915, provided, without a saving clause, that appeals

must be taken within six months. *Held*, that the appeal was too late.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1897, 1899.]

Appeal from Circuit Court, Coffee County; A. B. Foster, Judge.

Action by the Phillips-Boyd Publishing Company against Gus Shiver. Judgment for plaintiff, and defendant appealed. On motion of appellant to dismiss the appeal, and of appellee to affirm on certificate. Appeal dismissed.

Riley & Carmichael, of Elba, for appellant. W. W. Sanders, of Elba, for appellee.

BRICKEN, J. In this case, the appellee, Phillips-Boyd Publishing Company, obtained judgment against the appellant, Gus Shiver, on the 21st day of September, 1915, in the circuit court of Coffee county, in this state. The appellant sued out an appeal from this judgment on the 20th day of September, 1916. Certificate of appeal was filed in this court September 22, 1916. The case is now submitted on motion of appellant to dismiss his appeal and on motion of appellee to affirm on certificate. The motion of the appellant states that "he does not desire to further prosecute his appeal," and to this motion the appellee objects, and makes motion under rule 32 of the Supreme Court for an affirmance of the judgment on the certificate.

[1] It affirmatively appearing that this appeal was not taken in the time required by law, this court is without jurisdiction to consider same other than to dismiss the appeal, which is accordingly done. Code 1907, § 2868; Acts 1915, p. 711, § 1.

Appeal dismissed.

#### On Rehearing.

[2] On application for rehearing it is urged that the appeal in this case was taken within the time prescribed by law, in that section 2868 of Code 1907 was amended by act of Special Session 1909, p. 165, which said act makes the time for appealing one year from the rendition of the judgment or decree; and it is insisted that this act was in force on the 21st of September, 1915, the day upon which the judgment in favor of the appellee and against the appellant was obtained. The appeal was taken on the 20th day of September, 1916. It is true that the statute in force at the time the judgment was rendered allowed one year from the rendition of the judgment within which an appeal might be taken, and this act was duly noted and considered by this court in passing upon the motions on appeal in this case; but this statute was repealed by Acts 1915, p. 711, which became effective September 22, 1915, and the later statute provides that appeals must be taken within six months. It will be observed that there is no saving clause expressed in the statute (Acts 1915, p. 711) in respect to

judgments in existence at the time this statute took effect. The appeal in this case was not taken until one year, lacking one day, after the statute of 1915 was in effect, and therefore we must adhere to the opinion in this case; and under authority of *Theo. Poull & Co. v. Foy-Hays Construction Co.*, 159 Ala. 453, 48 South. 785, the application for rehearing is overruled.

Application overruled.

(15 Ala. App. 661)

#### BRYANT v. STATE. (6 Div. 138.)

(Court of Appeals of Alabama. April 3, 1917.)

##### 1. HABEAS CORPUS §30(3)—CORRECTION OF IRREGULARITIES—SENTENCE.

After defendant's conviction, the cause was remanded on his appeal that he might be asked by the court if he had anything to say why sentence should not be passed upon him. Pending the appeal the trial judge had died, and the solicitor whose name was signed to the indictment against defendant succeeded the trial judge as the presiding judge of the trial court. *Held*, that sentence passed by the new judge upon defendant was not void to the extent that writ of habeas corpus would lie, though the fact that the second judge had been of counsel and afterwards passed sentence upon defendant may have been irregular.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25.]

##### 2. HABEAS CORPUS §30(3)—CORRECTION OF IRREGULARITIES—JUDGMENT.

A writ of habeas corpus does not lie to correct error or irregularities in judgments of courts, and, to be entitled to the writ, petitioner must show that judgment is absolutely void, not merely voidable.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25.]

Appeal from Circuit Court, Jefferson County; C. B. Smith, Judge.

Petition for habeas corpus by R. Leonard Bryant against the State of Alabama. From a judgment sustaining demurrers to the petition and denying the writ, petitioner appeals. Affirmed.

See, also, 70 South. 961.

Smith & Wilkinson, of Birmingham, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

BRICKEN, J. This defendant was indicted at the January term, 1912, of the criminal court of Jefferson county for keeping a gaming table. At the February term, 1914, of said court he was convicted as charged, and a fine of \$100 was assessed against him, and an additional punishment of six months hard labor was imposed. The fine and hard labor sentence were the minimum punishment fixed by statute for offenses of this character. Code 1907, § 6985. From such judgment of conviction the defendant appealed to this court. The appeal so taken resulted in an affirmance of the judgment of conviction appealed from; but, because of the failure of said judgment to recite or show that defendant was asked by the court "if he had any-

thing to say why the sentence of the law should not be passed upon him," the cause was remanded in order that he be sentenced in conformity to the requirements of law in this respect. *Bryant v. State*, 13 Ala. App. 206, 68 South. 704. Pending the appeal in this court Judge Greene, who presided at the trial when this defendant was convicted, died; and the order of this court that the defendant be sentenced in conformity to the requirements of law was executed by Hon. H. P. Heflin, who had succeeded Judge Greene as the presiding judge of said criminal court of Jefferson county. After said sentence was passed, the said defendant being in custody, he filed a petition of habeas corpus before Hon. C. B. Smith, judge of the circuit court of Jefferson county, basing said petition upon the following grounds:

"That said sentence passed upon the defendant by H. P. Heflin, associate judge of the criminal court of Jefferson county, was void, for that said H. P. Heflin, associate judge of the criminal court of Jefferson county, was not the judge of said court at the time of the trial, and did not hear the evidence introduced at said trial; that said sentence is void, for that it was imposed by H. P. Heflin, associate judge of the criminal court of Jefferson county, who at the time of said trial of petitioner was the solicitor for Jefferson county and prosecuted the petitioner in behalf of the state, and that said H. P. Heflin, as solicitor, was with the grand jury of the criminal court at the January term, 1912, when the petitioner was indicted, and that the name of H. P. Heflin, solicitor, is signed to the indictment upon which the petitioner was tried on the 27th day of February, 1914; that the term of the criminal court of Jefferson county at which petitioner was tried and convicted had expired by operation of law before he was sentenced by H. P. Heflin, associate judge of the criminal court of Jefferson county; that petitioner is being held on a void sentence," etc.

The court sustained the demurrers of the state to said petition and denied the writ, from which judgment of the court the defendant appeals.

[1] There is no merit in the contention that the sentence passed upon the defendant by Hon. H. P. Heflin, associate judge of the criminal court of Jefferson county, was void. The punishment inflicted by said sentence was the same as that imposed by his predecessor at a former term of said court, and was the minimum punishment fixed by statute for this offense; therefore it will be readily seen that no injury resulted to the appellant by the acts complained of. The fact that said judge had been of counsel, as solicitor, in this case (which objection was not made at the time of the sentence complained of), and afterwards, as judge of said court, passed sentence upon the defendant, might have been irregular; but the sentence so passed, if from any viewpoint it could be termed voidable, certainly it could not be seriously insisted that such sentence was void to the extent that a writ of habeas corpus would lie.

[2] A writ of habeas corpus does not lie to

correct error or irregularities in the judgments of courts. In order to be entitled to the writ, the petitioner must show that the judgment is absolutely void, not merely voidable. *Ex parte Simmons*, 62 Ala. 416. For these reasons and under authority of *Wright v. State*, 12 Ala. App. 253, 67 South. 798, which appears to be exactly in point, and under authority also of *State ex rel. Attorney General v. Gunter*, Judge, 11 Ala. App. 399, 66 South. 844, the judgment of the lower court in denying the writ is affirmed, and, there appearing no error in the record of a reversible nature, the judgment of the lower court is affirmed.

Affirmed.

(15 Ala. App. 644)

CUNNINGHAM v. STATE. (7 Div. 344.)

(Court of Appeals of Alabama. March 23, 1917.)

1. INTOXICATING LIQUORS  $\Leftrightarrow$  139—UNLAWFUL POSSESSION.

Under Acts 1915, p. 44, making it unlawful for a person to have in his possession at one time more than one-half gallon of spirituous liquors, etc., it is immaterial when, where, or under what circumstances the prohibited liquors are acquired, since the offense is in "having in one's possession" more than the specified amount of prohibited liquor.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 149.]

2. CRIMINAL LAW  $\Leftrightarrow$  878(2) — VERDICT — REFERENCE TO GOOD COUNT.

In a prosecution for a violation of the prohibition law, where three counts of the complaint were conceded to be good, a general verdict of guilty will be referred to one of the good counts, rendering the sufficiency of other counts immaterial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2099.]

3. CRIMINAL LAW  $\Leftrightarrow$  1167(2) — HARMLESS ERROR — COMPLAINT — EFFECT OF INSTRUCTIONS.

As the court limited the jury to the consideration of the sole question as to "why" the defendant kept such liquors, other counts in the complaint as to the amount of such liquors not considered at the trial were not prejudicial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 8101.]

4. INTOXICATING LIQUORS  $\Leftrightarrow$  238(1)—CRIMINAL PROSECUTION—EVIDENCE—SUFFICIENCY.

In a prosecution on counts charging that the defendant sold, offered for sale, kept for sale, or otherwise disposed of spirituous, vinous, or malt liquors, etc., the general affirmative charge for the defendant held properly refused.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 324, 325, 327.]

Appeal from City Court of Gadsden; James A. Bilbro, Judge.

Arthur Cunningham was convicted of violating the prohibition law, and he appeals. Affirmed.

The facts sufficiently appear. Charge 5 is as follows:

If you find from this evidence that defendant received the whisky prior to January 27, 1915, you will find defendant not guilty.

**Charge 6:**

If you find from this evidence that defendant had in his possession within four consecutive weeks prior to the beginning of this prosecution no more than 120 pints of malt liquor, you will find defendant not guilty under count 7 of the complaint.

Roper & Stephens, of Gadsden, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

BRICKEN, J. The defendant was tried and convicted in the county court for violating the prohibition law and appealed to the city court of Gadsden. In the city court the solicitor filed a complaint containing several counts. The first three charged that the defendant sold, offered for sale, kept for sale, or otherwise disposed of spirituous, vinous, or malt liquors, etc. Counts 4 and 5 sought to charge a violation of the law which makes it unlawful for a person to have in his possession at one time more than one-half gallon of spirituous liquors, etc. Demurrers were confessed to counts 4 and 5, and the complaint was amended by adding counts 6 and 7, which charged, in the sixth count, that the defendant had in his possession at one time more than one-half gallon of spirituous liquors, and, in the seventh count, that he had in his possession at one time more than 60 pints in bottles of malted liquors, etc. Demurrers to counts 6 and 7 of the complaint as amended were overruled. There was a general verdict of guilty as charged in the complaint. The undisputed evidence showed that the defendant had in his house on the 22d or 23d day of February, 1915, 48 pint bottles of corn whisky, and that it was hidden behind the ceiling in the defendant's house; that the ceiling had been sawed between the studding with a flap of paper over it, making a hole large enough to pull a pint bottle through; that on the same day there was found in a small closet in the corner of the defendant's kitchen a barrel containing 95 or 100 pint bottles of Cook's Gold Blume beer, etc.

The demurrers to counts 6 and 7 raised the question of the constitutionality of section 12 of the prohibition law known as the Bonner Law (Acts 1915, p. 44), and also that said counts failed to aver that the prohibited liquors found in the possession of the defendant were received after the said law became effective.

The constitutionality of section 12, Acts 1915, p. 44 (Bonner Law), was passed upon by the Supreme Court in the case of *Southern Express Co. v. Whittle*, 194 Ala. 406, 69 South. 652, L. R. A. 1916C, 278, and the question was decided adversely to the contention of the defendant in this case. It was held in that case that section 12 of said act, making it unlawful to possess more than a specified quantity of the prohibited liquors, is a valid exercise of the police power, and

does not infringe upon the constitutional guaranties as to personal or property rights which are taken as the basis of attack upon the constitutionality of the act by the defendant. *Southern Express Co. v. Whittle*, supra.

[1] There is no merit in the second contention raised by demurrers, for it makes no difference, and it is immaterial, as to when, where, or under what circumstances the prohibited liquors were acquired; for the offense is in having in one's possession more than the specified amount of prohibited liquors, without regard to the time or manner or purpose of acquiring it. Acts 1915, p. 44, § 12; *O'Rear v. State*, 72 South. 505.

[2] It is contended that demurrers to counts 6 and 7 should have been sustained because said counts included a period between January 27th and February 8th in which it was not unlawful to possess or have in one's possession the designated quantity of prohibited liquors, and that these counts were defective in this particular. These counts were not subject to the demurrers as interposed; their sufficiency from this viewpoint was not raised by the demurrers. In any event the complaint as a whole contained, without dispute, three good counts; and, as before stated, the verdict of the jury was general, and will be referred to one of the good counts. *Shelton v. State*, 143 Ala. 98, 39 South. 377.

The evidence showed that the alleged offense was committed February 22 or February 23, 1915, which was several days after the law became effective. Therefore there was no merit in the contention that the provisions of the law providing that certain facts should constitute prima facie evidence that prohibited liquors were kept for unlawful purposes was given an *ex post facto* operation in this case. *Fitzpatrick v. State*, 169 Ala. 4, 53 South. 1021; *Ex parte Woodward*, 181 Ala. 97, 61 South. 295.

[3] Furthermore, it appears that the court, in its charge to the jury, limited the jury to the consideration of the sole question as to whether or not the defendant kept the prohibited liquors for sale. The tenor of the entire charge of the court was to this effect. In fact, the court expressly charged the jury that:

"The only thing therefore, for your consideration, is why he kept the liquors, and his own testimony is that he kept it for his own use. And if he was keeping them for his own use because of some kidney trouble, etc., he is not violating the law."

It thus appears that no injury could have resulted to the defendant because of counts 6 and 7 of the complaint; as at no time during the entire trial was any consideration given to the charges averred in said counts.

[4] There was no error in refusing the general affirmative charge for the defendant as to counts 1, 2, and 3.



There was no error in refusing charge 5. *O'Rear v. State*, 72 South. 505; *Southern Express Co. v. Whittle*, 194 Ala. 406, 69 South. 652, L. R. A. 1916C, 278. Neither was there error in the court's refusal to give charge 6. Authorities supra.

No error is found in the record.

Affirmed.

(15 Ala. App. 647)

**H. C. SCHRADER CO. v. A. Z. BAILEY GROCERY CO.** (8 Div. 405.)

(Court of Appeals of Alabama. Jan. 30, 1917. On Rehearing, April 3, 1917.)

**1. APPEARANCE ⇐8(1)—INTERPLEADER.**

Appearance by one after order, under Code 1907, § 6050, substituting him as defendant over his objection that it was not a case for interpleader, is not voluntary.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 23.]

**2. APPEAL AND ERROR ⇐187(1) — REVIEW — WAIVER.**

One substituted as defendant over his objection, persistently insisting that it was not a case for interpleader, saves right to review of the order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1184, 1186, 1188, 1189; Parties, Cent. Dig. § 175.]

**3. INTERPLEADER ⇐8(1) — RIGHT TO INTERPLEAD—BANK COLLECTING DRAFT.**

A draft having been paid to the bank to which it, with bill of lading attached, had been forwarded for collection, it was under duty to remit, and so breached its duty in retaining it at request of the drawee, accompanied by statement of defect in goods shipped, for price of which the draft was drawn, it being under no duty to make the contract good; and therefore it had no right to interplead the drawer or the forwarding bank when sued for the money by the drawee.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 8, 11.]

**4. INTERPLEADER ⇐43 — RIGHT TO PLEAD CLAIM.**

One interpleaded as defendant under Code 1907, § 6050, has a right to plead the facts constituting its claim, and should not be limited to statement that it claims the money deposited in court.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 82.]

**5. APPEAL AND ERROR ⇐1039(1)—HARMLESS ERROR—RULINGS ON PLEADING.**

Error in limiting one's pleading of his claim to a general statement was harmless; he being allowed to fully present his theory of the facts on the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4075.]

**6. SALES ⇐179(4)—RIGHT OF ACTION FOR PRICE—CONDITION PRECEDENT—WAIVER.**

The obligation of the seller under provision of contract to deliver good merchantable oranges, not constituting a collateral obligation, but a condition precedent to right to sue for price, is waived by acceptance of shipment and payment after inspection, though on the unauthorized assurance by the broker, who made the sale, that the seller would adjust the matter.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 460-463.]

**On Rehearing.**

**7. INTERPLEADER ⇐40—RIGHT TO OBJECT.**

The filing of the affidavit by the original defendant requisite under Code 1907, § 6050, to the court's jurisdiction to require interpleader, is not conclusive of the right to require it; but the third person sought to be substituted may object that it is not a proper case for interpleader.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 78.]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Action by the A. Z. Bailey Grocery Company against the H. C. Schrader Company, substitute defendant. Judgment for plaintiff, and said defendant appeals. Reversed and remanded.

G. O. Chenault, of Albany, for appellant. E. W. Godbey, of Decatur, for appellee.

**BROWN, J.** 'The A. Z. Bailey Grocery Company, the appellee, commenced this action against the Commercial Savings Bank & Trust Company for breach of contract, and for money had and received on the 9th day of December, 1912. The Bank & Trust Company, on the 10th day of January, 1913, filed an affidavit alleging, "that on November 29, 1912, they [it] received a draft from the Heard National Bank of Jacksonville, Florida, drawn by H. C. Schrader & Co. on A. Z. Bailey Grocery Company for the sum of \$396.00, which sum of \$396.00 was paid this defendant by the said A. Z. Bailey Grocery Company, to wit, November 29th, 1912. Shortly after this time this defendant was notified by A. Z. Bailey Grocery Company to hold said money, stating that the carload of oranges, which was the consideration of the above set forth draft, was defective and unfit for market," and that the Heard National Bank and H. C. Schrader & Co., of Jacksonville, Florida, without collusion with it, claimed the money in custody, which was deposited with the clerk of the court with the affidavit, and, under the provisions of section 6050 of the Code, prayed that notice issue to the Heard National Bank and H. C. Schrader & Co., that they be substituted as defendants and be compelled to litigate with the plaintiff as to the ownership of the money paid into court, and that it (the bank) be discharged from liability.

[1, 2] It being shown that the alleged claimants were both nonresident, notice by publication was made; and, so far as appears from the record, the Heard National Bank interposed no objection to being substituted as a defendant. The appellant, Schrader Company, however, protested, insisting that the case was not one for interpleader, and over its objection was, with the Heard National Bank, substituted as a defendant in lieu of the Commercial Savings Bank & Trust Company. After the order of substitution, the record shows that the Heard National Bank

appeared, but seems to have propounded no claim to the money paid into court, but Schrader Company propounded a claim to the fund and litigated the question; and at the conclusion of the evidence, the court, at the request of the plaintiff, gave the affirmative charge in its favor. The appellee contends that this constitutes a voluntary appearance by the Schrader Company, and that it cannot, on this appeal, question the propriety of the order substituting it as a defendant.

The uniform holding is that the purpose of the statute (Code 1907, § 6050) is to afford a defendant, against whom an action is pending upon a contract for the payment of money, where one not a party to the suit claims this money, a simple remedy to be relieved of liability by bringing the claimants together and compelling them to litigate, and "is a short method for accomplishing the purposes of a bill of interpleader in equity, and applies only when the facts would authorize a resort to a bill of interpleader in equity." *Davis v. Douglass*, 12 Ala. App. 581, 68 South. 528; *Stewart v. Sample*, 168 Ala. 270, 53 South. 182; *Coleman v. Chambers*, 127 Ala. 615, 29 South. 53.

After the issuance of notice to the alleged claimant as provided by the statute, the court is authorized to determine whether the case presented is one for interpleader; and, if so, to substitute the suggested claimant in lieu of the original defendant. *Stewart v. Sample*, supra. The effect of this order, if the statute has any force at all, is to compel the substituted defendant and the plaintiff to litigate between themselves as to the right in the money paid into court. The money, when paid into court, is in custodia legis, and the suit partakes of the nature of a proceeding in rem; and the judgment is not only conclusive as between the adverse claimants to the funds, but also of their right to further pursue the original defendant. *Johnson v. Maxey*, 43 Ala. 521; *McNamara v. Provident Sav. Life Assur. Soc.*, 114 Fed. 910, 52 C. C. A. 530; *Ford v. Dilly*, 5 B. & Sd. 885, 2 N. & M. 662, 27 E. O. L. 372; *Washington L. Ins. Co. v. Laurence*, 28 How. Prac. (N. Y.) 435. The appearance of the appellant was therefore involuntary; and by persistently insisting that the case was not one for interpleader, it saved the right to have the order reviewed on appeal. *Evans Marble Co. v. McDonald*, 142 Ala. 130, 37 South. 830; *Ashby Brick Co. v. Ely & Walker Dry Goods Co.*, 151 Ala. 272, 44 South. 96.

[3] Testing the right of the original defendant to interplead by the facts stated in the affidavit, it was the agent of the drawer of the draft to collect the draft and without unreasonable delay remit the proceeds to the forwarding bank; and by complying with this duty before service of legal process, it would be relieved of liability. By accepting the draft with bill of lading attached for collection as the agent of the forwarding bank,

it did not assume to perform the contract nor warrant the quantity or quality of the goods purchased by Bailey Grocery Company. *Cosmos Cotton Co. v. First National Bank of Birmingham*, 171 Ala. 392, 54 South. 621, 32 L. R. A. (N. S.) 1173, Ann. Cas. 1913B, 42, distinguishing, if not in effect overruling, *Haas v. Citizens' Bank*, 144 Ala. 562, 39 South. 129, 1 L. R. A. (N. S.) 242, 113 Am. St. Rep. 61.

Being under no duty to perform the contract of sale, after the payment of the draft it had no right to withhold the remittance of the proceeds of the draft at the plaintiff's request, and in doing so breached a duty which it owed the drawer of the draft, if, in fact, it was not guilty of a conversion of the proceeds of the draft.

It is essential to the right to require others to interplead in a pending action that the original defendant occupy the position of a disinterested stakeholder; and it should appear that he is ignorant of the rights of the parties upon whom he calls to interplead, or, at least, that there is a doubt as to which claimant the debt belongs so that he cannot safely pay to one without risk to the other. *Crass v. Memphis & C. R. R. Co.*, 96 Ala. 447, 11 South. 480. And where it appears that the original defendant is a wrongdoer as to either of the claimants, his right to require interpleader does not exist. *Conley v. Ala. Gold Life Ins. Co.*, 67 Ala. 472; *Coleman v. Chambers*, supra.

The original defendant, by disclaiming any interest in the debt and paying the money into court, conclusively refuted the fact that it was the transferee and owner of the debt. This is the fact that distinguishes the case of *Haas v. Citizens' Bank*, supra, from this case, and *Cosmos Cotton Co. v. First National Bank of Birmingham*, supra.

The affidavit showing on its face that the original defendant was not entitled to require the appellant to interplead, the court erred in substituting the appellant as a defendant, and requiring it to interplead over its protest. *Stewart v. Sample*, supra.

[4, 5] In *Johnson v. Maxey*, supra, the court held that a claimant who is brought into court under the statute (Code 1907, § 6050) must propound his claim with such certainty and fullness that the plaintiff may know in what his claim consists, and be enabled to plead to it as he may be advised; and that case was cited with approval in *Coleman v. Chambers*, supra. Under the ruling in *Johnson v. Maxey*, the substituted defendant had the right to state the facts in propounding its claim upon which its claim was rested, limited by the rule that:

"All pleadings must be as brief as is consistent with perspicuity, and the presentation of the facts, or matter to be put in issue, in an intelligible form." Code 1907, § 5321.

The court, therefore, erred in striking the plea or claim of appellant as amended, and in limiting its claim to the statement that it

claimed the money on deposit in court. However, under this claim the appellant was allowed to fully present its theory of the facts, and the error appears to be without injury.

[8] The contract between the appellant and plaintiff was made through W. L. Lyle, a broker, and was for the sale of "1 carload of good Florida merchantable oranges," containing 300 boxes "packed in standard boxes at \$2.10 per box delivered Decatur, Alabama"; and it was stipulated that the oranges were to be shipped on or as near as possible the date directed by the purchaser. The seller caused a carload of oranges to be shipped, containing the required number of boxes, and made draft on the purchaser with bill of lading attached, accompanied by instructions to allow inspection by the purchaser. The undisputed evidence shows that the car of oranges arrived in advance of the draft, and that the plaintiff, before paying the draft, inspected the oranges and found that they were in bad condition, some of the evidence showing that from 25 per cent. of the oranges upward were not merchantable, in fact, mushy rotten. The plaintiff, with knowledge of these facts, unloaded the oranges and paid the draft.

There is no pretense of fraud in the case; but the evidence tends to show that the door of the car was partly open, and that the oranges were packed and shipped in damp, cold weather, and that the condition of the oranges was possibly the result of the concurring negligence of the shipper and the carrier.

The plaintiff contends, and offered some evidence to sustain the contention, that before unloading the car, its president called Lyle, the broker, and Lyle advised it to accept the car, and gave the assurance that the seller would adjust the difference resulting from the defects in the shipment. However, the undisputed evidence shows that Lyle had no authority to bind the seller; that his relation to the transaction was that of broker; and that he was as much the agent of the purchaser as the seller.

The undisputed evidence showing that some of the oranges were not "good merchantable" oranges, the purchaser was under no obligation to accept the shipment. The seller undertook to deliver at Decatur one carload of good merchantable oranges, and by tendering the car laden in part with oranges that were not good merchantable oranges it breached its contract. "When the vendor sells an article by a particular description, it is a condition to his right of action that the thing which he offers to deliver, or has been delivered, should answer the description." *Benj. on Sales* (17th Ed.) § 600.

The obligation imposed on the seller to deliver "good merchantable oranges" was therefore not a collateral obligation—a war-

ranty—but a condition precedent to the seller's right to sue for the price. *Benj. on Sales*, § 645. "The maxim of the common law, *caveat emptor*, is the general rule applicable to sales, so far as quality is concerned. The buyer (in the absence of fraud) purchases at his risk, unless the seller has given an express warranty, or unless a warranty be implied from the nature and circumstances of the sale. \* \* \* So far as ascertained specific chattels already existing, and which the buyer has inspected, is concerned, the rule of *caveat emptor* admits of no exception by implied warranty of quality." *Benj. on Sales*, § 644.

There is no pretense that the seller was guilty of fraud; and there is no express collateral obligation that the oranges tendered were of the quality described in the contract; and the right of inspection which was fully exercised by the purchaser in this case before paying the draft excludes the idea of implied warranty as to quality. By accepting the shipment after inspection, the purchaser in this case waived noncompliance on the part of the seller, and in lieu thereof accepted the assurance of Lyle that the seller would adjust the matter. On the undisputed evidence, Lyle was without authority to bind the seller, and though his assurance of adjustment afforded the purchaser no indemnity, it could not hinder appellant's recovery.

The appellant, and not appellee, was entitled to the affirmative charge.

Reversed and remanded.

#### On Rehearing.

BROWN, P. J. [7] While the filing of the affidavit provided for in section 6050 of the Code is essential to the court's jurisdiction to entertain or require interpleader, the filing of such affidavit is not conclusive of the right to require interpleader. In one of the cases cited in the original opinion the Supreme Court held:

"Evidently objection may be made to the granting of the order of interpleader at the time the motion is acted on. When the affidavit is filed, if it shows, upon its face, that it is not a case for interpleader, the plaintiff may present to the court any reasons which he may desire to present, to show to the court that it is not a proper case for interpleader; and, if the court so holds, it should refuse then to grant the order, notifying the substituted defendant to come in and propound his claim; but, inasmuch as the statute does not require the defendant to set out the facts, on which he claims the right to interpleader, the plaintiff must have an opportunity to present the point that it is not a case for interpleader, when the facts are made known. Therefore this court properly held that the plaintiff could demur to the claim propounded by the substituted defendant"

—and in this way raise the question as to whether the case was one for interpleader. *Stewart v. Sample*, 168 Ala. 276, 53 South. 182; *Coleman v. Chambers*, 127 Ala. 615, 29 South. 58.

It would be an anomaly in judicial procedure to hold that the plaintiff may object to the interpleader, and in the same breath hold that the third party who is to be brought in and substituted for the defendant has no such right, and unless the plaintiff objects the right of the third party against the original defendant will be foreclosed. Such a holding would open a door to fraud and collusion through which the plaintiff and the original defendant could compel the innocent third party to litigate when and where they might determine, without right of objection or review; and the doctrine that if the defendant who invokes interpleader has incurred an "independent liability to either of the claimants," and does not "stand perfectly indifferent between them," he cannot compel interpleader (*Stewart v. Sample*, supra), would be futile. Suppose the original defendant has incurred an independent liability to the third party suggested as claimant; can he defeat that independent liability by interpleader? No. Yet, if the third party can be compelled to come in and litigate without the right to question the right of the original defendant to require interpleader, the judgment will conclude his right against the original defendant.

The case of *Frith & Co. v. Hollan*, 133 Ala. 583, 32 South. 494, 91 Am. St. Rep. 54, seems to have been a sale by description without inspection, the goods being shipped at the purchaser's request, and when the goods were delivered to the carrier at the initial point of shipment the title passed from the seller to the purchaser. *McCormick v. Joseph*, 77 Ala. 240; *Robinson v. Pogue*, 86 Ala. 261, 5 South. 635. And by receiving the goods when they reached their destination the purchaser deprived the seller of no right. In the case in hand the title to the oranges did not pass until after they were inspected and accepted by the Bailey Grocery Company, and, as we have said, the Bailey Grocery Company was under no obligation to accept them; yet it could not accept the oranges after inspection, in the absence of a stipulation in the contract for such contingency, and deprive the shipper of its property in them without liability for the contract price. The application is overruled.

Application overruled.

(15 Ala. App. 654)

FLOYD v. STATE. (1 Div. 234.)

(Court of Appeals of Alabama. March 23, 1917.)

1. HIGHWAYS  $\S$  107(4)—POWERS OF HIGHWAY BOARD.

Under Acts 1915, p. 573, giving the county commissioners and boards of revenue legislative, judicial, and executive power, and making them courts of unlimited jurisdiction as to construction, maintenance, and improvement of public roads, the statutory grant of power is plenary,

and on collateral attack the proceedings of the board are presumed to be regular, in the absence of contrary showing.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig.  $\S$  344.]

2. HIGHWAYS  $\S$  107(4)—CONSTRUCTION AND MAINTENANCE—VALIDITY OF PROCEEDINGS—MINUTES OF BOARD.

Minutes of board of revenue in terms: "Board of Revenue, November Term, 1916. The following rules, regulations, and laws affecting, governing, and controlling the public roads of Monroe county are hereby established, promulgated, declared, and enacted by the board of revenue of said county, on this the 3d day of November, 1915"—sufficiently show that the rules were adopted at a regular term of the board, and by the board.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig.  $\S$  344.]

3. HIGHWAYS  $\S$  107(4) — CONSTRUCTION—PROCEEDINGS—EVIDENCE—ADMISSIBILITY.

In collateral attack on action of board of revenue in road construction, minutes of regular meeting, in due form, are admissible in evidence.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig.  $\S$  344.]

Appeal from Law and Equity Court, Monroe County; W. G. McCorvey, Judge.

Andrew Floyd was convicted of a failure to work the public roads, and he appeals. Affirmed.

Page & McMillan, of Brewton, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

BROWN, P. J. By act approved September 20, 1915, the Legislature repealed all statutes providing for prosecutions for failure to work on the public roads embraced in the Code and acts amendatory thereof (Acts 1915, p. 623); and by act approved September 22d (Acts 1915, p. 573) conferred upon the courts of county commissioners and boards of revenue of the several counties in the state broad powers to provide for the establishment, discontinuance, construction, use, working, and maintenance of the public roads, bridges and ferries of the several counties, and the act provides:

"To this end they are given legislative, judicial and executive powers, except as limited herein. Courts of county commissioners, boards of revenue or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads. \* \* \* They may establish, promulgate, and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof."

Section 2 of the act makes the violation of "any rule, regulation or law which may be adopted or promulgated" by such court or board a misdemeanor and prescribes punishment therefor.

The questions presented and here argued

are: First, can the Legislature delegate to such governmental agencies the authority to make and promulgate rules and regulations, the violation of which constitutes crime? This question is fully answered in the affirmative by the following cases: *Whaley v. State*, 168 Ala. 152, 52 South. 941, 30 L. R. A. (N. S.) 499; *State v. McCarty*, 5 Ala. App. 212, 59 South. 543.

The second question is: Does this record sufficiently show that the powers conferred on the board of revenue of Monroe county by the statute were authoritatively exercised, so as to justify the prosecution of the defendant for a violation of the rules promulgated by the board? Section 5 of the act approved September 25, 1915 (Loc. Acts 1915, p. 394), establishing the board of revenue, provides that:

"The said board of revenue shall hold four sessions annually, viz.: On the second Mondays in February and August, and the first Mondays in April and November of each calendar year."

The minutes of the board of revenue offered in evidence recite the following:

"Board of Revenue, November Term, 1916. The following rules, regulations, and laws affecting, governing, and controlling the public roads of Monroe county are hereby established, promulgated, declared, and enacted by the board of revenue of said county, on this the 3d day of November, 1915."

Then followed the rules so adopted and promulgated, after which was the entry:

"Ordered that this regular meeting of the board be and the same hereby is adjourned until Tuesday, the 16th day of November."

[1] The statutory grant of power in respect to the matter of public roads and the adoption of rules and regulations is general and plenary, and on collateral attack the proceedings of the board are presumed to be regular and done in the lawful exercise of authority, unless the contrary appears. *Stephens v. Court of County Commissioners*, 180 Ala. 531, 61 South. 917; *McLaughlin v. Hardwick*, 70 South. 305.

[2, 3] It sufficiently appears that the regulations adopted by the board of revenue were adopted at a regular term of the board, and by the board, and the minutes were properly received in evidence.

Affirmed.

(15 Ala. App. 657)

COOPER v. STATE. (6 Div. 298.)

(Court of Appeals of Alabama. April 3, 1917.)

1. LIBEL AND SLANDER  $\Leftrightarrow$ 152(1)—CRIMINAL LIBEL—INDICTMENT—"UNCHASTE"—SUFFICIENCY.

Under Code 1907, § 7340, declaring that any person who writes, prints, or speaks of and concerning any woman, falsely imputing to her a want of chastity, an indictment charging that defendant falsely spoke of and concerning named woman in the presence of three named individuals charging her with want of chastity, in that she permitted him to hug her, and would have submitted to intercourse, charges an offense; for, while displays of affection on the part of a

woman, do not show want of chastity, words spoken charging that a certain time and place she permitted embraces, etc., imputes unchastity (citing 8 Words and Phrases, Unchaste).

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 417, 420, 423.]

2. LIBEL AND SLANDER  $\Leftrightarrow$ 152(5)—INDICTMENT—VARIANCE.

Where an indictment charged that an accused in the presence of three named persons used language imputing unchastity to a woman, the averment that the language was uttered in the presence of such named persons was descriptive of the crime, and proof of utterances in the presence of two of these persons was inadmissible on the ground of variance.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 428, 427.]

3. CONSTITUTIONAL LAW  $\Leftrightarrow$ 285—INDICTMENT AND INFORMATION  $\Leftrightarrow$ 56—RIGHT TO SUFFICIENT ACCUSATION.

The constitutional right of accused to demand the nature and cause of his accusation is not a technical right, but is essential to the guaranty that no person shall be deprived of his liberty, save by due process of law, nor be twice put in jeopardy for the same offense.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 755; *Indictment and Information*, Cent. Dig. §§ 175, 176.]

4. LIBEL AND SLANDER  $\Leftrightarrow$ 155—OFFENSES—EVIDENCE.

In a prosecution for the defaming of a woman, testimony that accused and his wife were heard, previous to the trial, fussing over the woman named, was inadmissible, having no tendency to show that accused uttered the defamation charged.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 430-436.]

5. LIBEL AND SLANDER  $\Leftrightarrow$ 143—OFFENSES—NATURE OF OFFENSE.

Malice is not an ingredient of the offense of defamation under Code 1907, § 7340, making it an offense to falsely impute want of chastity to a woman, and the intent or animus of accused in uttering such words is immaterial.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 406.]

6. CRIMINAL LAW  $\Leftrightarrow$ 369(1)—EVIDENCE—OTHER OFFENSES.

In a prosecution for defaming a woman at a fixed time, evidence that accused had been guilty of other defamations uttered at different times is inadmissible under the general rule that evidence of another offense than that for which the accused is tried is not admissible, not falling within the exceptions allowing such evidence where the two crimes are so intermingled as to constitute one transaction, or where the question of intent or animus is involved, or where there is a conflict of evidence as to whether accused or someone else committed the crime, or whether the crime was committed by some peculiar, extraordinary or novel means.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 822.]

7. CRIMINAL LAW  $\Leftrightarrow$ 369(1)—EVIDENCE—DEFAMATION—OTHER OFFENSES.

In a prosecution for defamation under Code 1907, § 7340, evidence of other distinctly defamatory offenses is not admissible in aggravation of the fine.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 822.]

Appeal from Winston County Court; John S. Curtis, Judge.

Jack Cooper was convicted of crime, and he appeals. Reversed and remanded.

Chester Tubb, of Haleyville, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

**BROWN, P. J.** [1] It has been held that: "A woman is unchaste who has had unlawful intercourse or is guilty of such conduct as would tend to indicate that she was ready and willing to submit to the unlawful embraces of a man. The embracing of a man and woman does not necessarily indicate unchastity; but words spoken of a woman charging that at a certain time and place the man was embracing her, and when discovered the parties seemed very much confused, etc., imputes unchastity." *Mason v. Stratton*, 49 Hun, 606, 1 N. Y. Supp. 511, 512; 8 Words and Phrases, 7153.

The complaint in this case charges:

That the defendant "falsely spoke of and concerning Eva Neely, in the presence of J. R. Lopham, Richard Shadix, and Will Tyre, charging her with a want of chastity in substance as follows: 'That Eva Neely had hugged him; that he had felt her person, and could have had intercourse with her had he so desired.'"

The utterances alleged to have been used by the defendant clearly impute that the person spoken of was of easy virtue, and that she manifested a willingness to submit to sexual intercourse with the defendant, and therefore the averments are sufficient to charge the offense denounced by section 7340, Code 1907.

[2] The complaint charges a single offense, imputing to the defendant the use of the defamatory language in the presence of the three persons named, and was not subject to the demurrer. *Thomas v. State*, 111 Ala. 51, 20 South. 617. The averment that the alleged defamatory language was uttered in the presence of the three named persons was descriptive of the offense and proof that the defendant on several occasions made defamatory utterances against the chastity of the prosecutrix in the presence of two of these persons on separate occasions does not sustain the charge as laid. *Thomas v. State*, supra; *Townsend v. State*, 137 Ala. 91, 34 South. 382; *Elliot v. State*, 26 Ala. 78; *McGehee v. State*, 58 Ala. 360.

[3] The constitutional right of the accused to demand the nature and cause of his accusation is not a technical right, but is fundamental and essential to the guaranty that no person shall be deprived of his liberty, except by due process of law, nor be twice put in jeopardy for the same offense. *Noah v. State*, 72 South. 611, affirmed by Supreme Court, Id., 72 South. 613; *Adams v. State*, 69 South. 358; *State v. Bush*, 12 Ala. App. 309, 68 South. 492; *Miles v. State*, 94 Ala. 106, 11 South. 403; *Turnipseed v. State*, 6 Ala. 666; *Carter v. State*, 55 Ala. 181. The court should have granted the motion of the defendant to exclude the evidence because of a variance in the allegations and proof.

[4] The testimony of the witness Howell to the effect that he was at defendant's house during the summer before the trial and heard the defendant and his wife fussing, and that

defendant said they were fussing about the prosecuting witness, Eva Neely, should not have been admitted. It had no tendency to show that the defendant made defamatory statements about the witness for the prosecution. The testimony of the witness Howell tending to show that the defendant on this occasion made defamatory utterances regarding the prosecuting witness was not admissible.

[5] Malice is not an ingredient of the offense under the statute (Code 1907, § 7340); and the intent or animus prompting the utterance of the slanderous words is wholly immaterial.

[6] The general rule in criminal cases is that evidence of another offense than that for which the accused is being tried is not admissible. *Dillard v. State*, 152 Ala. 86, 41 South. 537. And while this rule has exceptions arising from necessity, such as where two or more crimes are so intermingled and constitute a part of one and the same transaction that one cannot be proved without the other, or where the question of the intent or animus accompanying or inspiring the act under investigation is within the issues, or where there is a conflict in the evidence as to whether the defendant or some one else committed the crime, or where the crime in question was committed "by some peculiar, extraordinary, or novel means or implement or apparatus, or in a peculiar or extraordinary manner, evidence of similar crimes by the defendant and with like means may be shown. *Lowe v. State*, 134 Ala. 154, 32 South. 273; *Underhill on Cr. Evidence*, §§ 87-92. There are possibly other exceptions, but the case here under consideration is not within any of them.

[7] Each of the defamatory utterances was a separate and distinct offense, and evidence of a distinct offense from the one charged in the indictment is not admissible for the prosecution "in aggravation of the fine." *Ingram v. State*, 39 Ala. 247, 84 Am. Dec. 782.

For the errors pointed out, the judgment of the trial court is reversed, and the cause remanded.

Reversed and remanded.

(15 Ala. App. 660)  
**CONNER v. STATE.** (3 Div. 187.)

(Court of Appeals of Alabama. March 23, 1917.)

**APPEAL AND ERROR** §1221—DISPOSITION OF CASE—RESUBMISSION.

After the Court of Appeals has affirmed judgment, it is a final disposition of the case; upon the case being again submitted on briefs, it cannot disturb such judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4722.]

Appeal from Circuit Court, Autauga County; W. W. Pearson, Judge.

On resubmission on briefs. Certificate of affirmance reissued, and case stricken from the docket.

See, also, 70 South. 1015.

Guy Rice, of Prattville, for appellant. W. L. Martin, Atty. Gen., for the State.

BROWN, P. J. The judgment of the trial court was affirmed by this court on December 16, 1915, and on application of appellant the certificate of affirmance was recalled on December 20, 1915. No other steps were taken or orders made in the case until January 11, 1917, when the case was again submitted on briefs.

The judgment of affirmance was a final disposition of the case by this court; and the court cannot now disturb that judgment. Roll v. Howell, 73 South. 218. An order will therefore be entered striking the case from the docket and directing that the certificate of affirmance be reissued.

Case stricken from the docket.

(15 Ala. App. 661)

McCULLOUGH v. STATE. (4 Div. 476.)

(Court of Appeals of Alabama. March 23, 1917.)

CHATTEL MORTGAGES  $\S$ 234 — MORTGAGOR'S SALE—CRIMINAL RESPONSIBILITY—QUESTION FOR JURY.

Where evidence afforded inference that property was defendant's when chattel mortgage was given and that the mortgage was a lien thereon, that question and whether he unlawfully sold the property were for the jury.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig.  $\S$  495.]

Appeal from Circuit Court, Barbour County; J. S. Williams, Judge.

Jesse McCullough was convicted of selling mortgaged property, and he appeals. Affirmed.

The evidence tended to show that defendant was indebted to one W. T. Middlebrooks, and in order to secure said indebtedness mortgaged to Middlebrooks two cows and a calf, together with other property, that when he left Middlebrooks' place he turned over all the property except one cow to one Hart-sogg, who was agent for Middlebrooks, and that he told Middlebrooks the other cow had been sold to Mr. Stephens at Clio, Stephens testifying that he bought the cow from defendant's wife, and not defendant. Stephens further testified that defendant owed him an account, and that he went to defendant about it, and saw some cows in the pasture, and asked defendant about selling him one, and he told him that he could not sell him the cow as they belonged to his wife, but that, if his wife would sell him the cow, it would be all right.

E. W. Norton, of Clio, and McDowell & McDowell, of Eufaula, for appellant. W. L. Martin, Atty. Gen., for the State.

BROWN, P. J. The only question presented for review arises from a refusal of the affirmative charge requested by the defendant; the contention of appellant being that the undisputed evidence shows that the property alleged to have been unlawfully disposed of was never the property of the defendant, and hence the witness Middlebrooks had no lien thereon by virtue of his mortgage.

The opinion prevails that the evidence offered by the state reasonably affords an inference that the property was that of the defendant when the mortgage was given, and that the paper held by Middlebrooks was a lien thereon. If this was true, the question whether or not he sold the property was likewise for the jury. Stephens testified that he consented that his wife might sell the cow, and if the cow belonged to defendant, and he had given a mortgage on it, and thereafter consented to a sale of the cow, he would be guilty as charged.

Affirmed.

(15 Ala. App. 662)

SMITH v. STATE. (8 Div. 447.)

(Court of Appeals of Alabama. April 3, 1917.)

1. HOMICIDE  $\S$ 112(5)—DEFENSES—SELF-DEFENSE—PROVOKING DIFFICULTY.

To save the right of self-defense, the defendant must not be unmindful of his acts, and if he shows a willingness to enter conflict, or by his acts invites the conflict, he must be held to have provoked the difficulty, and cannot invoke the doctrine of self-defense, and any act intentionally done or word spoken which had the tendency to provoke a difficulty is wrongful.

[Ed. Note.—For other cases, see Homicide, Cent. Dig.  $\S$  149.]

2. HOMICIDE  $\S$ 112(5)—DEFENSES—SELF-DEFENSE—PROVOKING DIFFICULTY.

Before the conduct of one accused of murder can be said to be wrongful so as to cut off the right of self-defense, his acts must be done with knowledge of the circumstances and of the fact that his conduct is likely to provoke a difficulty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig.  $\S$  149.]

3. HOMICIDE  $\S$ 276 — DEFENSES — SELF-DEFENSE—PROVOKING DIFFICULTY.

The question whether conduct of accused is wrongful and whether it brought on or encouraged the difficulty is one of fact for the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig.  $\S$  569.]

4. CRIMINAL LAW  $\S$ 761(3) — INSTRUCTION — ASSUMPTION AS TO FACTS.

Instruction that, if the jury believed beyond a reasonable doubt that defendant by words or deed provoked the difficulty, he cannot claim self-defense, was erroneous in assuming that the conduct of the defendant was wrongful, and is therefore invasive of the province of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  1731.]

5. CRIMINAL LAW  $\S$ 823(1)—TRIAL—CURE OF ERROR.

In view of Acts 1915, p. 815, the harmful results from giving an erroneous charge are not

cured by a correct statement of the law in the oral charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1994, 3158.]

**6. HOMICIDE §=113—SELF-DEFENSE—PROVOKING DIFFICULTY.**

If one accused of murder was at fault in bringing on the difficulty in the first instance, he must before he could set up self-defense have withdrawn from the conflict in good faith and announced his desire for peace by words or act.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 151, 152.]

**7. HOMICIDE §=300(2)—SELF-DEFENSE—PROVOKING DIFFICULTY.**

In prosecution for murder, where defendant claimed that there was a struggle and he attempted to leave when deceased attacked him, instruction that, if defendant sought to retreat and get out of the room and away from a difficulty, and deceased intercepted him, caught him and held him, and made a violent assault which he could not escape, defendant's right of self-defense was not cut off by any words theretofore passing, was properly refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 616.]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Milton Smith was convicted of manslaughter, and he appeals. Reversed and remanded.

The defendant and Delbert Sisk were shooting craps in an outhouse used as a cotton gin, and a dispute arose as to whether defendant had won his point, and an altercation ensued in which Smith shot and killed Sisk with a pistol. The evidence is in conflict as to some of the details, but the tendencies were to show that after some words the parties arose from the ground, Smith started towards the door, and, as he passed by Sisk, Sisk grabbed Smith, throwing his left arm around his neck, crowded him back into a corner, and was striking him with his fist or a knife, when Smith shot him. The other tendencies were that when the dispute arose Sisk called Smith a "damn liar," Smith repeating the same epithet to Sisk, when they went together and a pistol was fired. The court gave for the state the following charge:

(1) If you believe from all the evidence in this case beyond a reasonable doubt that Milton Smith either by words or deed provoked or encouraged the difficulty, then he cannot claim self-defense.

The following charge was refused to defendant:

(5) If defendant sought to retreat and get out of the room and away from a difficulty, and deceased intercepted him, caught and held him, and proceeded to make a violent assault on him which he could not escape, then defendant's right of self-defense was not cut off by any words theretofore passing.

Bouldin & Wimberly, of Scottsboro, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

BROWN, P. J. [1] Any act intentionally done or word intentionally spoken which un-

der the circumstances had a tendency to provoke a difficulty would be wrongful within the meaning of the law, although ordinarily such word or act would not be wrongful. To save the right of self-defense, the defendant at the time of and leading up to the homicide "must not be unmindful of his acts or conduct which are likely to produce a deadly combat, and if by his acts or conduct he shows a willingness to enter the conflict, or if by those acts he invites it, he must be held to have produced the necessity for slaying his adversary, and cannot invoke the doctrine of self-defense." *Reese v. State*, 135 Ala. 14, 33 South. 672; *Langham v. State*, 12 Ala. App. 46, 68 South. 504. He must be wholly free from fault. *Brewer v. State*, 160 Ala. 66, 49 South. 336.

[2, 3] Before the conduct of the accused can be said to be wrongful in the sense that it operates to cut off the right of self-defense, his acts must be done with a knowledge of the circumstances surrounding him at the time, and that his conduct is likely to provoke a difficulty. If he is ignorant of the presence of his adversary and that his acts are likely to produce combat, and his conduct is in itself innocent, it would not be wrongful. The question as to whether the conduct of the accused is wrongful and whether it brought on, provoked, or encouraged the difficulty is one of fact for the jury.

[4] Charge 1 given at the instance of the solicitor is erroneous in assuming that the conduct of the defendant was wrongful and was invasive of the province of the jury.

[5] The harmful results arising from giving an erroneous charge are not cured by a correct statement of the law in the oral charge. *Acts 1915, p. 815.*

[6, 7] If the defendant was at fault in bringing on the difficulty in the first instance, before he could set up self-defense he must have withdrawn from the conflict in good faith and announced his desire for peace by word or act. *Parker v. State*, 88 Ala. 4, 7 South. 98; *Brewer v. State*, supra. Charge 5 was refused without error.

We have examined the other exceptions, and find nothing to warrant further discussion.

For the error pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

(15 Ala. App. 665)

TERRY v. STATE. (8 Div. 411.)

(Court of Appeals of Alabama. March 23, 1917.)

**1. HOMICIDE §=166(6)—EVIDENCE—MOTIVE.**

In absence of showing that motive for killing was to prevent deceased's attentions to "the McClanahan woman," evidence relating thereto was inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 820.]



## 2. CRIMINAL LAW ⚡453—CHARACTER OF ACCUSED—PERSONAL KNOWLEDGE.

Mere opinion of witnesses as to defendant's character for peace and quiet from their personal knowledge is not admissible for any purpose, not being evidence of defendant's general character.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1043.]

## 3. WITNESSES ⚡337(4) — CROSS-EXAMINATION—CHARACTER OF ACCUSED.

Witnesses' testimony, on direct examination as to personal knowledge of defendant's character, could not be made a predicate for showing on cross-examination defendant's reputation for lewdness; such specific trait not being admissible to impeach defendant's character for truth and veracity.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1131.]

## 4. WITNESSES ⚡337(2) — IMPEACHMENT OF ACCUSED—GENERAL REPUTATION.

In impeaching credibility of accused's testimony, impeaching evidence must relate to his general reputation or character in the community, or general reputation for truth and veracity, and it is not permissible to inquire as to specific traits.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1113.]

## 5. HOMICIDE ⚡118(1) — SELF-DEFENSE—DUTY TO RETREAT.

Where defendant and deceased were rightfully at a public ferry, defendant was not relieved of the duty of retreating to avoid a difficulty before shooting deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 168.]

## 6. HOMICIDE ⚡276—QUESTION FOR JURY—DEFENDANT'S FREEDOM FROM FAULT.

The question of whether defendant was free from fault in bringing about an altercation during which he shot deceased was for the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 569.]

## 7. HOMICIDE ⚡112(1)—SELF-DEFENSE—PROVOKING COMBAT.

The mere fact that defendant armed himself after deceased arrived and began his abuse might have had a tendency to provoke deadly combat in which case the doctrine of self-defense would not apply.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 145.]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

James Terry was indicted for murder, convicted of manslaughter in the first degree, and he appeals. Reversed and remanded.

The facts sufficiently appear. The following are the charges refused to defendant:

(1) The court charges the jury that defendant was at his place of business, and under no obligation to retreat unless he was at fault in bringing on the difficulty.

(2) The court charges the jury that the defendant, if after hearing of the threats, and when deceased came to his place and began to abuse him, if you find that he did, then defendant had the right to arm himself for defense of his person if he did so with no intention of having the pistol for offensive purposes.

Milo Moody, of Scottsboro, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

BROWN, P. J. [1] In the absence of evidence tending to show that the motive for the homicide was to prevent deceased's attentions to "the McClanahan woman," the evidence elicited by the state that the defendant and deceased were frequent visitors of this woman was wholly immaterial and should not have been admitted. We have examined the record carefully for such tendencies in the evidence, and find nothing that affords an inference that such was defendant's motive for killing Mathews.

[2] The defendant examined two witnesses, McAnnally and Graham, who testified that they had known the defendant since he was a little boy, "and knew him to be a good man, peaceable, quiet citizen." This was not evidence of the defendant's general character for peace and quiet—in fact, was the mere opinion of the witnesses as to the defendant from their personal knowledge, and was not admissible for any purpose. *Andrews v. State*, 159 Ala. 14, 48 South. 858.

[3] The testimony of these witnesses on direct examination, not relating to the defendant's general character, could not be made a predicate for showing on cross-examination that the defendant had the reputation of being lewd. Such evidence shed no light on the defendant's character for peace and quiet, and the specific trait of lewdness was not admissible to impeach his character for truth and veracity. *Story v. State*, 178 Ala. 98, 59 South. 480; *Holland, Adm'r, v. Barnes*, 53 Ala. 83, 25 Am. Rep. 595.

[4] The court also erred in allowing the solicitor to ask the witness Jenkins on his direct examination the following question: "Do you know Terry's character in that neighborhood; I am not talking about his character for peace and quiet, but asking about his moral character, and from that talk do you think you know his moral character?" and in overruling the motion of the defendant to exclude the answer: "Well, it is a little bad." Manifestly the state was offering this to impeach the credibility of the defendant's testimony, and for this purpose the law limits the testimony to the general reputation or character in the community, or general reputation for truth and veracity, and for this purpose it is not permissible to inquire as to other specific traits. *Coates v. State*, 5 Ala. App. 182, 59 South. 323; *McCutchen v. Loggins*, 109 Ala. 457, 19 South. 810; *McQueen v. State*, 108 Ala. 54, 18 South. 843; *Way v. State*, 155 Ala. 52, 46 South. 273.

The other matters pertaining to the admission or exclusion of evidence complained of appear free from reversible error.

[5] The killing was at a public ferry where both parties had a right to be, and the defendant was not relieved of the duty of retreating. *Huguley v. State*, 72 South. 764; *McGhee v. State*, 178 Ala. 4, 59 South. 573;

Thomas v. State, 13 Ala. App. 50, 69 South. 315. The defendant not being, under the circumstances, relieved from the duty of retreat, charge 1 was well refused.

[6, 7] The question of defendant's freedom from fault was, under the evidence, for the jury; and charge 2 was an invasion of their province. The mere fact that he armed himself after the deceased arrived and began his abuse, if such was the case, might have had a tendency to provoke deadly combat. Reese v. State, 135 Ala. 13, 33 South. 672; Langham v. State, 12 Ala. App. 50, 68 South. 504.

We find no other error in the record; but for those pointed out the judgment is reversed.

Reversed and remanded.

(15 Ala. App. 687)

**SAMPLES v. STATE.** (7 Div. 462.)

(Court of Appeals of Alabama. March 23, 1917.  
On Rehearing, April 8, 1917.)

**1. BASTARDS ¶92 — APPEAL AND ERROR — VERDICT—EVIDENCE TO SUPPORT.**

Where there was evidence which, if believed, authorized a conviction, the verdict will not be disturbed; the jury and trial judge being in a better position to judge of the credibility of witnesses than the appellate court.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 228-239.]

**2. BASTARDS ¶60—ARGUMENT OF PROSECUTOR—COMMENT ON EVIDENCE.**

The solicitor had a right to comment in argument upon all testimony introduced on direct or cross examination.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 178, 181-184, 187.]

**3. BASTARDS ¶60—ARGUMENT OF PROSECUTOR—URGING JURY TO DISCHARGE DUTY.**

In a bastardy prosecution, the solicitor could properly urge jury to discharge their duty, and not to "wink" at invasion of sanctity of the home.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 178, 181-184, 187.]

**4. BASTARDS ¶50—CRIMINAL PROSECUTION—EVIDENCE—CONDUCT OF PROSECUTRIX.**

Evidence showing intercourse between prosecutrix and other men about the time the child was conceived was admissible for the purpose of affording an inference that another than accused was the father, but not as affecting prosecutrix's credibility as a witness.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 161-164.]

On Rehearing.

**6. BASTARDS ¶20—CONSTITUTIONAL LAW ¶55—STATUTES—PRESUMPTIONS ON APPEAL—INVASION OF JUDICIAL POWER.**

Code 1907, § 2846, amended by Acts 1915, p. 722, providing that no presumption in favor of the correctness of trial court's judgment shall be indulged in, does not change rule in passing on granting or refusal of new trial; such statutes being an unwarranted invasion of judicial functions.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 36-38; Constitutional Law, Cent. Dig. §§ 58-69, 71, 80, 81, 83.]

Appeal from Circuit Court, Cherokee County; W. W. Haralson, Judge.

Wesley Samples was convicted of bastardy, and he appeals. Affirmed. On rehearing, application overruled, and former opinion sustained.

Referring to the fact that the witness Wilson was present at the preliminary trial as a witness, and was not examined, the solicitor said:

"They knew these facts then, as they know them now. Why didn't they dispose of the case down there without bringing it to the courthouse. Why is it one of these boys says that he was there in the house, and a witness; why is it you want to humiliate this girl and her father by bringing this matter here if you had all this testimony down there?"

In further argument he said:

"If you are going to wink at this no man's house is safe—wink at the conduct of the parties as shown by the testimony of the defendant's witnesses?"

Hugh Reed and R. F. Conner, both of Center, for appellant. William L. Martin, Atty. Gen., for the State.

**BROWN, P. J.** [1] There was evidence which, if believed by the jury, authorized them to find the defendant guilty; and the jury and trial judge were in better position to judge of the credibility of the witnesses than we are. After a careful consideration of the evidence, we are not convinced that the finding of the jury was wrong and unjust. South. Ry. Co. v. Kirsch, 150 Ala. 659, 43 South. 796; Cobb v. Malone, 92 Ala. 630, 9 South. 738; Dillard v. Savage, 98 Ala. 538, 13 South. 514; Jones v. Tucker, 132 Ala. 305, 31 South. 21.

[2] The defendant's witness Dock Wilson testified that he frequently had sexual intercourse with the prosecutrix; and on cross-examination testified that he was subpoenaed as a witness for the defendant on the preliminary trial before the justice of the peace and was sworn and put under the rule, and that he was not examined as a witness in that trial. This was evidence before the jury, and the solicitor had the right to comment on it in his argument. The case of Du Bose v. Conner, 1 Ala. App. 456, 55 South. 432, does not sustain the appellant's contention. In that case the witness was not examined, and there was nothing before the jury, and the solicitor was guilty of stating facts not in evidence. Tannehill v. State, 159 Ala. 51, 48 South. 662; Roden v. State, 3 Ala. App. 202, 58 South. 72.

[3] There was nothing improper in the other part of the solicitor's argument to which exception was reserved. He had a right to urge the jury to discharge their duty and not to "wink" at the invasion of the sanctity of the home.

[4] The exception to the oral charge of the court cannot be sustained. The evidence showing acts of sexual intercourse between the prosecutrix and other men about the time

the child was conceived was relevant for the purpose of affording an inference that another than the accused was the father of the child (*Levy v. State*, 133 Ala. 190, 31 South. 805; *Underhill*, Crim. Evidence, § 532), and was not admissible as affecting the prosecutrix's credibility as a witness (*Underhill*, Crim. Evidence, § 531; *Terry v. State*, 74 South. 756).

We find no error in the record, and the judgment of the circuit court is affirmed.

Affirmed.

#### On Rehearing.

[5] It is urged that the amendment of the statute (Code 1907, § 2846) by act approved September 22, 1915 (Acts 1915, p. 722), by adding thereto the provision, "And no presumption in favor of the correctness of the judgment of the court appealed from shall be indulged by the appellate court," changes the rule heretofore prevailing in passing on the action of the trial court in granting or refusing to grant new trials. In *Hackett v. Cash*, 72 South. 52, the Supreme Court held that statutes designed to apply to cases where the evidence was given *ore tenus* before the trial court that require appellate courts to review the finding of facts by the trial court without any presumption in favor of the ruling of the trial court are an unwarranted invasion of the functions committed by the Constitution to the judiciary, and will be disregarded. This holding has been followed by both this court and the Supreme Court in subsequent cases. *Finney v. Studebaker Corporation*, 72 South. 54; *Ross v. State*, 72 South. 759; *Mulligan v. State*, 72 South. 761.

The other matters urged in the application do not warrant further discussion.

Application overruled.

(15 Ala. App. 670)

#### MATTHEWS et al. v. STATE. (3 Div. 240, 241.)

(Court of Appeals of Alabama. March 23, 1917.)

#### 1. LARCENY $\Leftrightarrow$ 40(2)—VARIANCE—PLACE OF OFFENSE.

Where commission of a crime in a dwelling aggravates the offense, it must be proved, as well as alleged, that the building was used as a dwelling when the crime was committed.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 103-108.]

#### 2. LARCENY $\Leftrightarrow$ 40(5)—INDICTMENT—VARIANCE AS TO PLACE OF TAKING.

Under Code 1907, § 7324, as amended by Acts 1911, p. 92, making the theft of plumbing fixtures, etc., from a dwelling house or other building or structure grand larceny, there is no fatal variance between an indictment stating that fixtures were taken from a dwelling house, and proof that the building was unoccupied, since the word "dwelling" is nonessential, and may be rejected as surplusage.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 111.]

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Ned Matthews and Will Massey were convicted of larceny, and appeal. Affirmed.

Thomas & Wiley and Warren S. Reese, all of Montgomery, for appellants. W. L. Martin, Atty Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

BRICKEN, J. The defendants, Ned Matthews, alias Ed Massey, and Will Massey, alias Will Matthews, together with another (who was not on trial in this case) were jointly indicted for the offense of burglary and grand larceny. The indictment contained two counts; the first count charging burglary, in that the defendants, with intent to steal, broke into and entered the dwelling house of Mrs. T. C. Johnson. The second count charged grand larceny under section 7324 of Code 1907, as amended by Acts 1911, p. 92, and was as follows:

"The grand jury of said county further charge that before the finding of this indictment [naming the defendants] feloniously took and carried away from a dwelling house, light fixtures which were attached and a part of such dwelling house, the value of which was over five dollars to the owner, Mrs. T. C. Johnson, before being detached from said dwelling house, against," etc.

No objection to the sufficiency of the second count was raised by demurrer or otherwise, and the defendants joined issue by plea of not guilty. The defendants were convicted under count 2 of the indictment, the court having charged the jury that the defendants could not be convicted under the first count. Notwithstanding numerous exceptions were reserved to the rulings of the court pending this appeal, it is conceded both by the appellants' counsel and counsel for the state that the sole question raised on this appeal is the question whether the defendants could legally be convicted under count 2 of the indictment, which charged grand larceny from the building in question. The evidence without conflict disclosed the fact that the house or building in question was an unoccupied, uninhabited dwelling house, the property of Mrs. T. C. Johnson. It is contended that there was a fatal variance between the averments of count 2 of the indictment and the proof in this case. In other words, that the proof must have shown that the designated building was in fact the dwelling house of Mrs. T. C. Johnson at the time of the commission of the alleged offense, in order to meet the allegation in the indictment to this effect.

[1, 2] It has been properly held that where the term "dwelling" house is the gravamen of the offense—where the term was used in the statute to aggravate the offense and increase the punishment because of the place of its commission—to justify a conviction of the higher grade of crime, it was indispensable that at the very time of its commission the building should have been in use as a dwell-

ing house. *Jefferson v. State*, 100 Ala. 59, 14 South. 627. A dwelling house is defined to be "the apartment, building, or cluster of buildings in which a man with his family resides"; and it has been held that unless it is shown that some one resided in the house, there cannot be a conviction of burglary for breaking and stealing in it with a felonious intent. *Fuller v. State*, 48 Ala. 273. The cases above referred to and the authorities supra were based upon section 7324 of the Code before it was amended by Acts 1911, p. 92. But what of said statute since it has been amended? To quote the amendment:

"\* \* \* Any person who knowingly, willfully and without the consent of the owner thereof, enters into any dwelling house, store house, warehouse or other building or structure and cuts, breaks, tears out, removes any plumbing fixtures, lead, pipe, copper, lock, grate, mantel, light fixture or other material which has been attached to and a part of such building, the value of which was five dollars or more to the owner before being detached from such house or structure, with the intent to convert it to his own use, shall be guilty of grand larceny and, on conviction, must be imprisoned in the penitentiary for not less than one nor more than ten years."

In this amended statute, is the word "dwelling" the gravamen of the offense? Is it the grievance complained of, the substantial cause of the action? Does the statute aggravate the offense and increase the punishment because of the place being a dwelling, as that word is used in the present statute, as unquestionably it did as used in the original section (7324), before it was amended? We think not; to the contrary, it seems to be manifestly clear that the intention of the Legislature in passing said amendment was undoubtedly to meet the law as laid down in *Jefferson v. State*, supra; for this amendment differs from the original statute and applies, not alone to a dwelling house or the other specially designated and named places, but generally to any other building or structure, without regard to its use or occupancy, and is leveled at the protection of property and not habitation. In fact, any building or structure comes within the provisions of this amendment. The terms "structure," "house," or "building" may be taken to be synonymous. The further purpose of the amendment, it would seem clear, was to reach and protect houses that were temporarily vacant and which were constantly the object of vandals who sought to and did remove plumbing and other fixtures attached to the building, and this regardless of its inhabitancy or character as such. It would appear, then, that the word "dwelling" in this indictment is merely surplusage, and was wholly unnecessary. Under the statute as amended, it is immaterial whether it was a dwelling house or any other building or structure; and it certainly cannot be contended that the term "dwelling" house, as used in this indictment, was descriptive of the fact or degree of the crime, for had the indictment omitted the word

"dwelling" entirely, still it would have sufficiently charged the crime for the same degree of offense which it does charge with the word "dwelling" preceding the word "house." *McGehee v. State*, 52 Ala. 224. In *McGehee's Case*, supra, it was held that that part of the indictment which alleged that *McGehee* was a freedman was mere surplusage, and was not essential, and had no legal effect. Having no legal effect, proof thereof, or the absence of proof thereof, could not affect the indictment. If, on the contrary, the alleged surplusage was descriptive of the offense or degree of crime, or is material to jurisdiction, then it would, in order to prevent a variance, be essential and necessary to be proved as alleged; otherwise there would be a variance fatal to the state's case. But in this case the word "dwelling" is not descriptive of the offense or degree of crime charged; nor is it material to the jurisdiction, for under the amended statute the crime could have been committed in any dwelling house, storehouse, warehouse, or other building or structure. This statute, by saying "other structure or building," shows that the words "dwelling house" or "storehouse" are not essential, and are not descriptive of the fact or degree of crime charged. *Newsom v. State*, 107 Ala. 133, 18 South. 206, bears out this contention. In that case the indictment charged that the defendant stole a full sack of corn from the owner thereof. The evidence showed that the defendant did not steal a full sack of corn, but that he stole only a part of a sack of corn. The court held that the word "full" preceding the words "of corn" was merely surplusage, and might be disregarded; it being immaterial whether the sack was full, or only partially full. On the question of variance, it has been repeatedly held in this state that where an indictment charged that the defendant committed homicide by shooting deceased with a pistol, it may be supported by evidence that the defendant shot deceased with a shotgun. *Taylor v. State*, 148 Ala. 565, 42 South. 997; *Turner v. State*, 97 Ala. 57, 12 South. 54.

In *Jones v. State*, 137 Ala. 12, 34 South. 681, it was said:

"It is sufficient, if the substance of the charge be proved, without regard to the precise instrument used. Though the indictment charges a particular weapon (knife), the averment is substantially proved, if it be shown that some other instrument was employed, which occasions a wound of the same kind as the instrument charged, and the same consequences naturally follow."

In this case (*Jones v. State*, supra) the court further held that while the indictment charged that the homicide was committed with a knife, and although the jury might not believe that the cutting was done with a knife, still, if they believed that it was done by the defendant with an instrument of like kind, this would be sufficient to sustain the charge that it was done with a knife.

In this case, treating the word "dwelling" as merely surplusage and as being an immaterial averment, we are then confronted with an indictment which alleges the larceny from a house. In the case of *Ford v. State*, 112 Ind. 373, 14 N. E. 241, the court held that the word "house" clearly means a building in the ordinary sense of the word. In the case of *State v. Dan*, 18 Nev. 345, 4 Pac. 336, which is almost identical with the case at bar, it was held that the word "house," in a statute declaring the crime of burglary may be committed in any dwelling house or any other house or building, is to be construed to mean a house without regard to its inhabitants.

Webster's New International Dictionary defines a house as a "structure intended for human habitation." It is seen from this, therefore, that the words "building," "structure," or "house" are used interchangeably, and that the striking of the word "dwelling" would still leave the offense of grand larceny, which seems to be sufficiently charged under section 7324 of the Code, as amended by act approved March 7, 1911 (Acts 1911, p. 92); and therefore there would be no variance in the indictment and the proof that should work a reversal of this case. It is contended that even if the word "dwelling," as used in the indictment in this case, is mere surplusage and an unnecessary averment, still it imposed upon the state an additional burden of proof to meet this allegation, etc. This may be true; but we are of the opinion that this additional burden of proof has been fully met by the uncontradicted evidence in this case; the witness Mrs. A. I. Donald, when recalled by the defendant, having testified:

"That the house was the property of her sister, Mrs. T. C. Johnson; that it was known as a dwelling house and had been built for that purpose, and had been occupied since October 1, 1915 (about two months after the alleged offense), until the time of the trial in the lower court as a dwelling house."

It would appear that there is no merit in this contention, the proof made having fully met each and every averment in the indictment.

As before stated, all other questions arising during the trial of this case were abandoned and conceded by appellants to be without merit. There is no necessity, therefore, to discuss them.

We find no error in the record, and the judgment of the court will be affirmed.

Affirmed.

(15 Ala. App. 675)

JONES v. MARTIN. (4 Div. 415.)

(Court of Appeals of Alabama. Jan. 30, 1917.  
Rehearing Denied April 30, 1917.)

1. CORPORATIONS ⇨642(2)—FOREIGN CORPORATIONS—TRANSACTIONING BUSINESS WITHIN STATE—SALE OF STOCK BY AGENT.

The sale of corporate stock by a foreign corporation is the exercise of a corporate function within Const. 1901, § 232, and Code 1907,

§ 3642, and a sale by an agent for the corporation within the state is transacting business in the state within Code 1907, §§ 3644, 3645.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2522.]

For other definitions, see Words and Phrases, First and Second Series, Transacting Business.]

2. BILLS AND NOTES ⇨473 — ACTIONS ON NOTE—COMPLAINT—NEGOTIABILITY.

Where a complaint to recover the amount of a note, does not on its face declare on a negotiable note, the pleas are not subject to demurrer for failure to aver that plaintiff had notice of the defense set up when he acquired the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1503-1507, 1555.]

3. BILLS AND NOTES ⇨875 — INNOCENT HOLDER — FOREIGN CORPORATIONS — PLACE OF BUSINESS AND AGENT — VALIDITY OF CONTRACTS.

A note given to a foreign corporation which had no known place of business or designated agent within the state as required by Const. 1901, § 232, and Code 1907, §§ 3642-3646, can be enforced by an innocent holder, though not by the corporation, since it is not made void ab initio.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 971-981.]

4. BILLS AND NOTES ⇨875—FOREIGN CORPORATIONS—FAILURE TO SECURE PERMIT—VALIDITY—NOTE—BONA FIDE HOLDER.

A note given in consideration of a sale of corporate stock by a foreign corporation, which had not procured a permit to do business as required by Code 1907, §§ 3651-3653, cannot be enforced by an innocent holder, since the statute makes all contracts, either by or to such corporations, null and void.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 971-981.]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by T. R. Jones against W. F. Martin on a promissory note. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The note sued on was executed by Martin to one Hendricks, and by Hendricks assigned to Jones. Defendant filed five pleas: First, the general issue; second, that the consideration for the note sued on was for the purchase of stock of a foreign corporation, and that said corporation by its agent came into Alabama and sold the stock to Martin, for which the note was executed as the purchase price, and that this constituted the doing of business in the state of Alabama, and that the foreign corporation did not have a known place of business, and a designated agent in this state. The third plea set up the same facts as established, and alleged that at the time of the sale said corporation did not have a permit to do business in the state of Alabama. The fourth plea set up that the execution of the note was obtained by false pretense and false representation. The fifth plea was for want of consideration.

M. B. Byrd and A. E. Pace, both of Dothan, for appellant. Espy & Farmer, of Dothan, for appellee.

BROWN, P. J. [1] We entertain no doubt that the sale of its corporate stock by a foreign corporation is the exercise of a corporate function within the meaning of section 232 of the Constitution and section 3642 of the Code of 1907; and that such sale made in this state by an agent of the corporation, for the corporation, is engaging in or transacting business in this state within the meaning of sections 3644, 3645, of the Code.

[2] The complaint, on its face, does not declare on a negotiable note, and the defendant's pleas were not subject to demurrer because they did not aver that the plaintiff had notice of the defense thus set up when he acquired the note. *Weinstein et al. v. Citizens' Bank*, 18 Ala. App. 552, 69 South. 972. The pleas were not subject to the stated grounds of demurrer, and the ruling of the court was free from error. Code 1907, § 5340.

The plaintiff, without filing a general replication to pleas 2, 3, 4, and 5, replied specially that the plaintiff purchased the notes sued on before maturity, for value, in the usual course of business, and without notice of any infirmity in the instruments or defect in the title of the person negotiating them. The court sustained a demurrer to this replication in so far as it applied to pleas 2 and 3.

[3] The purpose of section 232 of the Constitution, and sections 3642-3646, Code 1907, is to compel foreign corporations to submit themselves to the jurisdiction of the courts of this state as a prerequisite to their right to invoke the equal protection of the law in the enforcement of obligations arising out of intrastate business transacted by them in this state. While the law penalizes offending corporations and their agents, contracts entered into by the corporation in this state are not declared void by the Constitution or these statutes. While such contract is not void, the courts of the state will not allow the corporation or any one involved in the guilt of violating the public policy of the state, as evidenced by the Constitution and statutes, to enforce the contract. *Citizens' National Bank v. Buchelt*, 71 South. 82; *Alexander v. Ala. Western Ry. Co.*, 179 Ala. 480, 60 South. 295; *Drew v. Ft. Payne Co.*, 186 Ala. 285, 65 South. 71; *Sunflower Lumber Co. v. Turner*, 158 Ala. 191, 48 South. 510, 132 Am. St. Rep. 20.

The note sued on issuing out of and resting upon a contract not void ab initio was not subject to the defense that the transaction in which the note was given was by a foreign corporation in violation of section 232 of the Constitution, and sections 3642-3646, Code 1907. *Citizens' Nat. Bank v. Buchelt*,

supra. The court, therefore, erred in sustaining the defendant's demurrers to the replication to plea 2.

[4] A different question is presented by the defendant's plea 3. This plea avers that the note was given in consideration of a sale of corporate stock by a foreign corporation in this state, and at the time of such transaction the corporation "had not procured from the secretary of state of the state of Alabama a permit admitting it to do business in the state of Alabama," as required by sections 3651-3653 of the Code, the latter of which provides:

"No such corporation, its agents, officers, or servants, shall transact any business for or in the name of such corporation within the state of Alabama without having first procured said permit, and all contracts, engagements, or undertakings or agreements with, by, or to such corporation, made without obtaining such permit, shall be null and void."

Under the uniform holding of the Supreme Court of this state, a negotiable note, "issuing out of, and resting on a contract thus expressly declared to be absolutely void, cannot be enforced even by a bona fide purchaser for value without notice." *Hanover Nat. Bank v. Johnson*, 90 Ala. 549, 8 South. 42; *Ala. Nat. Bank v. Parker & Co.*, 146 Ala. 518, 40 South. 987; *Whitehead v. Coker*, 76 South. 484; *Birmingham Savings Co. v. Curry*, 160 Ala. 370, 49 South. 319, 125 Am. St. Rep. 102; *Moog v. Hannon*, 93 Ala. 503, 9 South. 596; *Bozeman v. Allen*, 48 Ala. 512; *Saltmarsh v. Tuthill*, 13 Ala. 390.

In passing upon this question in *Citizens' Nat. Bank v. Buchelt*, 71 South. 82, we felt that we were bound by the holding in *Drew v. Ft. Payne*, 186 Ala. 285, 65 South. 71; but on further consideration of the question and the holding in that case, in the light of the subsequent holdings of the Supreme Court, it is manifest that the question was not presented in the *Drew* Case, and that the court was not considering the effect of the statute quoted above. See *Ex parte Banks*, 185 Ala. 275, 64 South. 74; *Douglass v. Standard Real Estate Co.*, 189 Ala. 223, 66 South. 614. The holding on this point in *Citizens' Nat. Bank v. Buchelt*, supra, was unsound, and that case is modified to conform to the views above stated.

The replication was not an answer to the defendant's plea 3, and the demurrers were properly sustained.

As the case must be reversed, and, as the issues will necessarily be different on another trial, what we have here said will be a sufficient guide for another trial.

Reversed and remanded.

(15 Ala. App. 678)

BREWER v. WOODHAM et al. (4 Div. 450.)

(Court of Appeals of Alabama. Feb. 6, 1917.

On Rehearing, April 3, 1917.)

## 1. LOTTERIES — 3—"LOTTERY"—WHAT CONSTITUTES—PUNCH BOARD.

One who sells a punch board consisting of a board with holes in which blank slips, and slips calling for prizes are inserted, the right to punch one hole being sold for 10 cents, the purchaser receiving either nothing or a determined prize, is concerned in setting up a lottery within Code 1907, § 6997.

[Ed. Note.—For other cases, see Lotteries, Cent. Dig. § 3.]

For other definitions, see Words and Phrases, First and Second Series, Lottery.]

## 2. LOTTERIES — 12—LEGALITY OF CONTRACT—PUNCH BOARD.

The contract for sale of such device, though made in another state, but prepared by plaintiff and sold to be operated in the state under written directions furnished by him, is violative of public policy, and not enforceable.

[Ed. Note.—For other cases, see Lotteries, Cent. Dig. §§ 12, 13.]

## 3. LOTTERIES — 12—LEGALITY OF CONTRACT—PUNCH BOARD.

In a contract for sale of a gambling punch board, where the sale was completed in Chicago, to render the contract unenforceable as against public policy it was not necessary that the seller should personally have been present and actually assisted in operation of the board in Alabama.

[Ed. Note.—For other cases, see Lotteries, Cent. Dig. §§ 12, 13.]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by Charles A. Brewer, doing business as the Devon Manufacturing Company, against W. H. Woodham and R. S. Elmore. Judgment for defendants, and plaintiff appeals. Affirmed.

H. R. McClintock and E. S. Thigpen, both of Dothan, for appellant.

BROWN, J. This is an action on account for goods, wares, and merchandise sold by the plaintiff to the defendants at their request. The undisputed evidence shows that the alleged indebtedness was the purchase price of a "punch board," a gambling device consisting of a board containing a number of holes, in which were placed slips of paper, some of which contained the names of designated articles of merchandise or jewelry, and others blanks; that chances were sold at 10 cents each, and the party taking the chance would push through one of these holes, and if the slip therein contained the name of an article, it was delivered to him; if the slip was blank, he got nothing. This board was loaded by the plaintiff at his place of business in Chicago, and sold on the defendants' order taken through a traveling salesman, the order being sent to the plaintiff in Chicago, there approved, and the board and the assortment of merchandise accompanying it were shipped to the defendants.

The written order presented to the defend-

ants, and which was signed by a member of the firm, was in these words:

"Devon Manufacturing Company, Chicago, Ill. Please ship to my address by prepaid express one assortment No. 8 at \$40.00, terms 60 days, less \$5.00 if remittance is made in 10 days from date on invoice. If remittance of \$40.00 is made thirty days from the date of invoice, you agree to ship to my address, making no charge for same, my choice of premiums shown on your illustrated list; or if at the end of thirty days I remit 80 per cent. of the gross receipts, which is 8 cents for each sale, you agree to take back any unsold goods at price charged me, provided they have been offered for sale as per printed directions for sixty days from date of invoice, at which time final settlement is to be made. The assortment consists of 8 watches, 92 pieces of jewelry and cutlery, and 400 packages of chocolates. You agree to place in center of tray an extra watch for which no charge is made. This watch to be used as per printed directions or returned by me with unsold goods. No salesman has authority to collect money or goods or make settlement of this account. It is understood that I have no agreement with you except as herein stated. [Customer sign here.]"

[1] The undisputed evidence shows that this order was prepared by the plaintiff, and was its usual blank, and carries on its face evidence that the entire matter was a gambling scheme. The board, which appears to have been accompanied by written directions as to its use sent out by the plaintiff, was not merely adapted for a gambling device, but could be used for no other purpose; and (while the plaintiff may not be criminally liable, a question not here presented) in preparing the board and sending it out with the assortment of prizes to be set up and operated in the defendants' store in this state, "according to written directions" accompanying the board and assortment, plaintiff was within the meaning of section 6997 of Code 1907, "concerned in setting up and carrying on a lottery or device of like kind." *Loiseau v. State*, 114 Ala. 84, 22 South. 188, 62 Am. St. Rep. 84; *Yellowstone Kit v. State*, 88 Ala. 196, 7 South. 338, 7 L. R. A. 599, 16 Am. St. Rep. 38; *Chavannah v. State*, 49 Ala. 396; *Kuhl v. M. Gally Universal Press Co.*, 123 Ala. 452, 26 South. 535, 82 Am. St. Rep. 135.

[2] The sale of this device, though made in another state, being prepared by the plaintiff and sold to be operated in this state under written directions furnished by the plaintiff, is violative of the state's public policy. The courts of this state will not enforce the contract at the instance of the parties thereto, though the contract was not void in the making. *Ala. West Ry. Co. v. Talley Bates Co.*, 162 Ala. 396, 50 South. 341; *Alexander v. Ala. West Ry. Co.*, 179 Ala. 482, 60 South. 295; *Citizens' Nat. Bank v. Buchelt*, 71 South. 82; *W. U. T. Co. v. Young*, 138 Ala. 240, 36 South. 374; *Jones v. Martin*, 74 South. 761.

It appearing from the undisputed evidence that the plaintiff was concerned in setting up the device, and that the alleged sale was

In violation of the public policy of the state, he suffered no injury as a result of any ruling of the court, and the judgment is affirmed.

Affirmed.

#### On Rehearing.

**BROWN, P. J.** The tenth plea avers that the suit is to recover the purchase price of a gambling device sold by the plaintiff to the defendants, and shows that the plaintiff was concerned with defendants in setting up and operating the device, and by arrangement between them, the plaintiff was to participate in the proceeds of the gambling operation, and was not subject to any of the stated grounds of demurrer. *Kuhl v. Gally Universal Press Co.*, 123 Ala. 456, 26 South. 535, 82 Am. St. Rep. 135; *Bickel v. Sheets*, 24 Ind. 1; *Rose v. Mitchell*, 6 Colo. 102, 45 Am. Rep. 520; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Skiff v. Johnson*, 57 N. H. 475; 12 R. C. L. 750, § 55; 6 R. C. L. 776, § 181.

The evidence offered by the plaintiff to sustain his cause of action clearly shows that it was contemplated that the punch board was to be operated according to the directions prepared by the plaintiff, and that he was, under certain conditions, to receive 80 per cent. of the proceeds arising from the operation of the board; and the evidence clearly shows that the contract between the parties was made in furtherance of a gambling transaction, in which the plaintiff was a participant. 6 R. C. L. 776, § 181, *supra*. There was evidence tending to support the tenth plea, and the affirmative charge was properly refused.

[3] Charge 2 refused to the plaintiff was calculated to impress the jury that it was necessary for the plaintiff to be present and physically ("actually") participate in the operation of the board, and was refused without error. The application is overruled.

Application overruled.

(15 Ala. App. 681)

#### BREWER v. STATE. (3 Div. 410.)

(Court of Appeals of Alabama. April 3, 1917.)

#### 1. WEAPONS §17(1)—SHOOTING INTO DWELLING HOUSE — INDICTMENT — SUFFICIENCY — UNLAWFUL CHARACTER OF ACT.

Under Code 1907, § 6897, making shooting into a dwelling house, etc., a misdemeanor, an indictment is fatally defective in not alleging that the shooting was unlawful.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. §§ 20, 22-25.]

#### 2. WEAPONS §17(1)—SHOOTING INTO DWELLING HOUSE — INDICTMENT — SUFFICIENCY — NEGATING ACCUSED'S OWNERSHIP OF HOUSE.

Under Code 1907, § 6897, making shooting into dwelling houses, etc., a misdemeanor, an indictment should negative accused's ownership of the house fired upon, under section 7147, regulating allegations regarding ownership of property.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. §§ 20, 22-25.]

#### 3. CRIMINAL LAW §338(8)—EVIDENCE—ADMISSIBILITY.

An officer's testimony that he had a warrant and searched for accused's witness is inadmissible, being irrelevant and calculated to discredit the witness.

#### 4. WEAPONS §15—CRIMINAL RESPONSIBILITY—SHOOTING INTO DWELLING.

Code 1907, § 6897, making shooting into a dwelling house, etc., a misdemeanor, may be violated by two or more persons conspiring together.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 18.]

#### 5. CONSPIRACY §47—SUFFICIENCY OF EVIDENCE.

A conspiracy need not be established by positive testimony, nor need a prearrangement to do the specified wrong be shown.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105-107.]

#### 6. CRIMINAL LAW §830 — REQUESTED INSTRUCTIONS—REFUSAL.

A requested special charge which needs qualification, modification, or restriction should be refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017.]

#### 7. CRIMINAL LAW §834(2)—REQUESTED INSTRUCTION—MODIFICATION.

Where the court gives a requested charge, it is error to qualify it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2013, 2014.]

Appeal from Circuit Court, Franklin County; C. P. Alkon, Judge.

Millege Brewer was convicted of shooting into a dwelling house, and appeals. Reversed and remanded.

William Steil and Travis Williams, both of Russellville, and James M. Brown, of Fulton, Miss., for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

**BROWN, P. J.** [1, 2] The defendant was convicted of the offense denounced by section 6897, Code 1907, and the evidence shows that the house shot at or into was the dwelling house of J. L. Lindley. The indictment charges "that Fayette Miller, Millege Brewer, and Frank Strawbridge shot a pistol, or other firearm at, into, through, or against a dwelling house." This indictment is fatally defective in not showing that the shooting was unlawful. The indictment should negative the defendant's ownership. *Emmonds v. State*, 87 Ala. 12, 6 South. 54; Code 1907, § 7147.

[3] The testimony of the witness Cox, offered in rebuttal, merely shows that he was an officer, that as such he had a warrant for the witness Griffith, and that the officer went to Griffith's house and searched for him. Whether he found Griffith or not is not shown. This evidence was clearly irrelevant to the issue, and its tendency was to discredit the witness by showing that he was charged with some offense.

[4, 5] The offense denounced by the statute is susceptible of being committed by two or



more persons conspiring together to that end. Conspiracy, or a common purpose to do an unlawful act, need not be shown by positive testimony; nor need it be shown that there was prearrangement to do the specified wrong complained of. *Jones v. State*, 174 Ala. 53, 57 South. 31. The exception to the oral charge of the court is not sustained. The same principle justified the refusal of the special charges requested by the defendant. The remarks of the court after giving charge 10 were explanatory of the charge, and not improper. *Lewis v. State*, 96 Ala. 6, 11 South. 259, 38 Am. St. Rep. 75; *R. A. R. Co. v. White*, 69 South. 308.

[6, 7] If a special charge requested needs qualification, modification, or restriction to render it correct, it should be refused; and if the court gives a charge, it is error to add qualification. "Any other ruling nullifies the plain terms of the statute." *Eiland v. State*, 52 Ala. 322; *A. G. S. R. R. Co. v. Moody*, 92 Ala. 285, 9 South. 238; *Williams v. State*, 113 Ala. 63, 21 South. 463; *Schieffelin v. Schieffelin*, 127 Ala. 38, 28 South. 687. The court erred in qualifying charge 12 given at defendant's instance. Furthermore, the qualification was incorrect. The evidence must exclude all reasonable doubt of guilt. 1 Mayf. Dig. 314, § 2.

For the errors pointed out, the judgment is reversed.

Reversed and remanded.

(113 Miss. 887)

**WEATHERALL v. BROWN.** (No. 18848.)

(Supreme Court of Mississippi, Division A.  
Feb. 26, 1917. On Suggestion of  
Error, March 26, 1917.)

**1. JUSTICES OF THE PEACE § 60 — RIGHT TO QUESTION JURISDICTION.**

Where a tenant secured a remand of his landlord's attachment for double rent to a justice of the peace on the ground that neither the amount distrained for nor the value of the property exceeded the sum of \$200, the court properly refused to thereafter permit him, in order to show that the justice was without jurisdiction, to prove that the property seized was worth more than such sum.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 217-221.]

**2. LANDLORD AND TENANT § 260—ATTACHMENT FOR DOUBLE RENT—STATUTE.**

Under Code 1906, § 2848, an attachment for double rent may issue against a tenant when the landlord shall have just cause to suspect, and shall verily believe, that the tenant will remove from the leased premises any part of the agricultural products on which the landlord has a lien, the provision of the statute, that the removal by the tenant must be of such a character that distress cannot be made, having no application to agricultural products on which a lien is given by statute independent of seizure thereof at the instance of the landlord, applying only to such property as may be subject to payment of rent by seizure without prior lien thereon.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1045.]

**3. LANDLORD AND TENANT § 216—LIABILITY FOR DOUBLE RENT—HOLDING OVER—STATUTE.**

The liability of a tenant for double rent under Code 1906, § 2883, if he holds over after notice to quit, is absolute, without reference to his good or bad faith in so doing.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 861-865.]

**4. LANDLORD AND TENANT § 216—LIABILITY FOR DOUBLE RENT — HOLDING OVER—"WILLFULLY."**

In statutes providing for double rent in the event a tenant holds over after notice to quit, the word "willfully" means not merely voluntarily, but with a bad purpose (citing *Words and Phrases*, First Series, *Willfully*).

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 861-865.]

Appeal from Circuit Court, Pontotoc County; Claude Clayton, Judge.

Attachment for double rent by Mrs. C. S. Brown against W. W. Weatherall. From a judgment for plaintiff, defendant appeals. Affirmed.

Appellant by parol agreement rented from appellee certain lands for the years 1913, 1914, and 1915, and delivered to appellee his three promissory notes, each for the sum of \$100, for rental of said premises for said three years. During the fall of 1913 appellee gave notice to appellant, in writing, to quit the premises and deliver possession of same January 1, 1914. The rent note for the year 1913 was paid. Appellant refused to deliver possession of the premises, and appellee returned to appellant the two notes covering the rent for 1914 and 1915, and brought her suit in the justice court for the possession of the land, and from a judgment in her favor, the appellant appealed to the circuit court, where a judgment was again rendered in favor of appellee, adjudging that she have possession of the premises, but it was toward the close of the year 1914 before this judgment was entered and possession given appellee. Thereupon appellee filed an affidavit in the justice court for an attachment for double rent for the year 1914, as provided by section 2883 of the Code of 1906, which is as follows:

"When a tenant, being lawfully notified by his landlord, shall fail or refuse to quit the demised premises and deliver up the same as required by the notice, or when a tenant shall give notice of his intention to quit the premises at a time specified, and shall not deliver up the premises at the time appointed, he shall, in either case, thence forward pay to the landlord double the rent which he should otherwise have paid, to be levied, sued for, and recovered as the single rent before the giving of notice could be; and double rent shall continue to be paid during all the time the tenant shall so continue in possession."

The attachment was levied against certain agricultural products consisting of cotton and corn, being a portion of the crop raised on the premises leased, and was replevied by appel-

lant, who executed a bond in the sum of \$400, being double the amount of appellee's claim for rent, and said writ and bond were filed by the constable in the circuit court. Thereupon appellant filed a motion in the circuit court to transfer the cause to the court of a justice of the peace, on the ground that there appeared nothing in the record to indicate the amount claimed or the value of the property distrained which would confer jurisdiction on the circuit court. This motion was sustained, and the cause transferred to a justice court, where a judgment was entered for appellee for \$100, and on appeal to the circuit court on a trial de novo appellee obtained judgment for \$200, double the rent for the year 1914, from which judgment comes this appeal.

Mitchell & Mitchell, of Pontotoc, for appellant. Fontaine & Fontaine, of Pontotoc, for appellee.

SMITH, C. J. [1] Appellant having secured a remand of the cause to a justice of the peace on the ground that neither the amount distrained for nor the value of the property seized exceeded the sum of \$200, the court below committed no error in refusing to permit him, in order to show that the justice of the peace was without jurisdiction, to prove that the property seized was worth more than that sum.

[2] No error was committed by the exclusion of the evidence offered by appellant to show that at the time the attachment was sued out there remained on the leased premises agricultural products, subject to appellee's lien, more than sufficient to pay the rent claimed, for the reason that an attachment may issue under section 2848 of the Code, the one here invoked, when the landlord shall have just cause to suspect, and shall verily believe, that his tenant will remove from the leased premises any part of the agricultural products on which he has a lien.

[3, 4] The evidence intended to show that appellant's holding over after notice to quit was because of his belief entertained in good faith that he had the right so to do was also properly excluded for the reason that the liability of a tenant holding over after notice to quit for double rent is made absolute by section 2883 of the Code without reference to his good or bad faith in so doing. The decisions to the contrary to which we have been referred, so far as we have been able to ascertain, are based upon statutes providing for double rent in event a tenant willfully holds over after notice to quit, and are consequently of no assistance here, for "the word 'willfully' means not merely voluntarily, but with a bad purpose." § Words and Phrases (1st Ed.) 7469.

Affirmed.

### On Suggestion of Error.

Appellant suggests that, in holding that the court below committed no error in excluding the evidence offered by him to show "that at the time the attachment was sued out there remained on the leased premises agricultural products subject to appellee's lien more than sufficient to pay the rent claimed," we overlooked the provision of the statute that such removal must be of such character "that distress cannot be made." This provision of the statute has no application to agricultural products on which a lien is given by statute independent of the seizure thereof at the instance of the landlord, but applies only to such property as may be subjected to the payment of rent by seizure without prior lien thereon. The distinction made by the statute between these two classes of property was referred to in *Henry v. Davis*, 60 Miss. 212, and the reason therefor explained.

Overruled.

(113 Miss. 896)

### ILLINOIS CENT. R. CO. v. COLE. (No. 18925.)

(Supreme Court of Mississippi. In Banc.  
April 9, 1917.)

#### 1. CARRIERS $\S$ 282—PASSENGERS—TRESPASSER—PERSONAL INJURIES—HEPBURN ACT.

Where plaintiff was a trespasser on a railroad train, and was injured on the train on which he was riding without having paid fare, recovery was not barred by Hepburn Act June 29, 1906, c. 3591, § 4 Stat. 584, forbidding persons under penalty from riding on a free pass. [Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1108, 1107, 1108, 1115, 1116.]

#### 2. TRIAL $\S$ 190—INSTRUCTION—ASSUMPTION OF FACTS.

In an action against a railroad for personal injuries received by plaintiff who was either a trespasser or a licensee on a train, instruction held not erroneous as assuming facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-435.]

#### 3. TRIAL $\S$ 252(10)—INSTRUCTION.

In an action against a railroad for personal injuries, plaintiff had a right to submit a hypothesis containing the facts which were in evidence or which the whole evidence in the case tended to prove.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 603.]

#### 4. DAMAGES $\S$ 215(1)—PUNITIVE DAMAGES—INSTRUCTION—GROSS NEGLIGENCE.

While the trial court cannot in any case instruct the jury peremptorily to find punitive damages, it may instruct the jury to find compensatory damages, and if the facts in proof are such as could not exist without defendant being guilty of gross, wanton, and willful negligence, the court may tell the jury that, if they believe such facts have been proven to be true by plaintiff, there was, as matter of law, gross and wanton negligence.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 543, 545, 546.]

#### 5. CARRIERS $\S$ 297—OPERATION OF TRAIN—WANTON NEGLIGENCE.

It was gross and wanton negligence on the part of a locomotive engineer to run a train

at a high speed, some 50 miles an hour or more, after receiving a telegram that there was water over the track ahead.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1204.]

Stevens, J., dissenting.

Appeal from Circuit Court, Holmes County; Frank E. Everett, Judge.

Suit by Harry T. Cole against the Illinois Central Railroad Company and another. From a judgment for plaintiff, defendant named appeals. Affirmed.

R. V. Fletcher, of Chicago, Ill., and Mayes & Mayes, of Jackson, for appellant. Barbour & Henry, of Yazoo City, for appellee.

WTHRIDGE, J. Harry T. Cole sued the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company, as partners, in the circuit court of Holmes county, for personal injuries, and was awarded a judgment for \$7,500, from which judgment the railroad company appealed. This is a companion case to the *Yazoo & Mississippi Valley Railroad Co. v. Messina*, 67 South. 963, Id., 111 Miss. 884, 72 South. 779. The appellee in this case being injured in the same accident that Messina was injured in in the case referred to, the statement of facts by Judge Cook in the Messina Case will render the full statement of the facts unnecessary in the present case. Cole had prior to the injury been working in New Orleans, La., and had beaten his way from New Orleans, La., to Canton, Miss., on one of the trains of appellant, the Illinois Central Railroad Company, and when he reached Canton he struck up with Messina and other parties, and, learning from them that they were going to Memphis, Tenn., decided to go along also, and, according to the testimony of the plaintiffs, procured the consent of the engineer in charge of the train upon which the injury occurred to ride on the tender of the engine on said trip. Prior to leaving Canton, Miss., the engineer received a telegram which informed him that there was "more or less rain all over the district tonight." On reaching Durant, Miss., the engineer received the following telegram:

"No. 5 reports water high between Beatty and Sawyer; have had very hard rains in past three hours; water over the track but no damage reported, at Sawyer."

Durant was the last stop of this particular train until Winona would be reached, and the injury happened between Durant and Winona by reason of the washout over a stream about three miles south of Winona near a place called Foltz. The testimony for the appellee showed that at the time of the injury the train was running at about 50 miles per hour, different witnesses placing it at from 50 to 55 miles per hour, while the engineer testified that they were running about 35 miles per hour. About 250 yards south of the trestle where the injury occurred there was a curve in the track and

the trestle could not be seen from a north-bound train until the curve was rounded. The engineer testified that he could not have stopped his train in less than 150 yards, and that he was using acetylene headlight, which was next in power and efficiency to an electric headlight, and that with this light he could only see a short distance ahead, about 25 or 30 yards. The engineer had been running between Canton and Memphis about 17 years, and had 27 years' experience as an engineer. The plaintiff was injured by having his foot and leg crushed so that an amputation was necessary, and was at the time of the trial 23 years of age, and had prior to the injury been working as a pressman in New Orleans, at which place his wages were \$2.30 per day, and that he spent \$400 in having his limb amputated and medical and surgical attention on account of the injury. The physicians whose testimony was excluded in the Messina Case were introduced and testified without objection in this case on behalf of the defendants. They testified that they amputated the leg of the plaintiff, and as to their treatment of his injuries.

For a further statement of the facts I refer to *Railroad Co. v. Messina*, 67 South. 964.

[1] The first assignment presents the question as to whether or not plaintiff in this case could recover for the injuries because riding in violation of the Hepburn Act, forbidding persons (under penalty) from riding upon a free pass, and it is contended that, as the plaintiff was a trespasser and was injured on the train on which he was riding without having paid fare, he would be barred of a recovery because of said fact (the Supreme Court of the United States having decided in the Messina Case on appeal of that case to the Supreme Court of the United States in 36 Sup. Ct. 368, 60 L. Ed. 709, 240 U. S. 395, that the Hepburn Act forbade persons riding in the manner and under the circumstances in which the plaintiff and the others were riding when injured), and that his injury flowed from his own wrong and for that reason he could not recover. We think the announcement of the Messina Case would be a sufficient answer to this contention, but we think the United States Supreme Court itself has passed upon this question adversely to the appellant in the case of *Southern Pacific R. R. Co. v. Schuyler*, 227 U. S. 601, at page 612, 33 Sup. Ct. 277, at page 280, 57 L. Ed. 662, at page 669 (43 L. R. A. [N. S.] 901). The Supreme Court, in passing upon this question, said:

"But the act itself declares what penalty shall be imposed for a violation of its prohibition: 'Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty.' This penalty is not to be enlarged by

construction. Neither the letter nor the spirit of the act makes an outlaw of him who violates its prohibition by either giving or accepting gratuitous interstate carriage. The deceased no more forfeited his life, limb, or safety, and no more forfeited his right to the protection accorded by the local law to a passenger in his situation, than the carrier forfeited its right of property in the mail car upon which the deceased rode. His right to safe carriage was not derived, according to the law of Utah, from the contract made between him and the carrier, and therefore was not deduced from the supposed violation of the Hepburn Act. It arose from the fact that he was a human being, of whose safety the plaintiff in error had undertaken the charge. With its consent he had placed his life in its keeping, and the local law thereupon imposed a duty upon the carrier, irrespective of the contract of carriage. The Hepburn Act does not deprive one who accepts gratuitous carriage, under such circumstances, of the benefit and protection of the law of the state in this regard."

It appears from the monographic case note appended to the report in 57 L. Ed. at page 663 that with practical unanimity the authorities hold in accordance with the above case; and there is therefore no merit in this assignment. This question under the above assignment was raised by pleas and by instructions in the court below, and that court held in accordance with our views, and we think its action was proper.

[2] It is next contended that the fourth instruction for the plaintiff constitutes error. This instruction reads as follows:

"The court instructs you that, if you believe from the evidence that plaintiff, Cole, rode on defendant's train No. 2 from New Orleans to Canton without paying his fare, and without permission of any one with authority and got off said train at Canton, but afterwards, in company with Messina and others, got back on the engine of said train, with the consent or knowledge of the engineer, Barnett, and was so riding on the engine at the time of the wreck; then you will find a verdict for the plaintiff, if you further believe from the evidence that the engineer, Barnett, shortly before the wreck, received a communication or information from the train dispatcher notifying him that the track of defendant on which his train must shortly run was under water, and with such information or knowledge in mind, and conscious of the probable danger at the time, ran his engine and train at a speed of 50 miles an hour, and at such a speed that he could not stop his train in a less distance than 150 yards, over the track covered by said communication, and at the time under weather and other conditions which rendered him unable to see more than 25 yards ahead, if you believe the evidence showed such conditions to exist and to be known by said engineer, if you further believe from the evidence that as a result thereof the train was wrecked, and plaintiff received his injuries thereby."

[3] We do not believe that this instruction is subject to the criticism that is made of it as assuming facts. The jury are told in the instruction that, if they believe from the evidence certain facts stated therein, they would find for the plaintiff. There is evidence in the record warranting the inference of the facts embraced in the hypothesis of

the instruction, and the plaintiff had a right to submit a hypothesis containing the facts which are in evidence, or the whole evidence, in the case tended to prove. It is also criticized because it is said that the instruction did not leave the jury to decide just what acts constitute willful and wanton negligence and recklessness, but states that certain facts, if believed, will, as a matter of law, constitute such negligence.

[4] This is not a case involving an instruction to the jury to find punitive damages, but the only damages sought to be recovered and embodied in this suit are compensatory damages, and while the court cannot in any case instruct the jury peremptorily to find punitive damages, it may instruct the jury to find compensatory damages, and if the facts in proof are such as could not exist without the defendant being guilty of gross, wanton, and willful negligence, then the court may tell the jury, if they believe such facts have been proven on the part of the plaintiff be true, that there was as a matter of law gross and wanton negligence, and we think there is no error in the giving of this instruction.

[5] Conceding that the engineer construed the telegram as he testified he construed it, still it was gross and wanton negligence to run under conditions disclosed by the telegram and in the evidence at the rate of speed testified to by the plaintiff and the plaintiff's witnesses.

It is next assigned that the court erred in refusing the defendant's fifteenth instruction:

"If the jury believe from the evidence that the plaintiff before and at the time he received the injury complained of was stealing a ride on defendant Illinois Central Railroad Company's train, then and there and thereby obtaining, and in the act of obtaining, free transportation from the city of Canton, in the State of Mississippi, to the city of Memphis, in the state of Tennessee, said plaintiff was guilty of a violation of section 26 of the regulations governing the issuance and recording of passes made and promulgated by the Interstate Commerce Commission under the authority granted by the acts of Congress to regulate commerce commonly known as the Hepburn Act, approved June 29, 1906, and amended April 13, 1908 [35 Stat. 60, c. 143], and June 18, 1910 [38 Stat. 544, c. 309], and also guilty of a violation of said acts of Congress which preclude his right to recover in this case, and the jury must find for the defendant."

This assignment has been covered in the opinion on the first assignment. We do not think that there is any error in the other assignments; that the law of the case was fairly given, and the defendant had given it in the instruction all the law that was applicable to the case and necessary to its protection.

The judgment of the court is therefore affirmed.

Affirmed.

STEVENS, J., dissents.

(114 Miss. 1)

UNITED STATES FIDELITY & GUARANTY CO. v. TATE COUNTY.  
(No. 18868.)(Supreme Court of Mississippi, Division A.  
March 12, 1917.)JUDGMENT 593 — RES JUDICATA — ENTIRE  
CAUSE OF ACTION.

Where the contractor with a county to work the public roads for two years abandoned the contract and refused to perform, and the board of supervisors notified his bondsmen, requesting them to perform, which they refused, the contract being then relet to the lowest bidder, who carried it out, the county recovering judgment against the original contractor's bondsmen for the amount of money which the county paid the second contractor for one year's work over that agreed to be paid the first contractor, such judgment was *res judicata* in the county's action against the bondsmen to recover like damages for the original contractor's abandonment and failure to perform his contract for the second year, since the contract for working roads for two years called for continuous work, not work to be performed by installments, so that the original contractor's obligation was entire, not divisible, and on his failure to perform the county had the right to recover all damages then and thereafter to be sustained, but it had not the right to institute separate suits for each new item of damage resulting from its original cause of action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1108.]

Appeal from Circuit Court, Tate County;  
E. D. Dinkins, Judge.

Suit by Tate County against the United States Fidelity & Guaranty Company and another. From a judgment for plaintiff against the named defendant, the latter appeals. Reversed and dismissed.

One Clarke entered into a contract with the board of supervisors of Tate county for working the public roads of said county, which contract provided that:

"This contract is to begin and be in force from and after the 1st day of February, 1912, until the 1st day of January, 1914, and during said term all of said roads shall be worked, constructed, and built and maintained according to specifications adopted by the board," etc.

The contract further provided that said Clarke was to receive the sum of \$43.50 per annum per mile for all roads so worked, constructed, and maintained. The contractor was to receive his pay quarterly, except 25 per cent., which was to be retained until the end of each year, when settlement for the entire year was to be made for the work done during that year. Appellant was surety on the contractor's bond. After working the roads under said contract for a time, Clarke abandoned said contract and refused to carry it out. Thereafter the board notified his bondsmen, requesting them to perform the contract, which they refused to do, and the contract was then relet to one Crenshaw, who was the lowest bidder, at \$65 per mile, and Crenshaw carried out the contract. At the end of the first year the bondsmen were called upon to pay the county the excess which it had been compelled to pay Crenshaw over

and above the amount which it had contracted to pay Clarke. The bondsmen declined to pay same, and suit was brought for the difference, and judgment recovered by the county against the bondsmen (appellant), from which no appeal was prosecuted, and appellant paid the judgment. At the end of the second year, the county having again been compelled to pay Crenshaw an amount over and above the amount contracted to be paid to Clarke, demand was made on appellant to make good the excess, which appellant declined to do, whereupon suit was filed against Clarke and his bondsmen, when appellant interposed a plea of *res judicata*, which was overruled by the court and a peremptory instruction given to find for the county in the sum sued for, and from a judgment thereon this appeal is prosecuted.

Holmes & Sledge, of Senatobia, and W. M. Hall, of Memphis, Tenn., for appellant. J. F. Dean and M. H. Thompson, both of Senatobia, for appellee.

SMITH, C. J. The rule announced in *Armfield v. Nash*, 31 Miss. 361, followed in *Williams v. Lockett*, 77 Miss. 394, 26 South. 967, and relied upon by counsel for appellee, has no application here; for, while Clarke's compensation for working the roads was to be paid him in installments, his work upon the roads was not to be performed by installments, but was to be continuous, so that his obligation under the contract was not divisible, but was entire. When he unqualifiedly refused to continue to work the roads, and appellee, as it had the right to do, treated his refusal as a total breach of the contract, and made other arrangements for the working of its roads, his contract with appellee was thereby terminated, and appellee had thereafter only a cause of action against him for the damages sustained by it because of the breach by him of the contract. It had the right to sue upon this cause of action at once, or at any time thereafter, within the limits of the statute of limitations, and recover all damages then or thereafter to be sustained, but had not the right to institute separate suits for each new item of damage resulting from its original cause of action; for "it is a rule of law that a man shall not be twice vexed for one and the same cause."

"The true criterion whether damages can be recovered for nonperformance of a whole contract, including damages not sustained when the action is brought and the suit is tried, is whether there has been such a breach as authorizes the plaintiff to treat it as entirely putting an end to the contract. If the breach is entire and total, the plaintiff may recover damages for an entire nonfulfillment; but if it is only partial and temporary, he can recover only such damages as he has already sustained, and must still accept performance of the residue of the contract if the other party will fulfill it. The question depends upon whether the damages are a new cause of action, or are only new damages resulting from the original cause of action. In

the former case a new action may and must be brought, while in the latter all the damages may and must be recovered in a single action." 8 R. C. L. 550.

See, also, 3 Elliott on Contracts, § 2141; Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.

It follows, from the foregoing views, that appellant's plea of res adjudicata was good; and, since the matters alleged therein appear from the record and are admitted by counsel for appellee to be true, the judgment of the court below will be reversed, and the cause dismissed.

Reversed and dismissed.

(114 Miss. 4)

DODWELL et al. v. RIEVES. (No. 17896.)

(Supreme Court of Mississippi, Division B. Dec. 23, 1916. On Suggestion of Error, Feb. 19, 1917.)

**1. BANKS AND BANKING** ⚡78—ASSIGNMENTS FOR BENEFIT OF CREDITORS—ACT OF DIRECTORS.

A general assignment for the benefit of creditors, made by the directors of a bank without having first obtained the consent of stockholders, was valid.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183.]

**2. BANKS AND BANKING** ⚡78—ASSIGNMENTS FOR BENEFIT OF CREDITORS—SCHEDULE OF CREDITORS—NECESSITY.

Where the directors of a bank made a general assignment for the benefit of creditors, the omission to file any schedule of creditors was not fatal to the assignment.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183.]

**3. BANKS AND BANKING** ⚡78—ASSIGNMENTS FOR BENEFIT OF CREDITORS—FILING SCHEDULE OF PROPERTY ASSIGNED—STATUTE.

In view of Code 1906, § 128, fixing the exclusive penalty for failure to file, with an assignment for creditors, schedules of assets and creditors, where a bank by its directors made a general assignment of all its property for the benefit of all its creditors, the assignment was good, though no schedule or list of the property assigned was annexed to the assignment filed.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183.]

**4. BANKS AND BANKING** ⚡78—ASSIGNMENTS FOR BENEFIT OF CREDITORS—PREFERENCE.

A general assignment for the benefit of all creditors by a bank through its board of directors, which provided for the payment of attorney's fees to a firm of lawyers, one of the members of the firm being a director of the bank, was not invalid as making a preference, the lawyer director declining to serve.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183.]

**5. BANKS AND BANKING** ⚡78—ASSIGNMENTS FOR BENEFIT OF CREDITORS—FAILURE TO SEAL—EQUITABLE TITLE.

A bank's general assignment for creditors to which the seal of the corporation was not affixed passed the equitable title in the bank's assets to the assignee.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183.]

**6. ACKNOWLEDGMENT** ⚡20(1) — ASSIGNMENTS FOR BENEFIT OF CREDITORS—COMPETENCY TO TAKE.

The clerk who took the acknowledgment of a bank's general assignment through its directors for the benefit of creditors was not incompetent to take such acknowledgment because he was a debtor of the bank.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 104, 105, 107, 111.]

**7. BANKS AND BANKING** ⚡78—ASSIGNMENTS FOR BENEFIT OF CREDITORS—FAILURE TO ACKNOWLEDGE—PERSONS AFFECTED.

Under Code 1906, § 2787, providing that all conveyances shall be void as to subsequent purchasers for value without notice, unless acknowledged, if a bank's assignment for the benefit of creditors had not been acknowledged, only innocent purchasers of the bank's assets for value without notice would be affected by the omission.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183.]

**8. BANKS AND BANKING** ⚡78—ASSIGNMENTS FOR BENEFIT OF CREDITORS—PREFERENCE—ATTORNEY'S FEES.

Provisions in a bank's general assignment for creditors for the allowance of attorney's fees by the chancery court for the services of attorneys in the preparation of the assignment, and for services and advice rendered the assignee, did not create a preference; the services being essential to the preservation of the estate and for the proper administration of the assignee's trust.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183.]

On Suggestion of Error.

**9. BANKS AND BANKING** ⚡78—ASSIGNMENTS FOR BENEFIT OF CREDITORS—DECLARATION OF VOID CHARACTER—EFFECT.

The assignee receiver for a bank will not cease to be assignee for the benefit of creditors, though the bank's assignment for that purpose be declared void by the court.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183.]

**10. BANKS AND BANKING** ⚡78—ASSIGNMENTS FOR BENEFIT OF CREDITORS—DUTY OF ASSIGNEE TO REPRESENT CREDITORS.

In a suit questioning the validity of a bank's assignment for the benefit of creditors, it is the duty of the assignee receiver to represent the interests of creditors; the statute making him their representative.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 177-183.]

Appeal from Chancery Court, Carroll County; Jas. F. McCool, Chancellor.

Suit by J. M. Dodwell and others against J. A. Rieves, receiver for the Merchants' & Farmers' Bank of Vaiden. The prayer of the petition that the court instruct defendant receiver to prosecute an appeal to the Supreme Court from a decree of the chancellor vacating an assignment for creditors made by the bank was denied, but the court granted an appeal to petitioners. Reversed and remanded.

On February 21, 1913, the Merchants' & Farmers' Bank of Vaiden, acting through its board of directors, made a general assignment, without preferences, for the benefit of all of its creditors, to one McDougal, as assignee. No schedule was filed with the as-

signment, nor was the seal of the bank affixed to the instrument.

The instrument provided that the assignee should take possession of all the property, and collect all the accounts, and out of the proceeds should pay all expenses of executing and carrying into effect the trust imposed, including a reasonable compensation to be allowed by the court for his services and for the services of attorneys in advising and preparing the assignment, and for such other services as they might render the assignee, and that the assignee should, out of the residue of the proceeds, pay the creditors ratably, etc. On the following day the assignee filed a petition in the chancery court praying the approval of the deed of assignment, and that all creditors of the bank be made parties to the proceeding, as required by law. The court approved his bond, and later, on the 11th of March, he executed another deed of assignment, containing the same provisions as the former, except that it purported to correct certain errors and defects in the first instrument, and on the same date another petition was filed with the court with similar provisions as those contained in the former petition. The assignee filed his schedule on March 5th.

On March 11th a cross-petition was filed by certain creditors of the bank, attacking the validity of the assignment upon the following grounds, to wit: (1) That said assignment was executed without any authority from the stockholders, and at a meeting hurriedly called, and the minutes of which are not dated and signed. (2) That said assignment was filed by the clerk of the chancery court, and was unaccompanied by any inventory or schedule. (3) That the name of the bank was not signed to said assignment, nor was the seal of the bank attached thereto. (4) That said assignment was acknowledged before J. C. Allen, clerk of the circuit court, and that two of the claims assigned were on notes against said Allen for small amounts, about \$43 each. (5) That said assignee never filed a petition required by section 120 of the Code of 1906, making the bank and all its creditors parties to the petition; that the so-called petition filed by said assignee does not name but one party as defendant thereto, and that is J. O. Ringgold. (6) That the assignment is a preferential one—that is, preferring a debt due to Hill & Coleman for attorneys' fees—and, further, that A. J. Coleman, one of the members of said law firm, was one of the directors who made the assignment, and was thereby as a director making a contract with himself as a member of said law firm, "whose claim was preferred."

The cross-petitioners further alleged that McDougal was a former director of the bank, and was an improper person to serve as assignee, and prayed for the removal and the

appointment of a receiver. The assignee and certain of the directors answered, alleging that the assignment was general and without preferences, and intended to convey all the property of the assignor; and the assignee further alleged that he had employed other attorneys in the place of Messrs. Hill and Coleman to advise him in the administration of the affairs of the bank.

The chancellor, upon a hearing in vacation, removed McDougal as assignee, and appointed J. A. Rieves, one of the petitioning creditors, as receiver, and subsequently in term time confirmed the appointment, and vacated and set aside the assignment. Subsequently appellants and others who were depositors and creditors of said bank filed a notice to the receiver, requesting him to prosecute an appeal to the Supreme Court from the decree of the chancellor vacating the assignment, which the receiver declined to do, and thereupon appellants filed a petition in the chancery court praying that the court instruct the receiver to prosecute such an appeal. The court denied the prayer, but granted an appeal to the appellants.

The sole question before the court is whether or not the assignment made by the bank is valid or invalid, and whether or not the court below was correct in entering a decree vacating and setting aside said assignment.

McLean & Carothers, of Grenada, and F. M. Glass and J. W. Conger, both of Vaiden, for appellants. E. F. Noel, of Lexington, for appellee.

COOK, P. J. Many of the contentions of appellee have been disposed of by the judgment heretofore rendered in this case overruling their motion to dismiss this appeal. We necessarily held in the disposal of that motion that appellants had an appealable interest, and that the decree of the chancery court, from which this appeal was taken, is a final decree.

In the consideration of the merits, we will notice the main, if not the sole, question presented by the record—i. e., was the trial court right in holding that the general assignment made by the Merchants' & Farmers' Bank, of Vaiden, invalid?

[1] It appears that the directors of the bank executed the assignment without first having obtained the consent of the stockholders of the bank, and for this reason appellees insist that the assignment was invalid. We note the rule announced in *Corpus Juris*, vol. 7, p. 738, viz.:

"It is generally held that an assignment for the benefit of creditors may be made by the directors of a bank independently of any action of the stockholders."

There is much authority to support this statement of the law. *Blanton v. Kentucky Distilleries Co.* (C. C.) 120 Fed. 338; *Thompson on Corporations*, § 3989; *Descombes v. Wood*, 91 Mo. 196, 4 S. W. 82, 60 Am. Rep.

239; *Tripp v. Bank*, 41 Minn. 400, 43 N. W. 60; 10 Cyc. 1040.

The assignment in question is a general assignment of all of the assets of the bank for the benefit of all the creditors of the bank. This is simply directing that the assets be devoted to the payment of all the debts of the bank, without discrimination. The assets of the bank are set apart by law for the payment of its debts, and the assignment merely assigns its assets to prevent active creditors from gaining preferences over those less diligent.

[2, 3] It appears that no schedule of creditors was filed, and this omission appellees insist was fatal. We think not. No schedule or list of the property assigned was annexed to the assignment filed, and this appellees claim was a jurisdictional *sine qua non*. This contention might be sound if the assignment was partial, but when the assignment in the most comprehensive terms places all of its assets, of whatever kind or description, in the hands of the assignee to be converted into money for the benefit of all the creditors of the insolvent corporation, it is thus made plain that nothing is reserved. Upon this particular point the authorities seem to be in conflict, but we believe the authorities holding that an omission to file a schedule does not render the assignment void are sound, and our own court seems to be in line with this view of the law. *Kaufman v. Simon*, 80 Miss. 189, 31 South. 713. Besides, the statute (section 128, Code 1906) fixes the exclusive penalty for failure to file with the assignment schedules of assets and creditors. "A general assignment which does not comply with this section shall be void as to all preferences contained in it."

[4] Just here it may be well to note that the assignment was attacked because it provided for the payment of attorney's fees to a firm of lawyers—one of the members of the firm preferred, if it be a preference, being a director of the bank. The statute, it is contended, invalidates this preference. The lawyer named declined to serve.

[5] Referring to the objection that the seal of the corporation was not affixed to the assignment, the answer seems to be that the unsealed assignment passed "the equitable title, which equity will protect." *Hines v. Imperial Stores Co.*, 101 Miss. 802, 58 South. 650; *Southern Plan. Co. v. Kennedy Heading Co.*, 104 Miss. 131, 61 South. 166. Besides, we gather that the seal was affixed to the assignment when revised.

[6] J. C. Allen, the clerk who took the acknowledgment of the assignment, was a debtor of the bank, and for this reason it is contended that the acknowledgment was void, and the record, or filing of the instrument did not afford notice. Appellees seemed to have discovered that the assignment was made and have rather an intimate acquaintance with its contents, and even were this not so, we do not believe that the clerk, a

debtor of the bank was incompetent to take the acknowledgment.

[7] If the assignment had not been acknowledged at all, only innocent purchasers for value without notice would be affected by this omission, and appellees do not fall within that class. See section 2787, Code 1906; *Woods v. Garnett*, 72 Miss. 78, 16 South. 390; *Rosenthal v. Green*, 37 Mo. App. 272.

[8] Reverting to the provisions in the assignment providing for the allowance of attorney's fees by the chancery court for the services of the attorneys in the preparation of the assignment and for services and advice rendered the assignee, we wish to say that, in our opinion, this is not a preference at all. All of this was essential to the preservation of the estate for the benefit of all creditors and for the proper administration of the trust imposed upon the assignee. *Memphis Grocery Co. et al. v. Leach et al.*, 71 Miss. 964, 15 South. 113.

The energy and diligence displayed by the attorneys for appellees in the prosecution of their clients' claims has made it necessary to consider this record with minute care, and while some of the numerous points made by counsel may not be specifically mentioned in this opinion, they may be assured that all have been considered and overruled. We see no reason why the assignment should be set aside, but every reason demands that the chancery court should proceed to administer this estate and distribute the net assets, ratably, among the creditors of the defunct bank.

Reversed and remanded.

#### On Suggestion of Error.

This is the third time that the issues involved in this appeal have been argued in this court. First, the point made now that the complainants in the cross-bill are not parties to this appeal was made and ably presented on the motion to dismiss the appeal. The motion to dismiss was overruled. The same point was urged on the merits, and pressed with renewed ardor, and was again overruled. On this suggestion of error counsel return to the charge with unabated dash and energy. We confess that we again take up this point without undue relish.

[9, 10] We think that this court has made it quite plain that the assignee receiver is a trustee to administer his trust for all parties concerned; that he does not cease to be assignee, although the assignment be declared void by the court. *Shoe Co. v. Sykes*, 72 Miss. 390, 17 South. 171; *Metcalfe v. Bank et al.*, 89 Miss. 649, 41 South. 377. See, also, chapter 8, Code 1906. But it is claimed that cross-petitioners are not made parties to this appeal, and that their rights are not affected thereby. The facts are, they were parties, and their interests were alone considered.

Let us look at this contention for a moment. It appears that the same attorney



who filed the cross-petition in the chancery court is the attorney who appeared here and represented cross-petitioners at every step taken in this case. True, he appears, in form at least, for the assignee receiver, but his entire service has been given to cross-petitioners. We say this because the nominal appellee can have no peculiar reason for guarding the rights of the appellees, unless he believes that it is his duty to represent their interests, and his attitude throughout the case has been in their interests, and properly so, we believe. The statute makes him their representative.

We might set aside all former orders and direct that formal notice be served on appellees to appear and contest this appeal. What would be the result should we adopt that course? Why it is quite evident that the same counsel who has all the time represented them would or should refile his briefs with an addenda to his representative title. They have been here, in fact if not in form, we are quite sure.

As before stated, the assignee receiver is the statutory representative of all persons interested in the administration of this estate, and it happens that his attitude has been hostile to appellants and unswervingly loyal to appellees. Appellees could not ask for another attorney; the receiver has already selected their nominee, and that he has been true to his trust we are ready to testify. We have a well-founded belief that cross-petitioners have been here all the time, not only in spirit, but also in material form. Cross-petitioners have chosen the receiver to represent them in this court, and he employed cross-petitioners' attorney to make sure that their interests were taken care of. The receiver was the nominal party; cross-petitioners were the real parties.

Overruled.

(114 Miss. 21)

CASE v. YAZOO & M. V. R. CO. (No. 18612.)  
(Supreme Court of Mississippi, Division A.  
April 9, 1917.)

1. CARRIERS  $\Leftrightarrow$  277(6)—EXCESSIVE DAMAGES  
—ALIGHTING AT WRONG STATION.

Where a railroad's female passenger was set down at the wrong place, and forced to walk between a quarter and a half mile to the station in the rain, verdict in her favor of \$750 was grossly excessive, and the trial court should have set it aside and awarded a new trial, unless a proper remittitur was entered.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1084.]

2. DAMAGES  $\Leftrightarrow$  228—POWER OF COURT TO REDUCE DAMAGES.

In an action against a railroad for damages from setting a passenger down at the wrong place and forcing her to walk some distance to the station, the trial judge was without power to reduce excessive damages awarded to such an amount as in his opinion was proper, and, with-

out plaintiff's consent, to enter judgment therefor; the proper procedure was to set the verdict aside and award new trial, unless proper remittitur was entered.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 576-579.]

Appeal from Circuit Court, Franklin County; R. E. Jackson, Judge.

Action by Mrs. Allie Leggett Case against the Yazoo & Mississippi Valley Railroad Company. From a reduced judgment for plaintiff, she appeals. Reversed and remanded.

Appellant was plaintiff in the court below, and brought an action against the appellee, claiming damages because of the alleged negligent acts of the servants of appellee in permitting her to get off of her train before it reached her station. It seems that the train upon which she was traveling ran over a torpedo and stopped about 2,000 feet before reaching the station which was her destination, and, according to her testimony, when the train stopped she went to the steps and asked the flagman if this was where she got off, and was advised that it was, and the flagman assisted her off. It was raining, and she was compelled to walk between a quarter and a half mile to the station. The flagman denies assisting her off, but says that he asked her if this was where she wanted to get off, and understood her to reply in the affirmative. The case was submitted to a jury, and a verdict returned for \$750. Whereupon the defendant moved the court to set aside the verdict because it was grossly excessive, and the court thereupon reduced the verdict of the jury to \$100, and entered judgment for that amount, from which the plaintiff appeals.

Whittington & McGehee, of Meadville, and Geo. Butler, of Jackson, for appellant. Mayes, Wells, May & Sanders, of Jackson, for appellee.

SMITH, C. J. [1] The verdict rendered by the jury is grossly excessive, and the court below should have set it aside and awarded a new trial unless a proper remittitur was entered.

[2] But the judge thereof was without power to reduce the damages awarded to such an amount as in his opinion was proper, and without the plaintiff's consent to enter a judgment therefor. The judgment of the court below will be reversed, and, entering here the judgment which should have been entered there, the verdict will be set aside, and the cause remanded for a new trial, unless a remittitur of \$650 is entered by appellant, in which event judgment will be entered here for her in the sum of \$100.

Reversed and remanded.

(114 Miss. 25)

**BOWERS v. SOUTHERN AUTOMATIC MUSIC CO. (No. 18892.)**(Supreme Court of Mississippi, Division B.  
March 19, 1917. Suggestion of Error  
Overruled April 2, 1917.)**1. SALES  $\Leftrightarrow$ 445(4) — ACTION — BREACH OF WARRANTY — RECOUPMENT — QUESTIONS FOR JURY.**

In action on notes given for a piano, where defendant filed plea in recoupment for breach of warranty of the instrument, and there was evidence that the piano did not meet the warranty, the issue should have been submitted to the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1306.]

**2. SALES  $\Leftrightarrow$ 288(2)—BREACH OF WARRANTY—WAIVER OF DAMAGES — ACCEPTANCE OF GOODS.**

Acceptance of a piano sold under warranty, but which did not meet the warranty, was not a waiver of the purchaser's claim for damages for the breach.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 818, 819.]

**3. COMPROMISE AND SETTLEMENT  $\Leftrightarrow$ 5(1)—EXECUTION OF AGREEMENT—ABORTIVE ATTEMPT.**

Where purchaser of piano traded in an old instrument at an agreed price and gave notes in addition, the new instrument being warranted in certain respects and being found totally unsatisfactory and not to meet the warranty, and the parties agreed that the seller should return the old instrument in as good condition as it was when given to the seller, and the buyer should return the new one with a sum of money, the condition of the old instrument being left to decision of disinterested party, who certified that the instrument was not in good condition, and the buyer did not pay the money or return the new piano, there was no compromise and settlement.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 10, 11, 14-16.]

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Action by the Southern Automatic Music Company against Houston D. Bowers. Peremptory instruction for plaintiff, and defendant appeals. Reversed and remanded.

This suit was begun by the appellee as plaintiff in the court below to recover upon 12 promissory notes, each being part of the purchase price of a Wurlitzer piano sold by appellee to appellant for use in a picture show. As part of the purchase price, appellant delivered to appellee an old piano owned by him at an agreed price of \$600 and gave his 12 notes for \$75 each, payable monthly. The appellant declined to pay any of the notes, and suit was brought and a writ of seizure granted to enforce the lien for the unpaid purchase price. The defendant pleaded a breach of warranty on the part of plaintiff, alleging that the plaintiff had represented that the piano was new and that it was in good condition and would furnish the kind of music which plaintiff knew defendant desired, and that it could be so regulated that it would make soft music when desired, when as a matter of fact these warranties were untrue, and that defendant had tendered the

piano back to the plaintiff and demanded of it that it make good its warranty. Defendant also pleaded damages by way of recoupment and issue was joined on both these pleas. Defendant also filed a plea of puis darrein continuance in which he avers that the parties had settled this suit by agreement, whereby plaintiff was to return to defendant at his place of business in Jackson, Miss., the old piano taken as part payment in as good condition as it was when delivered to plaintiff, and that one Freeland, the agent of the plaintiff, was to be the judge of the condition of the old piano, and that the defendant was to return to plaintiff the Wurlitzer piano and pay plaintiff \$100 and the costs of this suit, but that the plaintiff had not returned the old piano to the defendant in good condition, though the defendant stood ready at all times to carry out the terms of the compromise settlement which he pleaded in bar of this action. After all the testimony had been taken, there was a peremptory instruction for the plaintiff, and the defendant appeals.

Powell & Featherstone and Watkins & Watkins, all of Jackson, for appellant. Green & Greene, of Jackson, for appellee.

STEVENS, J. [1, 2] The issue presented by the plea of recoupment should have been submitted to the jury. There was evidence tending to prove that appellee warranted the Wurlitzer piano, purchased by appellant from the appellee, to be a first-class musical instrument; that it could be regulated to play either loud or soft music; that it would make music suitable for a theaterium or picture show; and that it would be satisfactory to Mr. Bowers as the proprietor and operator of such show. The testimony tended further to prove that the instrument was not a first-class piano; that it could not be regulated to play soft music; but, on the contrary, that appellee's agent had attempted to regulate it and had failed in the attempt; that, in the language of Mr. Bowers, it was a "groan box"; that it was not satisfactory to him as the operator of the moving picture show; and that the instrument did not come up to representations. The testimony was indefinite as to the difference in value of the instrument as it proved to be, and the piano that Mr. Bowers thought he was buying, or the one as represented; and the evidence was not altogether definite as to the exact amount of damage sustained by Mr. Bowers. There was, however, an affirmative plea interposed by the defendant, claiming damages for the breach of the warranty of the kind or quality of the article sold, and the proof justified a submission to the jury of the inquiry as to the exact amount of damages. The sufficiency of the plea of recoupment was not challenged. The acceptance of the new piano by Mr. Bowers, under all the circumstances, was

not a waiver of his claim for damages for the breach of warranty. *Stillwell Co. v. Bilozi Co.*, 78 Miss. 779, 29 South. 513; *Commission Co. v. Crook*, 87 Miss. 445, 40 South. 20, 1006; *Mobile Auto Co. v. Sturges*, 107 Miss. 848, 66 South. 205. In the instant case there was an express warranty about the quality of music the instrument would make, and about its adaptability to the use and purpose for which it was purchased. Appellee was fully advised of Mr. Bowers' needs, the exact place the instrument was to be installed, and the purpose for which it was bought.

[3] In our judgment, the effort to compromise proved abortive, and the proposition of settlement is no longer binding upon either party. The testimony shows that if appellee returned the old piano to Mr. Bowers, at his place of business, in as good condition as it was, the latter would accept it back and pay \$100 and the cost of court. There was no agreement that appellee was to repair the old instrument, and the question as to whether it was, or was not, in as good condition, was a fact to be decided by Mr. Freeland, and by him alone. The party selected to pass judgment upon the condition of the old piano unhesitatingly certified that it was not in good condition, and his statement was accepted by Mr. Bowers without protest. The proposition of settlement seems not to have been entertained further. The agreement was tentative and never executed. The undertaking of appellee was not to return the old piano absolutely in as good condition as it was when Bowers parted with the possession, but to return it, provided only in the judgment of Mr. Freeland it was in as good condition as before.

The judgment of the learned circuit court will be reversed, and the cause remanded.

(114 Miss. 110)

ILLINOIS CENT. R. CO. v. HAWKINS.  
(No. 18958.)

(Supreme Court of Mississippi, Division A.  
March 26, 1917.)

1. CARRIERS ⇐277(5)—PUNITIVE DAMAGES—  
WILLFUL DELAY IN TRANSPORTATION OF  
PASSENGER.

Where a railroad company willfully delays a train for 2½ hours to accommodate 50 school-girls, attending a concert, a passenger, who because of such delay fails to make connections with train going to her destination, being forced to spend night in depot hotel, is entitled to punitive damages.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1083.]

2. CARRIERS ⇐264 — TRANSPORTATION OF  
PASSENGER—"WILLFUL NEGLECT OF DUTY."

A railroad company, which knowingly and intentionally delays a passenger train 2½ hours to accommodate other persons intending to become passengers, in violation of rights of a passenger, is guilty of "willful neglect of duty."

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1037-1039.

For other definitions, see *Words and Phrases*, *Willful Neglect*.]

3. CARRIERS ⇐277(3)—DELAY IN TRANSPORTATION OF PASSENGERS—DAMAGES—MENTAL SUFFERING.

Where evidence in an action for delay in transportation of a passenger would justify infliction of punitive damages, recovery for mental pain and suffering shown by the evidence is proper.

Appeal from Circuit Court, Carroll County.

Action by Margaret M. Hawkins against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Gardner, McBea & Gardner, of Greenwood, for appellant. E. F. Noel, of Lexington, and J. W. Conger, of Vaiden, for appellee.

HOLDEN, J. Miss Margaret M. Hawkins, the plaintiff, a young lady 23 years of age, resident of Atlanta, Ga., brought suit in the circuit court, Second judicial district, of Carroll county, to recover \$2,990 damages alleged to have been sustained on account of the "wanton, willful, negligent, and reckless conduct" of appellant railroad company in failing to transport her from Vaiden to Holly Springs, Miss., on schedule time, on one of its local passenger trains, in May, 1915, and from a verdict and judgment for \$800, actual and punitive damages, in favor of Miss Hawkins, the railroad company appeals here.

The facts in the case appear to be that Miss Hawkins desired to go from Vaiden, by way of Holly Springs, to Atlanta, and she inquired through her uncle of the agent of appellant railroad at Vaiden about the train connections with the Frisco Railroad at Holly Springs, and was informed by the agent that she would make connection with the Frisco train at Holly Springs for Atlanta by traveling on one of appellant's local trains. She boarded appellant's passenger train at Vaiden at 4:35 p. m., with the expectation of reaching Holly Springs at 8:35, in accordance with the published schedule and the information given her by the agent, and would make connection there with the Frisco train going to Atlanta at 10:40 p. m. After she delivered her ticket, or mileage, to the conductor, and informed him of her desire and expectation to make the connection at Holly Springs for Atlanta, the train arrived at Oxford, where, by order of the superintendent of the railroad, it was detained for about 2 hours and 30 minutes for the purpose of waiting for, and receiving, a number of schoolgirls as passengers for Holly Springs. On account of this delay of 2 hours and 30 minutes at Oxford, the train did not arrive at Holly Springs until after the Frisco train had left for Atlanta. Appellee was compelled to remain in the depot hotel at Holly Springs during the night, and departed for Atlanta at 9:35 a. m. next day. She complains that she had to pay her hotel bill, and spent a sleepless and troubled night, suffering much nervousness, and subsequently had

a week's illness after arriving at Atlanta. She claims that she suffered greatly in body and mind in having to stay at the hotel alone, as she was not accustomed to traveling alone, and that her situation was uncomfortable and fearful to her, and resulted in much mental suffering, accompanied with subsequent illness.

It appears that this lady had traveled a great deal, with a companion, in the United States, Canada, and Europe. The record further shows that the conductor of the train and the appellant's agent at Holly Springs knew that the schedule of the Frisco Railroad had been changed, so that the train left Holly Springs at an earlier time than previously. The superintendent did not know of this change personally. When the train was being detained at Oxford, the appellee requested the conductor to carry her on to Holly Springs, so that she could make the connection for Atlanta, and he told her that he could do nothing, as the superintendent had ordered the delay of the train at Oxford. The testimony in the record shows that appellee received due courtesy, kind treatment, and a comfortable room at the hotel, and that no employé of the appellant was guilty of any abuse, insult, or oppression, but, on the other hand, they were all courteous, and guilty of no oppressive or offensive conduct toward her.

[1] The only serious question presented in this appeal is whether the facts here justify the infliction of punitive damages. Of course, if there was no willful wrong or gross negligence on the part of the appellant railroad company, then punitive damages were not recoverable, and it would follow that no recovery could be had for the mental pain and suffering claimed by the appellee. But, on the other hand, if the appellant, through its servants, was guilty of willfulness or wantonness in delaying the train 2 hours and 30 minutes at Oxford, causing the appellee to suffer damages, resulting from the delay, then there was no error of the lower court in permitting the recovery of punitive damages in this case.

It seems that there were about 50 school-girls at Oxford, attending a concert, who wanted to go to Holly Springs on the train upon which appellee was traveling, and they asked the railroad superintendent as an accommodation to them to hold the train at Oxford until the concert, which they were attending, was over. The desire of the superintendent to accommodate these young lady passengers, no doubt, prompted him to order this train held at Oxford for them until after the concert, so that they might board it and return to Holly Springs. He was under no duty or obligation whatever to do this, but he was under contractual obligation and duty to the appellee to perform his contract of transporting her to her destination without unnecessary and unreasonable delay.

The concert seems to have lasted 2 hours and 30 minutes, because the train was held for that length of time at Oxford for the young ladies, who boarded it and rode thereon to Holly Springs. But, in the meantime, here was another young lady passenger upon that train, who had paid appellant for her transportation to Holly Springs, and she expected, and had a right to expect, when she boarded the train at Valden, that she would be transported without unreasonable delay to her point of destination. And when the train was stopped at Oxford, and she learned that it was to be detained there for some length of time, she then complained to the conductor, and to the agent there, protesting against the delay, and notified them that she desired to make the connection at Holly Springs with the Frisco Railroad for Atlanta; but, notwithstanding this appeal by her to the conductor and the agent of the appellant company, the train was willfully and intentionally delayed at Oxford for 2 hours and 30 minutes, causing her the delay over night at Holly Springs, which resulted in the injuries complained of.

[2] It is clear to us that the appellant railroad company was guilty of willful wrong, in this: That it knowingly and intentionally delayed the train at Oxford 2 hours and 30 minutes, when it was under contract, and public duty, to the appellee to transport her from Valden to Holly Springs on reasonable schedule time. This conduct amounts to willful neglect of duty. *Vicksburg Co. v. Marlett*, 78 Miss. 872, 29 South. 62.

[3] It is true that all of the agents and servants of the appellant railroad company were courteous toward the appellee, but the willfulness which warrants the infliction of punitive damages in this case consists of the treatment she received by being intentionally and willfully delayed at Oxford. *Yazoo, etc., R. Co. v. Hardie*, 100 Miss. 148, 55 South. 42, 967, 34 L. R. A. (N. S.) 740, 742, Ann. Cas. 1914A, 323. A common carrier cannot willfully disregard the rights of a passenger, in order to accommodate other persons intending to become passengers by delaying a passenger train the unreasonable time of 2 hours and 30 minutes. 4 R. C. L. 1068, 1069. And even though the motive of the railroad superintendent was good, still the duty he owed appellee was before him, and he knowingly and intentionally violated it, and must suffer punishment in damages for the result. The case being one that justifies the infliction of exemplary damages, recovery for mental pain and suffering, shown by the evidence, was proper. *Heirn v. McCaughan*, 32 Miss. 17, 66 Am. Dec. 588; *Yazoo, etc., R. Co. v. White*, 82 Miss. 120, 33 South. 970; *Burns v. Alabama, etc., R. Co.*, 93 Miss. 816, 47 South. 640; *Railroad Co. v. Mitchell*, 33 Miss. 179, 35 South. 339; *Railroad Co. v. Harper*, 83 Miss. 560, 35 South. 764; *Yazoo, etc., R. Co. v. Hardie*, 100 Miss. 132-148, 55

South. 42, 987, 34 L. R. A. (N. S.) 740, 742, Ann. Cas. 1914A, 323; Western Union v. Rogers, 68 Miss. 748, 9 South. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300; 4 R. C. L. 1003.

The judgment of the lower court is affirmed.

Affirmed.

(114 Miss. 46)

**KOHLER v. OLIVER.** (No. 18557.)

(Supreme Court of Mississippi, Division B. March 19, 1917.)

**COMPROMISE AND SETTLEMENT** §16(1)—**INCLUSION OF INDEBTEDNESS IN AGREEMENT.**

Where plaintiff and defendant executed a written agreement that plaintiff, in consideration of the agreement and sum to be paid by defendant according to a note and deed of trust, together with defendant, settled all differences between them, the contract, executed August 28, 1914, included defendant's debt on an account stated, made May 1, 1914, and on an open account, made on or before August 18, 1914, and it was not competent for plaintiff to testify contrary to the terms of the instrument in a suit on the accounts against defendant.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 54-58, 62-65.]

Appeal from Circuit Court, Lamar County; A. E. Weathersby, Judge.

Suit by W. F. Kohler against Jerry Oliver. From a judgment for defendant, plaintiff appeals. Affirmed.

Tally & Mayson, of Hattiesburg, for appellant.

**ETHRIDGE, J.** Kohler sued Oliver in the circuit court of Lamar county in an action of account stated of \$606.02, and on open account for \$40.30, it being alleged that the account stated was made on the 1st of May, 1914, and the open account was made on or before the 18th day of August, 1914, itemized account as to the open account, verified as required by statute, being filed as an exhibit to the declaration. The defendant pleaded the general issue and gave notice under the general issue that he would offer in evidence an agreement between the plaintiff and defendant entered into on the 28th day of August, 1914, in which the parties had compromised and settled all matters outstanding between them on that date, the agreement being made an exhibit to this notice under the general issue. In said agreement it is recited as follows:

"That whereas certain controversies and misunderstandings have heretofore arisen between said parties and it appearing evident that unless speedily settled and composed, said controversy may lead to unnecessary and unfruitful litigation, and being mutually desirous of adjusting and settling all differences now existing between said parties it is hereby agreed and understood that the said W. F. Kohler, in consideration of the premises and the sum of \$1,925 to be paid by said Jerry Oliver, according to the tenor of a certain promissory note," etc.—and a certain deed of trust, etc., in which deed of trust certain property is conveyed to Oliver by Kohler, then proceeds:

"It is further agreed and understood between the parties hereto that as a part of the consideration of this agreement, that all outstanding accounts or indebtedness between the parties and all moneys due or to become due on account of any lumber heretofore sold and shipped is by the terms hereof settled and discharged and such money is to be collected and become the property of the said Kohler absolutely."

The agreement further recites that if Oliver shall undertake to sell any of the property conveyed by the deed of trust he should procure the consent of Kohler and the money to be paid to Kohler. It then recites:

"It being the purpose and intention of the parties to this agreement to wind up and put behind them each and every item of controversy and misunderstanding that might in any wise lead to further disagreement and this agreement and the note and deed of trust above mentioned contain the entire terms and conditions of the settlement of all of said differences this day existing compromised and composed."

Plaintiff thereupon made motion for judgment, which was overruled. The plaintiff took the stand as a witness, and testified that the compromise agreement was fully carried out by Oliver, but contended that the contract did not embrace the items sued for in this suit. The defendants introduced the contract and rested. The court thereupon gave a peremptory instruction to find for the defendant, and the plaintiff appeals.

We are of the opinion that the contract of compromise, under its terms, included the amount sued for in this suit, and that it was not competent for the plaintiff to testify contrary to the terms of the instrument. Compromises are favored by law. The rule is stated in 5 R. C. L. 878, as follows:

"It is the duty of courts rather to encourage than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims; and the nature or extent of the rights of each should not be nicely scrutinized. Courts should, so far as they can do so legally and properly, support agreements which have for their object the amicable settlement of doubtful rights by parties; the consideration for such agreements is not only valuable, but highly meritorious. They are encouraged because they promote peace, and when there is no fraud, and the parties meet on equal terms and adjust their differences, the court will not overlook the compromise, but will hold the parties concluded by the settlement."

See, also, 8 Cyc. 518.

The judgment is therefore affirmed.

(114 Miss. 39)

**COOK v. PITTS.** (No. 19052.)

(Supreme Court of Mississippi, Division B. April 16, 1917.)

**PROCESS** §61—**TRANSITORY ACTION.**

Under Code 1906, § 707, providing that action, other than local, shall be commenced in the county in which defendant may be found, jurisdiction of the court does not attach where defendant is served with process out of the county in which action is brought.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. § 69.]

Appeal from Circuit Court, Sunflower County; F. E. Everett, Judge.

Action by W. T. Pitts against E. B. Cook. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

H. C. Mounger, of Indianola, and Watkins & Watkins, of Jackson, for appellant. Moody & Williams, of Indianola, for appellee.

ETHRIDGE, J. W. T. Pitts, a real estate dealer in Sunflower county, Miss., filed suit against E. B. Cook in the circuit court of Sunflower county for the sum of \$2,740.50, claimed as a commission due Pitts on the sale of real estate under a contract between Cook and Pitts, made an exhibit to the declaration, by which Cook engaged Pitts to sell certain real estate, and in which it was agreed that Pitts should sell the real estate for \$19,810 cash, the buyer to assume, in addition, a mortgage loan of \$35,000, and to have one year in which to make sale. The lands embraced 1,566 acres. In this contract, Cook reserved the right to sell the land himself, but it was provided that in event Cook should sell the land to a purchaser not procured by Pitts, the latter was to receive a commission of 5 per cent. of the \$54,810 consideration. This contract was signed on the 30th day of January, 1915, and on the 16th day of April, 1915, Cook conveyed the land in question to one Emma B. Due for a consideration of \$13,500 and the assumption by the buyer of the \$35,000 mortgage on the property.

The suit was filed on the 1st of September, 1915, and on the 22d day of September Cook filed an affidavit in the cause, setting forth that he was a citizen of the state of Mississippi, a resident and householder of Sharkey county; that he was sued out of the county of his residence. Motion was made for a change of venue to Sharkey county, Miss., the county of his residence. On the motion for a change of venue, Cook testified that he moved to Sharkey county on the 28th or 29th of January, 1915, and had been living there ever since; that he was a householder of Sharkey county, Miss., the head of a family, but on cross-examination stated that he did not know whether or not he was there temporarily or permanently. It appears from the evidence on the motion that Cook had sold the plantation upon which he was living in Sharkey county, but had reserved the use of it until the 1st of January, 1916, and was living in Sharkey county, and process was served on him in Sharkey county in this suit. It appears that Cook, in August, 1915, made an affidavit in which he stated that he was a citizen of the state of Mississippi for more than two years last past, had been a resident of the Indianola precinct, Sunflower county, for more than one year, and that he was a white Democrat and entitled to vote in the state primary election. On this proof the motion for a change of venue was overruled. Thereupon the defendant filed a demurrer to the declaration, in which he challenged the sufficiency of the declaration on the ground that it did not show any consid-

eration, or that any act or thing was done by the plaintiff under the contract in question as a consideration for the contract. The demurrer was overruled, and the defendant applied for leave until the next term of court, or a later day of the then present term, in which to plead. The court overruled this motion, but allowed the defendant two or three hours in which to plead.

Defendant thereupon pleaded the general issue, and pleaded specially that there was no consideration for the contract sued on; that the plaintiff did not pay money or other valuable thing, or do any act under said contract as a part of said commission. Under this special plea issue was joined by consent.

Pitts was introduced, and testified that he advertised this property for sale in several places, and that he procured a party who would have purchased it but for the sale made by Cook. The defendant Cook offered no testimony on the merits of the case, and the court granted a peremptory instruction to find for the plaintiff for 5 per cent. on the sum of \$54,810; and from a judgment entered for said amount defendant appeals.

The question arises as to whether the case should be reversed because for the denial of the motion for a change of venue. We think it was error to deny the motion for a change of venue. Section 707 of the Code of 1906 reads as follows:

"Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant or any of them may be found, except where otherwise provided, and except actions of ejectment and actions of trespass on land, which shall be brought in the county where the land, or some part thereof, is situated; but if the land be in two or more counties, and the defendant reside in either of them, the action shall be brought in the county of his residence, and in such cases process may be issued against the defendant to any other county. If a citizen resident in this state shall be sued in any action, not local, out of the county of his household and residence, the venue shall be changed, on his application, to the county of his household and residence."

In *Campbell v. Triplett*, 74 Miss. 365, 20 South. 844, Judge Cooper held that where an attachment was sued out in Winston county, but which was not served on any property in that county, and where the defendants were served in another county, and none of the defendants were found in the county where the suit was filed, the court did not acquire jurisdiction. He says:

"The venue of civil actions of this class is in the county 'in which the defendants, or any of them, may be found,' and if no defendant is served with process in the county in which the suit is brought, the jurisdiction of the court does not attach. *Wolley v. Bowie*, 41 Miss. 553; *Pate v. Taylor*, 66 Miss. 97 [5 South. 515]."

See, also, *Spain v. Winter*, Walk. 152; *McLeod v. Shelton & Minor*, 42 Miss. 517.

Judgment of the court below will be reversed, the motion for change of venue sustained, and the cause remanded to the circuit court of Sharkey county for further proceedings.

Reversed and remanded.

(114 Miss. 49)

YAZOO &amp; M. V. R. CO. v. COX. (No. 19007.)

(Supreme Court of Mississippi, Division A.  
April 23, 1917.)**DAMAGES**  $\Leftrightarrow$  18—**PROXIMATE AND REMOTE.**

Where half of a carload of staves piled on right of way for shipment are burned through negligence of railroad, damages on the theory of others to make up a carload not being obtainable, and a lot less than a carload being of no value, or less proportional value, are not proximate, but too remote.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 37.]

Appeal from Circuit Court, Wilkinson County.

Action by J. A. Cox against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed on condition of remittitur.

Mayes, Wells, May & Sanders, of Jackson, for appellant. Bramlette & Bramlette, of Woodville, for appellee.

**HOLDEN, J.** This suit is appealed from the circuit court of Wilkinson county, where the appellee, J. A. Cox, sued and obtained judgment for \$150, damages, against the appellant railroad company, on account of the alleged negligence of the railroad in setting fire to and destroying 1,500 staves located at a switch along the appellant's railway track in the town of Centerville.

It appears from the record here that the appellee, J. A. Cox, had stacked 1,500 staves on the railroad right of way for the purpose of selling or shipping them; that the staves were valued at from 6 cents to 15 cents apiece. The circumstantial proof, and the testimony of the section foreman, shows that the fire was set out by one of appellant's locomotives, and communicated to the staves, and 700 of the 1,500 were totally destroyed, and the remaining 800 staves were not damaged; the section foreman having saved the 800 by removing them away from the other 700 that were destroyed by fire.

The appellant railroad company assigns several grounds of error, but we do not think there is any merit in any of the contentions presented, except one; and that is, the appellant contends that no recovery can be had by the appellee except for the actual value of the 700 staves destroyed by fire. The plaintiff below testified that, while only 700 of the staves were actually destroyed by fire, the other 800 were rendered valueless, "because, being so much less than a carload, there was no market for the same." It appears that the appellee recovered a judgment on a basis of the loss of the entire 1,500 staves, at 10 cents each, and the appellant urges that this was wrong, and that the lower court erred in refusing instruction No. 4, which reads as follows:

"That if they find for the plaintiff, they can only find for the value of the 700 staves burned,

with 6 per cent. interest from date of burning of staves."

We think this assignment of error is well grounded and must reverse the judgment of the lower court. The law is well settled that the recovery of damages in this character of case is limited to the pecuniary compensation for the actual injuries sustained. *Culver v. Hill*, 68 Ala. 66, 44 Am. Rep. 134; *Brewster v. Van Liew*, 119 Ill. 554, 8 N. E. 842, 59 Am. Rep. 823; *Trustees Howard College v. Turner*, 71 Ala. 429, 46 Am. Rep. 326; *Priestly v. Railroad*, 26 Ill. 205, 79 Am. Dec. 369; *Railroad v. Implement Co.*, 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 6 L. R. A. (N. S.) 1058, 117 Am. St. Rep. 468, 9 Ann. Cas. 790; *Seely v. Alden*, 61 Pa. 302, 100 Am. Dec. 642, and note. The fact that the destruction of 700 of the 1,500 staves reduced the total number to less than a carload would not necessarily destroy the value of the remaining 800 staves. It is nowhere shown that 700 new staves could not have been supplied so as to bring the number up to 1,500, which seems to be a carload. Nor does it appear from this record that the plaintiff could not have realized upon the remaining 800 staves if loaded and shipped as a half carload, or otherwise disposed of. We think the damage here claimed for the 800 staves, which were not destroyed, was not the natural result flowing from the destruction of the 700 staves, but the connection, or basis of the claim, is too remote; and no recovery can be had against the railroad company for damages which were not proximately caused by it, and which would not reasonably and proximately follow from the act of negligence. Therefore we do not think that the appellant railroad is liable for damages for the 800 staves that were not destroyed by fire, but that a verdict for the reasonable value of the 700 staves destroyed by fire would have been correct and proper. *Culver v. Hill*, supra.

The jury by their verdict evidently valued the staves at 10 cents each; and, unless the appellee shall enter a remittitur here, reducing the judgment to \$70 and 6 per cent. interest from date of fire, the judgment of the lower court will be reversed, and the case remanded; if remittitur is entered, it will be affirmed.

Reversed, unless remittitur to \$70 is entered here.

(114 Miss. 115)

**DICKERSON v. WESTERN UNION TELEGRAPH CO. et al.** (No. 18695.)

(Supreme Court of Mississippi. In Banc.  
April 9, 1917.)

**1. APPEAL AND ERROR**  $\Leftrightarrow$  1195(1)—**LAW OF CASE.**

A decision on a former appeal which disposed of the defense of limitations becomes the law of the case, and is binding on retrial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4661.]

## 2. TELEGRAPHS AND TELEPHONES ¶55— CONTRACTS—STIPULATIONS.

A stipulation in a telegraph blank declared that the defendant company was made the agent of the sender without liability to forward any message over the lines of any other company when necessary to reach its destination. A message was delivered to defendant for transmission from a point in Mississippi to a point in Alabama. *Held*, that as the contract was governed by the laws of Mississippi and Alabama, and as defendant had a line reaching from the sending point to the point of destination, it was not entitled to deliver the message to a second telegraph company as agent for the sender, but was itself liable for nontransmission.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 23.]

## 3. TELEGRAPHS AND TELEPHONES ¶69— NONDELIVERY—DAMAGES—PUNITIVE DAM- AGES.

Under the law of both Mississippi and Alabama, the willful and wanton neglect of a telegraph company in sending and delivering a message authorizes punitive damages, but under the federal law, there can be no recovery of punitive damages, unless it is shown that the telegraph company either participated in the wrong of its servants, or ratified the same.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 71.]

## 4. COURTS ¶8—STATE LAWS—APPLICABIL- ITY.

A state cannot impose, by virtue of its statutes or decisions, liability which will extend beyond its territorial limits.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 18, 19.]

## 5. COMMERCE ¶8(7)—INTERSTATE MESSAGES —STATUTES—CONSTRUCTION.

Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379, as amended by Act June 18, 1910, c. 309, 36 Stat. 539, which provides that all charges made for service rendered or to be rendered in the transportation of passengers or property, and for the transmission of messages by telegraph, telephone, or cable, shall be just and reasonable, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful, provided that messages by telegraph, telephone, or cable subject to the provisions of the act may be classified into day, night, repeated, or unrepeat, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes, does not show that Congress has assumed control of interstate telephone and telegraph business to the extent that it has taken charge of common carriers by the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, para. 11, 12, 34 Stat. 595 [U.S. Comp. St. 1913, § 8592]), declaring that any common carrier, receiving property for transportation in one state to a point in another state, shall issue a bill of lading, and shall be liable to the holder thereof for any loss or damage caused by any carrier to which it may be delivered, and that the initial carrier may recover from the connecting carrier the amount of any loss occasioned by its negligence, the fact that Congress did not completely regulate the matter showing an intention to leave the state laws in force.

## 6. COMMERCE ¶8(7)—STATUTES—OPERATION.

As Congress, by the act to regulate commerce, as amended by Act 1910, has not prescribed complete regulations for interstate transmission of telegraphic messages, the state laws apply.

Stevens, J., dissenting.

Appeal from Circuit Court, Lee County; Claude Clayton, Judge.

Action by J. L. Dickerson against the Western Union Telegraph Company, and the Postal Telegraph Cable Company. From a judgment for defendants, plaintiff appeals. Affirmed as to the Western Union Telegraph Company, and reversed and remanded as to the last-named defendant.

See, also, 111 Miss. 264, 71 South. 385.

Plaintiff J. L. Dickerson filed suit in the circuit court of Lee county against the Western Union Telegraph Company and Postal Telegraph Company for damages for the failure to deliver a message from E. S. Dickerson to J. L. Dickerson, sent from Tupelo, Miss., to Guin, Ala., said telegram bearing date of November 30, 1912, and reading as follows:

"J. L. Dickerson, % Mrs. Kirk, Guin, Ala. John Guyton fell dead today Bury tomorrow "E. S. Dickerson."

It was alleged that John Guyton was an uncle of plaintiff; that his home was at Cotton Plant, in the state of Mississippi; that the relation between the plaintiff and his uncle was very close, and they were fond of each other; that E. S. Dickerson, brother of the plaintiff, being at Tupelo, and hearing of said death on said day, delivered the above telegram to the Postal Telegraph & Cable Company at Tupelo, Miss., about 5 o'clock p. m. on said day; that the said company knew of the close relation between plaintiff and deceased, Guyton, and knew that the plaintiff would desire to attend the funeral of the said Guyton, and that the plaintiff was temporarily located at Guin; that the Postal Telegraph & Cable Company accepted the telegram for delivery, and that the Postal Company had an office at both Tupelo, Miss., and Guin, Ala., and a connecting line between said points, but failed to send and deliver it as agreed and contracted; but, by some arrangement between the Postal Company and the Western Union Company, the nature of which is unknown to the plaintiff, the Postal Company turned over the message to the Western Union Company to be sent and delivered, paying the Western Union Company in advance the fee required for such transmission for delivery, and that the Western Union Company owed plaintiff the duty of sending said message and delivering it to him. It is alleged that through the gross, willful, and wanton negligence of the said companies, and each of them, the message was not sent and delivered to the plaintiff on the day it should have been delivered, but through willful, wanton, and gross neglect was not delivered until noon the following day, December 1, 1912, at which time it was too late for the plaintiff to attend the funeral and burial of the said uncle, which took place on that day, and that he could not possibly reach the place where his uncle lived and died; that thereby the plaintiff



was grieved and distressed in mind and body on account of being unable to attend the funeral and burial of his uncle. It is further alleged that if reasonable care had been used and exercised by the defendants, or either of them, the telegram could have been delivered, and that the failure to deliver same was the gross, wanton, and willful fault of defendants.

The Western Union Telegraph Company demurred to the declaration as against it, on the following grounds: First, the declaration is vague, uncertain, indefinite, and insufficient; second, it fails to state any cause of action whatever against the Western Union Telegraph Company; third, because if any one is liable to plaintiff, it is the Postal Telegraph & Cable Company and not the Western Union Telegraph Company; fourth, because the declaration shows that there was no contractual relation between the Western Union Telegraph Company and the plaintiff, and that the Western Union Telegraph Company is not liable to the plaintiff, but, if liable to any one, is liable to the Postal Telegraph & Cable Company. The court sustained the demurrer of the Western Union Telegraph Company and dismissed the suit as to it.

The Postal Telegraph & Cable Company filed three special pleas in defense of the suit: First, that the Postal Telegraph & Cable Company was a common carrier by telegraph, under the laws of the United States, and that the message upon which suit was based was an interstate message from Tupelo, Miss., to Guin, Ala.; that said message was written upon a blank of the defendant company; that, among other stipulations, in the said sending blank it was therein provided that defendant company was not liable for damages or statutory penalty in any case where the claim is not presented in writing within 60 days after the message is filed with the company for transmission; that this stipulation is a valid and binding one in the contract of transmission of the message upon which suit is based, and that no claim was presented in writing to the defendant within 60 days after the message was received. This plea was demurred to by the plaintiff on the following grounds: First, because the plea is insufficient at law and presents no defense; second, that the laws of the United States have no application to this cause of action; that the same is wholly governed and controlled by the laws of the state of Alabama and the state of Mississippi, where the transaction took place.

Defendant's second special plea alleged that the defendant was a common carrier under the laws of the United States; that the message in suit was an interstate message, and was written on a regular sending blank of defendant, and, among other stipulations, in said sending blank it was provided that the defendant company "is hereby made

agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination"; that this stipulation is valid and binding, and was part of the contract of transmission of the message on which suit is based; that the company made diligent effort to send said message over its own line to Guin, Ala., but was unable to do so by reason of the fact that the Guin office of the defendant company had then, at its regular time, closed for the day, and it therefore became necessary for the defendant company, in an earnest effort to get the message through to destination, to forward the same over the line of another company, which it did by delivering same to the Western Union Telegraph Company, paying the said company 25 cents for transmitting same, which was the same amount received by the defendant for sending the message.

This special plea was demurred to by the plaintiff on the following grounds: First, because said plea is insufficient in law, and presents no defense to the cause of action; second, because the laws of the United States have no application to this cause of action; that the same is wholly governed by the laws of Alabama and Mississippi, where the transaction took place; third, because the stipulation set out is against public policy and void, defendant not being permitted by law to contract against its own negligence.

Defendant's third special plea alleges that the defendant is a common carrier under the laws of the United States, and that the message upon which the suit is based was an interstate one; that it was written on a regular sending blank of the company, and, among other stipulations, in the sending blank it is therein provided that the defendant company shall not be liable for non-delivery of any unrepeatd message beyond the amount received for sending the same; that the stipulation was valid and binding as a part of the contract upon which the suit is based; that the message was an unrepeatd message; and that the amount received by the defendant company for sending same was 25 cents, which amount the defendant now tenders and pays into court in satisfaction of the suit.

This plea was demurred to by the plaintiff: First, because it is insufficient in law, and presents no defense to the cause of action; second, because the laws of the United States have no application to this cause of action, same being governed wholly by the laws of the states of Alabama and Mississippi, where the transaction took place; third, because, the stipulation set out in said plea in reference to unrepeatd messages is void as being against public policy and violative of the principle that the defendant cannot contract against its own negligence.

The demurrers to each and all of these pleas were presented together to the court

below, and judgment entered on each as an entirety. The demurrers being overruled in each case, plaintiff declining to plead further, the suit was dismissed, at his cost.

W. D. & J. R. Anderson, of Tupelo, for appellant. J. A. Sykes, of Aberdeen, and Flowers, Brown, Chambers & Cooper, of Jackson, for appellees.

ETHRIDGE, J. (after stating the facts as above). [1, 2] At the March term, 1916, a motion was made in this case by the Western Union Telegraph Company to dismiss as to it, claiming that any right of appeal of appellant was barred by the statute of limitations, which motion was overruled by the court in an opinion (111 Miss. 264, 71 South. 385), which is the law in so far as the limitation question involved in this appeal is concerned. The question as to whether or not the Western Union would be liable would depend on whether the clause in the special plea of the Postal Company, in which it alleged that it procured or contracted with the Western Union Company as the agent of appellant or plaintiff, is valid. As we reach the conclusion that this clause in the contract was not valid, on our theory that the local state laws of Mississippi and Alabama would govern this case, and not the laws of the United States, and that the clause would apply only where the Postal Company had no line from the sending office to the receiving office, we decide that the Western Union Company is not liable to the plaintiff, Dickerson, but its liability, if any, is to the Postal Company; and on this branch of the case the action of the lower court is affirmed.

[3] The questions of liability between appellant and the Postal Company presented by the record depend upon the question as to whether or not the act of Congress of June 18, 1910, has the effect of suspending and displacing state regulations and laws with reference to the telegraph business. It is argued by the appellant that the act of 1910 did not undertake to regulate the duties and liabilities between the telegraph companies and their patrons and customers, but that it only undertakes to deal with rates, and that Congress has not, therefore, taken full control of the telegraph business, and that consequently the laws of the state apply to transactions of the kind presented by this record. Under the law of both the states of Mississippi and Alabama the willful and wanton neglect of the telegraph company in sending and delivering a message authorizes punitive damages. It follows that the matters pleaded in defense of this suit do not present a defense, with the exception, possibly, of the 60 day time limit for filing a claim, but the record shows the suit was filed within the 60 days, and that question is not presented for decision here.

The appellant concedes that if the federal law prevails and applies to this case, there

can be no recovery of punitive damages unless it is shown that the master either participated in the wrong of the servant or afterwards ratified it, and, further, the appellant could not establish liability by showing that the master participated in the wrong, or ratified it, as construed by the federal courts, after it was done. The question must turn upon whether the state or federal law governs the liability in this case.

[4, 5] The act to regulate commerce was amended by the act of 1910 so as to make telegraph companies common carriers, and provides that:

"All charges made for \* \* \* service rendered or to be rendered in the transportation of passengers or property and for transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, that messages by telegraph, telephone, or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeatable, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages."

The contention of appellee is that by this provision Congress has taken charge of the telegraph and telephone business to the same extent that it has taken charge of common carriers of persons and property under the Carmack Amendment. The Carmack Amendment is as follows:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

It is not contended by the appellees in the argument here that this specific provision applies to telephone and telegraph companies, but that the provision of the statute above quoted, on common carriers, is, in effect, as broad and comprehensive as the Carmack Amendment, and that it has the necessary effect of the federal government having undertaken full control of this business, and that, as to interstate messages, state laws and decisions are inapplicable, but that the liability is entirely controlled by the federal laws and decisions. It seems to us that the

act of 1910 is no broader, when applied to telegraph and telephone companies, than the original act to regulate commerce prior to the Carmack Amendment was to the railroads, and that the same rules would apply to the telegraph business under the present statute as applied to the railroads under the statute prior to the Carmack Amendment. We are aware that the courts of several states, and some of the federal courts, have decided in accordance with the contention of appellee, and that this court, in the case of *Western Union Telegraph Co. v. Showers*, 73 South. 276, followed those decisions in holding that the act of Congress had superseded state laws and decisions. In the present case, these authorities have been reviewed and discussed in the arguments, and we have carefully examined them, and have reached the conclusion that these decisions have misconceived the effect of the act of 1910, and have misconstrued the effect and purport of the decision of the United States Supreme Court in *Western Union Telegraph Co. v. Brown*, 234 U. S. 542, 34 Sup. Ct. 955, 58 L. Ed. 1457, and *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. In *Western Union Co. v. Brown*, supra, the cause of action sued on was brought under a statute of the state of South Carolina (Civil Code of South Carolina, 1902, § 2223), which imposed liability for the failure to send and deliver telegrams. As construed by the Supreme Court of that state, it was held that the telegraph company was liable on a message sent from South Carolina to Washington, D. C., where the cause of action arose, because of the negligence of the telegraph company in failing to deliver promptly the telegram after its receipt in Washington. The federal Supreme Court in deciding this case says:

"Whatever variations of opinion and practice there may have been, it is established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground, but the measure, of the maximum recovery. \* \* \* The injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious; and when a state attempts in this manner to affect conduct outside its jurisdiction or the consequences of such conduct, and to infringe upon the power of the United States, it must fail. The principle would be illustrated by supposing a direct clash between the state and federal statutes; but it is the same whenever the state undertakes to go beyond its jurisdiction into territory where the United States has exclusive control."

The court then proceeds to say:

"What we have said is enough to dispose of the case. But the act also is objectionable in its aspect of an attempt to regulate commerce among the states. That is, as construed, it attempts to determine the conduct required of the telegraph company in transmitting a message from one state to another or to this district by determining the consequences of not pursuing

such conduct, and in that way encounters *Western U. T. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187, 1 Interst. Com. R. 306, a decision in no way qualified by *Western U. T. Co. v. Commercial Mill Co.*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815."

In other words, the Supreme Court merely held that a state cannot impose, by its statutes or decisions, liability that would extend to conduct beyond the territorial limits of the state. It will readily be seen that if each state could extend its statutes beyond its own borders and impress liability upon a person for acts done outside of its territorial jurisdiction, there would be the utmost confusion. But the federal Supreme Court, in the case quoted above, did not decide, and, we apprehend, will not decide, that a state cannot enforce the performance of duties within its borders even as to interstate transactions, until Congress shall have provided a rule of liability. In the note to the *Lawyers' Edition* report of this case, the learned editor of the report says:

"Had the default occurred in South Carolina, however, a different result must have been reached, under the doctrine of *Western U. T. Co. v. Crovo*, 220 U. S. 364, 31 Sup. Ct. 399, 55 L. Ed. 498, where a state statute, under which a penalty is incurred by a telegraph company which negligently fails to transmit within the state as promptly as practicable a message received at an office in the state for transmission to a person in another state, was held to be a valid exercise of the police power of the state, in the absence of any legislation by Congress on the subject. In *Ivy v. Western U. T. Co.* [(C. C.) 165 Fed. 371] supra, the action was based upon a failure to deliver a message sent to a point in Indiana from a place in Arkansas, in which latter state the suit was brought. The court applied the Arkansas mental anguish statute, and held that, as so applied, the statute, though incidentally affecting contracts for the transmission of interstate messages, was not an unconstitutional regulation of interstate commerce."

In *Western Union Telegraph Co. v. Crovo*, 220 U. S. 364, 31 Sup. Ct. 399, 55 L. Ed. 498, above referred to, the court, discussing the proposition of imposing penalties upon interstate messages by state laws, said:

"The only question for decision is whether a statute of the state of Virginia which imposes a penalty for the failure to transmit a dispatch received at an office of the company in the state for transmission to a person in another state is a valid exercise of the power of the state, the delay occurring in the state. That companies engaged in the telegraph business, whose lines extend from one state to another, are engaged in interstate commerce, and that messages passing from one state to another constitute such commerce, is indisputable. Such companies and such messages come, therefore, under the regulating power of Congress. It follows, then, that if this statute as applied in the state court is to be construed as a regulation of commerce between the states, it is in excess of the power of the state. \* \* \* No attempt is here made to enforce the provisions of the state statute beyond the limits of the state, and no other state could, by legislative enactment, affect in any degree the duty of the company in relation to the delivery of messages within the limits of the state of Georgia. No confusion, therefore, could be expected in carrying out within the limits of that state the provisions of the statute. It is true it provides a penalty for a violation of

its terms and permits a recovery of the amount thereof irrespective of the question whether any actual damages have been sustained by the individual who brings the suit; but that is only a matter in aid of the performance of the general duty owed by the company. It is not a regulation of commerce, but a provision which only incidentally affects it. \* \* \* 'While it is vitally important that commerce between the states should be unembarrassed by vexatious state regulations regarding it, yet, on the other hand, there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those who are engaged in interstate commerce. We think the statute in question is one of that class, and in the absence of any legislation by Congress the statute is a valid exercise of the power of the state over the subject.'

In the case of *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, which involved a question as to whether or not Congress had taken over full control of railroad transportation under the Carmack Amendment, the federal Supreme Court, in analyzing the act as applied to railroad companies contained in the Carmack Amendment above referred to, says:

"The significant and dominating features of that amendment are these:

"First. It affirmatively requires the initial carrier to issue 'a receipt or bill of lading therefor,' when it receives 'property for transportation from a point in one state to a point in another.'

"Second. Such initial carrier is made 'liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it.'

"Third. It is also made liable for any loss, damage, or injury to such property caused by 'any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass.'

"Fourth. It affirmatively declares that 'no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed.'

"Prior to that amendment the rule of carrier's liability, for an interstate shipment of property, as enforced in both federal and state courts, was either that of the general common law as declared by this court and enforced in the federal courts throughout the United States (*Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717), or that determined by the supposed public policy of a particular state (*Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268), or that prescribed by statute law of a particular state (*Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688). \* \* \*

"That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist. *Northern P. R. Co. v. Washington*, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. 237;

*Southern R. Co. v. Reid*, 222 U. S. 424, 32 Sup. Ct. 140, 56 L. Ed. 257; *Second Employers' Liability Cases*, *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44."

It will be seen that the Carmack Amendment radically changed the obligations, liabilities, and duties of a common carrier in transportation as existing prior to 1906, and as cited by the court in the above quotation.

On page 505 of 226 U. S., page 152 of 33 Sup. Ct., page 320 of 57 L. Ed. (44 L. R. A. [N. S.] 257), of the above case, the court says:

"That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist."

In the case of *Pennsylvania Railroad Co. v. Hughes*, referred to in the *Croninger Case*, supra, the court, discussing the right of a state to impose regulations under the federal act to regulate commerce as it then existed, on page 486 of 191 U. S., page 134 of 24 Sup. Ct., on page 271 of 48 L. Ed., used the following language:

"In *Grogan v. Adams Exp. Co.*, 114 Pa. 523, 7 Atl. 134, 60 Am. Rep. 360, the Supreme Court of Pennsylvania expressly declined to follow the rule laid down in *Hart v. Pennsylvania Railroad Company*, adhering to its own declared doctrine, denying the right of a common carrier to thus limit its liability for injuries resulting from negligence. The cases are numerous and conflicting, different rules prevailing in different states. The federal courts in cases of which they have jurisdiction will doubtless continue to follow the rule of the *Hart Case*, but the highest court of Pennsylvania may administer the common law according to its understanding and interpretation of it, being only amenable to review in the federal Supreme Court where some right, title, immunity, or privilege, the creation of the federal power, has been asserted and denied. *Bethell v. Demaret*, 10 Wall. 537, 19 L. Ed. 1007; *Delmas v. Merchants' Mut. Ins. Co.*, 14 Wall. 666, 20 L. Ed. 759; *New York L. Ins. Co. v. Hendren*, 92 U. S. 287, 23 L. Ed. 709; *United States v. Thompson*, 93 U. S. 536, 23 L. Ed. 982.

"In the Supreme Court of Pennsylvania a further assignment of error was made as follows: 'III The learned court below erred in entering judgment in conflict with the act of Congress of February 4, 1887, entitled "An act to regulate commerce." Section 1 of said act clearly provides that where the transportation is from one state to another, under a through bill of lading, its provisions shall be carried out, unless it be in conflict with a statute of the state in which it may be performed, or in conflict with the policy of the United States as laid down in the federal courts, and that, as the contract was valid in the place where made, and, as there is no statute in Pennsylvania prohibitory of an agreed valuation to establish a rate, and as it is consistent with the policy of the United States

as declared by the federal courts, the judgment should have been for the valuation mentioned in the contract.

"Of this assignment of error, Mr. Justice Potter, delivering the opinion of the Supreme Court of Pennsylvania, said: 'The third assignment of error suggests that the entry of judgment is in conflict with the Interstate Commerce Act of Congress. This seems to be an afterthought, as there is no indication in the record that this question was raised or considered in the court below. It is not apparent how the act can have any application to this case. It contains nothing bearing upon the validity of a contract limiting the liability of a railroad for loss or injury caused by negligence. The object of the act seems to be to secure continuous carriage and uniform rates, and to compel the furnishing of equal facilities. We cannot see that the entry of judgment in this case interferes in any way with the legitimate exercise of interstate commerce.'

"Upon the authority of *Missouri, K. & T. R. Co. v. Elliott*, 184 U. S. 533, 22 Sup. Ct. 446, 46 L. Ed. 674, it may be admitted that the question of the decision of the state court, being in contravention of the legislation of Congress to regulate interstate commerce, was sufficiently made, and the adverse decision to the party claiming the benefit of that act gives rise to the right of review here. In refusing to limit the recovery to the valuation agreed upon, did the state court deny to the company a right or privilege secured by the interstate commerce law? It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of the law relied upon we fail to find any such provision therein. The sections of the interstate commerce law relied upon by the learned counsel for plaintiff in error (24 Stat. at L. 379-82, c. 104, U. S. Comp. Stat. 1901, pp. 3154-3159; 25 Stat. at L. 855, c. 382, U. S. Comp. Stat. 1901, p. 8158) provide for equal facilities to shippers for the interchange of traffic; for nondiscrimination in freight rates; for keeping schedules of rates open to public inspection; for posting the same in public places, with certain particulars as to charges, rules, and regulations; for the publication of joint tariff rates for continuous transportation over one or more lines, to be made public when directed by the Interstate Commerce Commission; against advances in joint tariff rates except after 10 days' notice to the Commission; against reduction of joint tariff rates except after 3 days' like notice; making it unlawful for any party to a joint tariff to receive or demand a greater or less compensation for the transportation of property between points as to which a joint tariff is made different than is specified in the schedule filed with the commission; giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violation; making it unlawful to prevent continuous carriage, and providing that no break of bulk, stoppage, or interruption by the carrier, unless made in good faith for some necessary purpose, without intention to evade the act, shall prevent the carriage of freights from being treated as one continuous carriage from the place of shipment to the place of destination.

"While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations, and, until Congress shall legislate

upon it, is there any valid objection to the state enforcing its own regulations upon the subject, although it may, to this extent, indirectly affect interstate commerce contracts of carriage?

"It is well settled that the state may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic. \* \* \*

"The case of *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688, is, in our opinion, virtually decisive of the question made upon this branch of the case. In that case cattle were loaded at Rock Valley, Iowa, to be shipped to Chicago. The contract, as here, was for interstate transportation. An injury happened to the drover in charge of the cattle in Iowa, due to the negligence of the transporting company. The shipper had signed a contract providing: 'That the company shall in no event be liable to the owner or person in charge of said stock for any injury to his person in any amount exceeding the sum of \$500. The company averred and offered to prove that, in view of this limited liability, it had agreed to transport the cattle at a reduced rate. The Statute of Iowa provided: 'No contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into.' Iowa Code of 1873, § 1303. The trial court charged that the limitation contained in the contract was void, and a verdict of \$1,000 damages was returned. A judgment on the verdict was affirmed in the Supreme Court of Iowa. In delivering the opinion of this court, Mr. Justice Gray said (169 U. S. p. 137 [18 Sup. Ct. 291, 42 L. Ed. 688]): 'A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable, according to the law of the state, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, the state has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits. \* \* \* The statute now in question, so far as it concerns liability for injuries happening within the state of Iowa, which is the only matter presented for decision in this case, clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares, or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty, resting upon them by virtue of their employment

as common carriers, to use the utmost care and diligence in the transportation of passengers and goods."

[8] Reverting to the act of 1910, set out above, what statute of the United States regulates liabilities, rights, and duties between the telegraph company and its patrons? It is elementary that there is no federal common law, and that the powers of the federal government are delegated ones, and it must, by statute, prescribe the rules and regulations of a subject committed to its care. *United States v. Hudson*, 7 Cranch, 32, 3 L. Ed. 259; *Hughes' Federal Jurisdiction and Procedure*, pp. 5, 6, and 22; *Wheaton v. Peters*, 8 Pet. 591, 8 L. Ed. 1055; *Smith v. Alabama*, 124 U. S. 465 [8 Sup. Ct. 564] 31 L. Ed. 508. The federal government, in cases where Congress has not acted, enforces rights in matters brought before it within its jurisdiction according to the laws of the states, but does not, in all cases, follow the state courts' interpretations of the common law, but uses its own judgment and decides for itself what the common law is. In some of the decisions this would create confusion, unless we bear in mind that the federal government is a government of delegated powers, and that it has never, by statute, adopted the common law as it existed in England or in any particular jurisdiction. Inasmuch as each state is sovereign, and adopts the common law, modified by its local conditions and environment, it would seem that the state court ought to be best able to judge of the common law in matters coming before it or arising within its territory. Certainly the rights, duties, and obligations imposed by the act of 1910, whatever they may be, must be enforced according to the law of the state where the cause of action originated, as Congress has not provided specifically what are those duties and rights, nor provided how and in what courts they should be exercised and enforced.

The government of the United States and the governments of the several states, being independent and interdependent, neither of them having full governmental functions, and being composed, within the limits of a state, of the same citizens, it is of the utmost importance that rights be enforced; and, where the federal government has supreme power, but has not asserted it to its full extent, the state laws should supplement the federal law so as to secure to all citizens of the country some remedy for wrongs and some plan for the enforcement of rights. And until necessarily there is a conflict, courts should not construe the law so as to deprive a person of his rights of property or person in the enforcement of obligations due him. We think the sound rule is to hold that the telegraph and telephone business now stand practically on the same plane of liability and obligation as railroads stood prior to the Carmack Amendment.

We have examined the authorities which take the contrary view, including *Western Union Telegraph Co. v. Showers*, in this state, and reach the conclusion that they have announced the wrong rule, and until the federal Supreme Court, which has final authority in this matter, shall decide otherwise, we hold that the state law applies to the telegraph and telephone business, even though it incidentally may affect interstate commerce, and the *Showers* Case is hereby overruled.

The court below having reached the contrary conclusion, the judgment is reversed, and the cause remanded.

Reversed and remanded.

STEVENS, J., dissents.

SYKES, J., took no part.

(114 Miss. 57)

HOLMES BROS. v. McCALL. (No. 19048.)

(Supreme Court of Mississippi, Division A.  
April 9, 1917.)

1. BILLS AND NOTES §—63—"EXECUTION."

The "execution" of a note involves, not only the signing but the delivery of the note.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 95-106.

For other definitions, see *Words and Phrases*, First and Second Series, *Execution*.]

2. BILLS AND NOTES §—402—DELIVERY—EVIDENCE.

Delivery of a note is presumed prima facie from its introduction in evidence by plaintiff.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1649-1651.]

3. BILLS AND NOTES §—485—SIGNING NOTE—ADMISSION—BURDEN OF PROOF.

A special plea under oath, as required by Code 1906, § 1974, to put in issue signing of note, denying execution and delivery of note, but setting forth that signature was obtained by fraud, is in effect an admission of signing entitling plaintiff to rest his case on having introduced note in evidence; delivery being presumed from introduction.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1542-1554; *Pleading*, Cent. Dig. § 866.]

4. BILLS AND NOTES §—404 — AFFIRMATIVE DEFENSE—FRAUD.

That defendant's signature to a note sued on was obtained by fraud is an affirmative defense to be proven by defendant.

Appeal from Circuit Court, Sunflower County; Frank E. Everett, Judge.

Suit by Holmes Brothers against Neal McCall. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The special plea referred to in the opinion is as follows:

"Comes the defendant, Neal McCall, by his attorney, and for further plea in this behalf says that the plaintiff ought not to have and maintain his aforesaid action, because he says that he did not execute or deliver the note herein sued on, and that his signature was procured to said note by false and fraudulent representation then and there made to him at the time of procuring his signature to said note; that said false and fraudulent representations were made to him by and through an agent rep-

representing the plaintiff herein, Holmes Bros.; and that said false and fraudulent representations consisted in said agent of Holmes Bros., the plaintiff herein, representing to said defendant that his signature was being placed to said note sued on as a witness and not as a principal. And this the defendant is ready to verify. S. D. Neill, Attorney for defendant.

"State of Mississippi, County of Sunflower. Personally appeared before me, the undersigned clerk of the circuit court in and for the county and state aforesaid, Neal McCall, the defendant in the above-styled cause, who, being first duly sworn by me, states on oath that the matters and things contained in the above and foregoing plea are true and correct as therein stated. Neal McCall.

"Sworn to and subscribed before me, this the 5th day of October, 1915. J. R. Key, Circuit Clerk."

L. M. Holmes, of McComb City, for appellant. S. D. Neill, of Indianola, for appellee.

SMITH, C. J. This is a suit upon a promissory note, commenced by attachment in the court of a justice of the peace. In the court below the trial on the attachment issue resulted in favor of the defendant, he being awarded damages in the sum of \$81 for the wrongful suing out of the attachment. The cause then came on to be heard on the merits, and, treating the case as one originating in the circuit court, the defendant filed two pleas in bar: The general issue, and a special plea sworn to (which the reporter will set out in full). The plaintiff, thereupon introduced in evidence the note sued on and rested, whereupon, on motion of the defendant, this evidence was excluded, the jury were instructed to find for the defendant, and there was a verdict and judgment accordingly. The plaintiffs appeal and assign as error two rulings of the court below both of which were made in the progress of the trial on the merits, and one of which was the exclusion of the plaintiff's evidence.

Section 1974 of the Code of 1906 relieves the plaintiff, in suits founded upon any written instrument, from proving "the signature or execution thereof, unless the same be specially denied by a plea, verified by the oath of the party pleading the same."

[1-4] The execution of a promissory note is the signing and delivery thereof, both of which must be proven when the execution is denied under oath. The second element—that is, delivery—is presumed *prima facie* from the introduction of the note in evidence by the plaintiff. The defendant's special plea denied the execution and delivery of the note, but then proceeded to set forth that his signature thereto was obtained by fraudulent representations, so that, construing the plea as a whole and most strongly against the pleader, it denies the delivery but not the signing of the note, and sets forth that the defendant's signature thereto was obtained by fraud, an affirmative defense to be proven by the defendant.

The plaintiffs were not called upon, there-

fore, to prove the defendant's signature to the note; and the motion to exclude their evidence should have been overruled. This error in no wise affects the judgment on the attachment issue, which will remain in full force and effect, but the judgment on the merits will be reversed, and the cause remanded.

Reversed and remanded.

(114 Miss. 62)

DENSON v. THIGPEN. (No. 18786.)

(Supreme Court of Mississippi, Division A.  
March 26, 1917.)

APPEAL AND ERROR ~~657~~(1)—TRIAL ON RECORD—RE-ESTABLISHMENT OF LOST BOND—REMAND.

Where the judgment appealed from finds no support in the record because it does not appear that any forthcoming bond, on which defendant appellant is a surety, was in fact executed, the case having been remanded to the docket and continued so that plaintiff appellee might have a copy of the bond certified to the Supreme Court by the clerk of the court below, but counsel for plaintiff appellee has made no attempt to re-establish and have certified the bond alleged to have been lost since rendition of the judgment appealed from, counsel, in lieu of such a step, having made and filed an affidavit stating that he personally knows that such bond was executed and was before the trial court when judgment was rendered, the cause will be remanded to the docket and continued for re-establishment of the lost bond in the court below under Code 1906, § 8173, and its certification to the Supreme Court, since the Supreme Court must try the cause by the record, and not upon statements of counsel not sustained thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2830, 2831, 2833.]

Appeal from Circuit Court, Jasper County; W. H. Hughes, Judge.

Suit by S. F. Thigpen, against J. O. Denson. From the judgment, Denson appeals. Cause remanded to the docket and continued.

Byrd & Byrd, of Newton, for appellant. C. W. Thigpen, of Bay Springs, for appellee.

SMITH, C. J. This cause was remanded to the docket at the last term, and in the opinion then rendered we said:

"The judgment appealed from finds no support in the record; for the reason that it does not appear therefrom that any forthcoming bond, on which appellant is a surety, was in fact executed. Counsel for appellee, however, states in his brief that such a bond was in fact given, so that we will remand the cause to the docket and continue it to the first call of same by Division A in March, 1917, in order that appellee may, if he so desires, have a copy of the bond certified to this court by the clerk of the court below."

The cause now comes on again to be heard, without any attempt having been made by counsel for appellee to re-establish and have certified to us the bond alleged to have been lost since the rendition of the judgment appealed from. In lieu thereof counsel for appellee has made and filed an affidavit stating that he personally knows that such bond was executed and was before the court



when judgment was rendered. We must try the cause by the record, and not upon statements of counsel not sustained thereby. In event a bond was in fact executed and has been lost it can be re-established in the court below under section 3173 of the Code, and then certified to this court, so that, in order for this to be done, the cause will be remanded to the docket and continued.

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**FORD v. PARSONS.** (No. 19197.)

(Supreme Court of Mississippi. April 23, 1917.)

Appeal from Circuit Court, Pike County; J. B. Holden, Judge.

Action between J. C. Ford and W. A. Parsons. Judgment for the latter, and the former appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.

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**THOMAS & WIGGINS v. EASLEY et al.**  
(No. 19203.)

(Supreme Court of Mississippi. April 23, 1917.)

Appeal from Circuit Court, Webster County; J. A. Teat, Judge.

Action between Thomas & Wiggins and W. T. Easley and others. Judgment for the latter, and the former appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.

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**RAYBORN v. STATE.** (No. 19556.)

(Supreme Court of Mississippi. April 23, 1917.)

Appeal from Circuit Court, Walthall County; D. M. Miller, Judge.

Clarence Rayborn was convicted of arson, and he appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.

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**RIDDLE v. STATE.** (No. 19638.)

(Supreme Court of Mississippi. April 23, 1917.)

Appeal from Circuit Court, Prentiss County. Will Riddle was convicted of selling liquor, and he appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.

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**WARE v. STATE.** (No. 19641.)

(Supreme Court of Mississippi. April 23, 1917.)

Appeal from Circuit Court, Jones County. Harry Ware was convicted of selling liquor, and he appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.

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**GILCHRIST-FORDNEY CO. v. STRINGER.**  
(No. 19060.)

(Supreme Court of Mississippi. April 16, 1917.)

Appeal from Chancery Court, Jasper County; G. C. Tann, Chancellor.

Suit between Gilchrist-Fordney Company and Lucy Jane Stringer. Decree for the latter, and the former appeals. Affirmed.

C. W. Thigpen and J. L. Thompson, both of Bay Springs, and Deavours, Hilbun & Deavours, of Laurel, for appellant. Byrd & Byrd, of Newton, for appellee.

PER CURIAM. Affirmed.

**GILCHRIST-FORDNEY CO. v. STRINGER.**  
(No. 19043.)

(Supreme Court of Mississippi. April 16, 1917.)

Appeal from Chancery Court, Jasper County; G. C. Tann, Chancellor.

Suit between the Gilchrist-Fordney Company and Lucy Jane Stringer. Decree for the latter, and the former appeals. Affirmed.

C. W. Thigpen and J. L. Thompson, both of Bay Springs, and Deavours, Hilbun & Deavours, of Laurel, for appellant. Byrd & Byrd, of Newton, for appellee.

PER CURIAM. Affirmed.

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**EDWARDS v. HUBBARD.** (No. 19059.)

(Supreme Court of Mississippi. April 16, 1917.)

Appeal from Chancery Court, Hancock County.

Suit between Kate Edwards and Nellie Hubbard. Decree for the latter, and the former appeals. Affirmed.

E. J. Gex, of Bay St. Louis, for appellant. Gex & Waller, of Bay St. Louis, for appellee.

PER CURIAM. Affirmed.

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**BOURLAND BROS. v. AMERICAN ART  
CUSTOM TAILORS.** (No. 19163.)

(Supreme Court of Mississippi. April 16, 1917.)

Appeal from Circuit Court, Monroe County; Claude Clayton, Judge.

Action between Bourland Bros. and the American Art Custom Tailors. Judgment for the latter, and the former appeals. Affirmed.

Leftwich & Tubb, of Aberdeen, for appellee.

PER CURIAM. Affirmed.

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**WESTERN UNION TELEGRAPH CO. v.  
MBEK.** (No. 19113.)

(Supreme Court of Mississippi. April 16, 1917.)

Appeal from Circuit Court, Lowndes County; T. B. Carroll, Judge.

Action between the Western Union Telegraph Company and Seth A. Meek. Judgment for the latter, and the former appeals. Affirmed.

John Allen Sykes, of Aberdeen, for appellant. W. C. Meek, of Columbus, for appellee.

PER CURIAM. Affirmed.

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**NELSON v. AETNA LIFE INS. CO.**  
(No. 18994.)

(Supreme Court of Mississippi. April 16, 1917.)

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Action between Fred L. Nelson and the Aetna Life Insurance Company. Judgment for the latter, and the former appeals. Affirmed.

Mayes & Mayes, of Jackson, for appellant. Mayes, Wells, May & Sanders, of Jackson, for appellee.

PER CURIAM. Affirmed.



**SHELTON v. YOUNG et al.**

(Supreme Court of Mississippi. April 16, 1917.)

Appeal from Chancery Court, Union County; A. J. McIntyre, Chancellor.

Suit between Mrs. Nancy Shelton and J. T. Young, administrator, and others. Decree for the latter, and the former appeals. Affirmed.

C. Lee Crum, of New Albany, for appellant. S. R. Knox, of New Albany, for appellees.

PER CURIAM. Affirmed.

**SOUTHERN STATES COTTON CORP. et al. v. EVANS.** (No. 19075.)

(Supreme Court of Mississippi. April 16, 1917.)

Appeal from Chancery Court, Lowndes County; J. F. McCool, Chancellor.

Suit between the Southern States Cotton Corporation and others and W. J. Evans. Judgment for the latter, and the former appeal. Affirmed.

Wm. Baldwin, of Columbus, for appellants. T. C. Kimbrough, of West Point, for appellee.

PER CURIAM. Affirmed.

**GULF & S. I. R. CO. v. YELVINGTON.** (No. 19198.)

(Supreme Court of Mississippi. April 23, 1917.)

Appeal from Circuit Court, Smith County; R. T. Hilton, Special Judge.

Action between the Gulf &amp; Ship Island Railroad Company and Archie Yelvington. Judgment for the latter, and the former appeals. Appeal dismissed.

T. J. Wills, of Raleigh, and B. E. Eaton, of Gulfport, for appellant. Whitfield &amp; Whitfield, of Jackson, J. B. Guthrie, of Indianola, M. U. Mounger, of Collins, and Hirsh, Dent &amp; Landau, of Vicksburg, for appellee.

PER CURIAM. Appeal dismissed.

**CHICAGO LUMBER & COAL CO. v. COPLEY.** (No. 19073.)

(Supreme Court of Mississippi. April 16, 1917.)

Appeal from Chancery Court, Clarke County; Sam Whitman, Jr., Chancellor.

Suit between the Chicago Lumber &amp; Coal Company and F. B. Copley. Decree for the latter, and the former appeals. Affirmed.

R. M. Bourdeaux, of Meridian, for appellant. S. H. Terral, of Quitman, for appellee.

PER CURIAM. Affirmed.

**LEMLY v. BERBETT.** (No. 18482.)

(Supreme Court of Mississippi. April 16, 1917.)

Appeal from Chancery Court, Hinds County; O. B. Taylor, Chancellor.

Suit between Tempie Lemly and Moran Ber-

bett. Judgment for the latter, and the former appeals. Affirmed.

Eugene Palmer, of Jackson, for appellant. Watkins &amp; Watkins, of Jackson, for appellee.

PER CURIAM. Affirmed.

**HOLDER v. HENDRIX et al.** (No. 19195.)

(Supreme Court of Mississippi. April 23, 1917.)

Appeal from Chancery Court, Jones County; Sam Whitman, Jr., Chancellor.

Suit between Dora A. Holder and Delma and Beulah Hendrix. Decree for the latter, and the former appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.

**TURLEY v. STATE.** (No. 17014.)

(Supreme Court of Mississippi. April 16, 1917.)

Appeal from Circuit Court, Rankin County; C. L. Dobbs, Judge.

T. H. Turley was convicted of embezzlement, and he appeals. Appeal dismissed.

A. J. McLaurin, Jr., and Stingily &amp; McIntyre, all of Brandon, and W. J. Oroom and Hamilton &amp; Hamilton, all of Jackson, for appellant. Ross Collins, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed.

**AMERICAN NAT. INS. CO. v. JACKSON.** (No. 19062.)

(Supreme Court of Mississippi. April 16, 1917.)

Appeal from Circuit Court, Warren County; E. L. Brien, Judge.

Action between the American National Insurance Company and Bessie Jackson. Judgment for the latter, and the former appeals. Affirmed.

N. Vick Robbins, of Vicksburg, for appellant. Anderson, Voller &amp; Kelly, of Vicksburg, for appellee.

PER CURIAM. Affirmed.

**NEW ORLEANS & N. E. R. CO. v. GRANT.** (No. 19051.)

(Supreme Court of Mississippi. April 16, 1917.)

Appeal from Circuit Court, Lauderdale County; W. W. Venable, Judge.

Action between the New Orleans &amp; North-eastern Railroad Company and Sam Grant, by next friend. Judgment for the latter, and the former appeals. Affirmed.

A. S. Bozeman and Ben F. Cameron, Jr., both of Meridian, and R. H. &amp; J. H. Thompson and Fulton Thompson, all of Jackson, for appellant. Fewell &amp; Cameron, of Meridian, for appellee.

PER CURIAM. Affirmed.

**VICKSBURG WATERWORKS CO. v. YAZOO & M. V. R. CO.** (No. 19057.)  
(Supreme Court of Mississippi. April 16, 1917.)

Appeal from Circuit Court, Warren County; B. L. Brien, Judge.

Action between the Vicksburg Waterworks Company and the Yazoo & Mississippi Valley Railroad Company. Judgment for the latter, and the former appeals. Affirmed.

Bryson & McCabe, of Vicksburg, for appellant. Mayes, Wells, May & Sanders and Mayes & Mayes, all of Jackson, for appellee.

**PER CURIAM.** Affirmed.

**JELKS v. STATE.** (No. 19650.)  
(Supreme Court of Mississippi. April 23, 1917.)

Appeal from Circuit Court, Lawrence County. Bill Jelks was convicted of selling liquor, and he appeals. Appeal dismissed.

**PER CURIAM.** Appeal dismissed.

**BLACK v. STATE.** (No. 19639.)  
(Supreme Court of Mississippi. April 23, 1917.)

Appeal from Circuit Court, Jones County. Sam Black, alias Will Ward, was convicted of grand larceny, and he appeals. Appeal dismissed.

**PER CURIAM.** Appeal dismissed.

(141 La. 131)

No. 20868.

**MEYERS et al. v. FUSILIER et al.**  
(Supreme Court of Louisiana. March 12, 1917.)

(*Syllabus by the Court.*)

**1. LIBEL AND SLANDER §=100(8)—PETITION—VARIANCE.**

In a civil suit based on slander, there must not be a variance between the proof and the words alleged in the petition; but it is sufficient that the proof of publication is substantially the language charged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 262-272.]

**2. LIBEL AND SLANDER §=121(2)—DAMAGES—AMOUNT.**

The injury inflicted by a slander may not be reasonably estimated in dollars; but a judgment will not be rendered greater in amount than the slanderer can perhaps bear.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 354.]

Appeal from Sixteenth Judicial District Court, Parish of Evangeline; B. H. Pavy, Judge.

Suit by Mrs. T. A. Meyers and others against Mrs. J. D. Fusilier and others. Judgment for plaintiffs for \$250, and defendants appeal, and plaintiffs, answering, ask for an increase of the judgment. Affirmed.

Dubulsson & Robertson, of Opelousas, for appellants. Morton H. Thompson, of Opelousas, and Garland & Garland, of Ville Platte, for appellees.

**SOMMERVILLE, J.** Plaintiff claims \$10,000 in damages from defendant for an alleged slander which is vile and unnecessary to be produced here.

Defendant excepted on the ground that the petition did not set forth the exact words of the alleged slander. Plaintiff amended her petition, and set out the exact words, without waiting for a trial of the exception. The defect in the original petition was thus cured. The case was tried without a jury; and there was judgment for plaintiff for \$250. Defendant appealed; and plaintiff has answered, and asked for an increase of the judgment.

[1] Defendant argues that there was a variance between the alleged words of the slander and the proof. But the variance is so slight in the words of the slander as alleged and the words of the witnesses on the trial of the case that it cannot be held to be a variance. The words have been strictly proven. Defendant says in her brief that the two witnesses for plaintiff who testified to the slander by defendant "testified that the slander was published substantially as alleged." That was all that was necessary.

The trial judge was of the opinion that plaintiff had proved her case by a preponderance of evidence; and his finding is concurred in.

Two witnesses swore positively to the utterance of the slander by defendant, and their testimony was not impeached. Defendant denied the slander; and her very young sister-in-law, who was present only a part of the time when the two witnesses and defendant were together, says that she did not hear the language attributed to her older sister-in-law. A male witness testified that he, too, was present most of the time when the three women were together, and that he did not hear the words used by defendant. But the affirmative testimony is very positive and clear that the slander alleged was uttered by defendant.

[2] Plaintiff's prayer for an amendment of the judgment will not be granted. The trial judge correctly says in his reasons for judgment:

"It would be impossible to fix upon any sum of money which would altogether make good the injury which has been inflicted by defendant upon plaintiff. Upon the other hand, a favorable judgment in the case is a vindication of the one and a rebuke to the other litigant; and I shall not add a penalty in money greater than the defendant can perhaps bear. There is no testimony that the defendant owns anything."

Affirmed.

(141 La. 133)

No. 21020.

GOVERNALE v. INTERSTATE FIRE INS.  
CO. OF BIRMINGHAM, ALA.(Supreme Court of Louisiana. March 12, 1917.  
Rehearing Denied April 16, 1917.)*(Syllabus by the Court.)*

**INSURANCE**  $\Rightarrow$  335(3)—**POLICY—INVALIDATION.**  
The removal by the insured of a considerable portion of the stock of merchandise covered by the policy of fire insurance, to another place of business, conducted by him, and his failure to have the transaction entered in due course on his books of account, will render the policy null and void.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 853.]

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Action by Frank Governale against the Interstate Fire Insurance Company of Birmingham, Ala. From a judgment for defendant, plaintiff appeals. Affirmed.

W. S. Lewis and Geo. J. Gulotta, both of New Orleans, for appellant. John C. Hollingsworth and Joseph Killeen, both of New Orleans, for appellee.

LAND, J. Plaintiff sued the defendant on a policy of fire insurance of date May 15, 1912, to recover the sum of \$3,400, with the statutory penalty of 12 per cent., and a reasonable attorney fee, for alleged loss sustained by reason of the total destruction by fire, on August 18, 1912, of his certain stock of merchandise, furniture, and fixtures contained in the premises, No. 1782 Dorgenois street, city of New Orleans.

The special defenses set up by the defendant may be briefly stated as follows:

"(1) That the hazard was increased by the fact that there was contained in the premises, turpentine, kerosene and several 'set-ups,' the latter being composed of paper, excelsior, and cotton wadding saturated with kerosene, and highly inflammable. That the insured had complete control of the premises, and the presence of this inflammable material thereon, constituted an increase of the hazard within the control and knowledge of the insured.

"(2) That the insured was guilty of fraud and false swearing in grossly exaggerating his loss in the proofs furnished to the defendant.

"(3) That the insured violated the iron-safe clause of the contract of insurance by his failure to keep a set of books which would be a complete and correct record of the business transacted by him on the premises described in the policy."

The cause was tried on its merits, and judgment was rendered in favor of the defendant. Plaintiff has appealed.

We have no means of knowing whether the judge below sustained all three or only one of the special defenses set up by the defendant company.

The plaintiff could not read or write. He had learned to sign his name mechanically.

He could make figures, and add simple sums.

Plaintiff employed a bookkeeper who opened his books, and came to his store about once a week to make entries in them. The bookkeeper testified that he made entries in the cashbook from slips, which the plaintiff left in the safe, and that after making the entries he destroyed the slips.

Plaintiff could not write, and therefore could not keep a record of his sales and other business transactions. We assume that the plaintiff made figures on each slip representing the total of each day's sales.

But plaintiff failed to have made, and preserved, original entries showing the sales of merchandise made during each day. In the absence of such entries it is impossible to check and probe the entries in the cashbook of total sales for each day.

Such entries as "Mdse. Cash Sale \$45.05" convey no information as to the kind, quantity, or price of the merchandise sold.

But a more vital objection is that two considerable invoices of goods were taken by plaintiff out of the insured stock and carried to another bar and grocery store owned by the plaintiff in the same section of the city.

This transaction was never entered on the plaintiff's books, but the omission was later attempted to be supplied by pasting two slips in the ledger. The bookkeeper testified that he knew nothing of this pasting. Plaintiff testified that one of these slips was copied by the bookkeeper from an old paper after the fire, and that he does not know whether the other slip was written before or after the fire.

The two slips total \$418.90 of merchandise admittedly taken and removed from the insured stock to the other grocery store of the plaintiff, while the deputy fire marshal and his appraiser, after the fire, found merchandise to the amount of \$597.70 in the latter store, which had been removed from the insured stock on Dorgenois street.

The second paragraph of the iron-safe clause of the policy sued on reads:

"The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory, as provided for in first section of this clause and during the continuance of this policy."

The removal of a considerable portion of the insured stock as above stated had the same effect as a sale or shipment; and, as the transaction was not in due course entered on the books of the plaintiff, the policy, as stipulated, became null and void.

This conclusion renders it unnecessary to consider the other special defenses urged by the defendant.

Judgment affirmed.

SOMMERVILLE, J., concurs.

441 La. 136)

No. 22283.

## STATE v. CARRIERE.

(Supreme Court of Louisiana. Feb. 12, 1917.  
Rehearing Denied March 12, 1917.)

(Syllabus by the Court.)

1. JURY  $\S$ 103(14)—COMPETENCY OF JURORS.

A juror is competent to serve who, on his voir dire, says that he has read and heard of the homicide, and that he has formed an opinion as to the guilt or innocence of the accused; if he is unprejudiced, and says, at the same time, that his opinion will yield to the evidence produced on the trial, and that he will find a verdict in accordance with that evidence and the law as given to him by the trial judge.

[Ed. Note.—For other cases, see Jury, Cent. Dig.  $\S$  473, 478.]

2. JURY  $\S$ 137(4)—PEREMPTORY CHALLENGE—TIME.

It is too late to peremptorily challenge a juror who had been accepted and sworn by both sides. If the jury is to be purged, it must be done in the proper way.

[Ed. Note.—For other cases, see Jury, Cent. Dig.  $\S$  623.]

3. CRIMINAL LAW  $\S$ 726—TRIAL—ARGUMENT OF COUNSEL.

Where counsel, in his argument, has pleaded for mercy for the defendant, and the district attorney, in answer to said appeal, says that the accused is not entitled to any more mercy than other criminals, or words to that effect, the language of the district attorney cannot be said to have injured the accused in any way.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  1681.]

4. HOMICIDE  $\S$ 158(1), 166(1)—EVIDENCE—THREATS.

Threats made by the accused against the deceased may be offered in evidence to show malice and motive.

[Ed. Note.—For other cases, see Homicide, Cent. Dig.  $\S$  293, 320.]

5. CRIMINAL LAW  $\S$ 854(9)—SEPARATION OF JURY.

A jury cannot be said to be separated when they are taken, in the custody of two deputy sheriffs, to a restaurant in the vicinity for the purpose of taking supper, when it is shown that they were placed at tables separate and apart from other customers in the restaurant, and that they have had no communication of any kind with any third person.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  2047.]

O'Neill, J., dissenting.

Appeal from Sixteenth Judicial District Court, Parish of St. Landry; B. H. Pavy, Judge.

Heilaire Carriere was convicted of murder, and appeals. Affirmed.

Perrin & Perrin, of Jena, and D. R. Rosenthal, of Lake Charles, for appellant. A. V. Coco, Atty. Gen., and R. Lee Garland, Dist. Atty., of Opelousas (L. Austin Fontenot, of Opelousas, and Vernon A. Coco, of Marks-ville, of counsel), for the State.

SOMMERVILLE, J. Defendant appeals from a verdict finding him guilty of the murder of Marion L. Swords, the sheriff of the

parish of St. Landry, and a judgment condemning him to death.

There are 13 bills of exceptions found in the record, and several unsigned bills.

The first bill has reference to a ruling of the court on the trial of a motion for a change of venue. The motion was subsequently abandoned.

The second bill was taken to a ruling of the court on defendant's objection to going to trial on the ground that:

"The jury commissioners of the parish of St. Landry had failed and neglected to prepare the tales jury box, or box of 100 tales jury men, in accordance with law by placing therein the names of one hundred men," etc.

The trial judge states that the objection was overruled "for the reason that the defendant has not established by any method that the list of tales jurors was not regularly drawn, or to show how said list in any manner is irregular." It appears from the record that 60 names were drawn from the box at one time, and subsequently 40 other names. It was therefore clear that the number of names in the box was 100 when the objection to going to trial was made.

[1] Bills Nos. 3, 4, 5, and 6 were taken to rulings declaring four jurors named to have been competent and qualified to sit on the jury. The record contains the examination of these several jurors, in part. It appears that they had answered that they had read or heard of the crime charged against defendant, and that they had formed opinions as to the guilt of the accused. They had answered counsel for the defendant that they would require defendant to prove his innocence. But, on examination by the judge, they testified that they did not understand the questions propounded by counsel for the defendant, and answered the following question by the court in the negative:

"Q. Mr. Cannon, if the court instructed you that the defendant is presumed to be innocent, and is not required to prove his innocence, but, on the contrary, that the state is required to prove his guilt beyond a reasonable doubt, then you would require him to prove himself innocent?"

And in answer to a further question by defendant's counsel, the juror stated:

"I didn't understand what you were saying. If I did (that I would require the accused party to prove his innocence before I would acquit him) I will take it back."

Juror Guldry answered to the same effect. He said that the opinion which he had formed would depend upon the evidence, and that it would yield to that evidence; his opinion was not fixed, and that, if the evidence produced upon the trial was different from what he had heard, his opinion would be changed.

Juror Dupre answered the same; that, while he had formed an opinion, it would yield to the evidence, and that he would go into the jury box and decide the case exclusively on the evidence given by the witnesses and the law as given by the court.

Juror Cormier testified that his opinion was fixed from what he had heard, but that it could be changed by the evidence. When asked:

"Q. Do you feel that, notwithstanding what you have heard or read about the case and the opinion that you have expressed, you could go into the jury box here and under your oath as a juror decide the case according to the law and the evidence?"

—and he answered that he could; and that his opinion "would yield to the evidence."

It is well settled that a citizen does not disqualify himself from jury service because he reads the newspaper accounts of the crimes committed in the community and forms his opinion with reference to the guilt or innocence of the accused parties; provided, that opinion will yield to the evidence produced on the trial of the cause, and that the prospective juror is not biased, and will decide the cause on the evidence adduced on the trial. It appears that 180 jurors were examined on their voir dire before the jury was selected in this case; and it will be assumed that no jury could have been selected in the parish if every inhabitant disqualified himself by having read of or talked over the murder of the sheriff of that parish. It will be assumed that no intelligent person in the parish had not read or heard of the occurrence, and that some kind of opinion had been formed by each one as to the guilt or innocence of the accused. But inclination and opinion on the part of the prospective juror should not disqualify him, when it is shown by the examination on his voir dire that he is not prejudiced, and that the opinion which he had formed is not fixed, and would yield to evidence introduced on the trial of the cause, and that he would be guided as to the law of the case by instructions from the trial judge. It would indeed be hard to find, we suppose, 12 jurors who had not read or heard of the murder of the sheriff of their parish; the intelligence of such would be of such a low order that they could hardly be expected to serve as competent jurors in any case. The rulings of the district judge were correct.

[2] The seventh bill of exceptions is taken to the ruling of the court in refusing to permit the defendant to peremptorily challenge a juror who had been accepted by both state and defendant and sworn, which juror was unnamed in the motion to challenge by counsel. It was too late to, peremptorily challenge the juror after he had been accepted and sworn. He might have been challenged by the defense before he had been accepted by him. Or, if defendant wished to purge the jury, he should have proceeded in a different manner, and the disqualification of the juror be shown in a legal way.

The eighth bill of exceptions was taken to confessions or admissions made by the defendant to the sheriff of Calcasieu parish, and were testified to by that sheriff as a witness. The ground of objection was that the

defendant had been shot on the day before, and that he was not in a physical condition to have made any binding statement, and that he was not responsible for any statement that he made at that time. The objection was overruled by the district judge for the reason that:

"In the opinion of the court the evidence shows that the statement testified to by sheriff Reid was made to him by the defendant, free and voluntary."

The evidence of the witness was that the defendant had said that he was sorry that he had killed Sheriff Swords, and that he would not have done it if he had not had certain negroes with him. The witness further testified that the statements made by defendant were made freely and voluntarily, and that, while the defendant was suffering, he was conscious of what he was saying. The admissions of the defendant were properly admitted.

The ninth bill of exceptions is taken to the ruling of the court in permitting Sheriff Reid to testify that a certain rifle and belt had been picked up at the place of the killing and handed to him at the time of the arrest of the defendant, for the reason that it had not been shown that this rifle was the same one that Mr. Fontenot, the sheriff of the parish of St. Landry, had received. Mr. Fontenot did not take the stand to identify the rifle.

Mr. Reid appears to have testified, according to the statement of the trial judge, that the rifle was the same rifle which he, Reid, had taken from the deceased at the time of the murder, and that he had handed over to the sheriff of St. Landry on the morning of the trial. It was unnecessary for Sheriff Fontenot to take the stand to identify the rifle in the presence of Sheriff Reid, who identified the rifle as the one belonging to the accused, which he, the witness, had had in his possession ever since the killing. The ruling was correct.

[4] The tenth bill of exceptions was taken to the testimony of a witness, to the effect that defendant had said that he would kill anybody who attempted to arrest him. The objection is based on the ground that no overt act had been established by the state, and that no previous threat could be admitted until the proper foundation had been made. The evidence was properly admitted to show malice and motive, whether such threats were ever communicated to the deceased or not; and it was not necessary to prove an overt act on the part of the accused before admitting evidence of the threats he made against the accused. *Marr's Criminal Jurisprudence*, § 39, p. 67; *State v. Fontenot*, 48 La. Ann. 305, 19 South. 111. The objection was properly overruled.

Bill of exceptions No. 11 is to the same effect as that of No. 10, with this addition: That the witness is said not to have been able to repeat the entire conversation between the accused and the witness named in

bill No. 10. He repeated the substance of the conversation; and this was all that was necessary. It would appear from the judge's reasons that the witness testified to the entire conversation that he had heard. The ruling was correct.

[3] The twelfth bill of exceptions was taken to a certain remark of the district attorney made in the course of his argument to the jury. According to the statement of the district judge attached to the bill, it appears:

"The evidence in this case shows that the defendant had armed himself and expressed his intention to resist arrest on a charge of murder then pending against him in the parish of Jefferson Davis. That he carried a rifle and belt of cartridges constantly with him and had sent word to the deceased sheriff that if he wished to see him, he must come alone and with open hands. The defendant's counsel had made a pathetic appeal to the jury for mercy, and had read freely from the Bible in their plea for mercy. In answering this plea for mercy, the district attorney said: 'They plead to you for mercy, but, gentlemen of the jury, under the circumstances of this case, this defendant is no more entitled to your mercy than is Villa to that of the civilized world.'"

It is difficult to see what injury may have been done by the district attorney in the use of the language complained of. The district attorney therein was simply answering the appeal which had been made by defendant's counsel for mercy, and he said that he was not entitled to mercy, no more entitled to it than "is Villa to that of the civilized world." This was a legitimate comparison, and it was used by the district attorney as being one that would be readily understood by the jury, as they had doubtless read or heard of Villa and his doings. There is no objection to the remark complained of.

[5] The last bill of exceptions is taken to the ruling of the court on a motion for a new trial, containing the several points already disposed of in this opinion, and, in addition thereto, that the jury, during its deliberations on the case—

"was allowed to dine in the restaurant (a public restaurant) along with the common public, and that they ate at separate tables, and were separated, that they were exposed to the remarks of the public, and that the public was highly incensed against the accused party, who is your mover, and that there were many people in the restaurant where they dined, and that numerous parties were compelled to vacate tables and go to other tables in the same room in order to allow the jury to occupy tables in the common restaurant, and that all of said occurrences happened after they had been charged by the court, and were engaged in their deliberations."

The evidence taken in connection with this motion does not sustain the allegations made, except in part. The jurors were taken to a public restaurant in charge of two deputy sheriffs, and they ate at separate tables, because one table was not large enough to accommodate them all. There were not many people in the restaurant, perhaps not more than six, some of whom were requested to go

to the other side of the room from where they were sitting, so that the jurors might all sit on one side of the room, away from the other guests. They did not "dine along with the common public." They dined at three tables, ranged in a row, to themselves, and they were not exposed to any remarks of the public, or addressed by any person who "was highly incensed against the accused party." They were kept apart from all other persons, and had no communication of any kind with any person. The jurors, under such circumstances, cannot be said to have been separated, and misconduct on their part, or on the part of any towards them, is not shown in the evidence.

Defendant's counsel and his wife were among those who were in the restaurant at the time the jury entered, and they remained in the restaurant for a part of that time. Counsel did not testify to any misconduct on the part of the jury; and, as has been stated, none was shown. The motion for a new trial was properly overruled.

Judgment affirmed.

O'NIELL, J., dissents on the ground that the peremptory challenge of the jurors Guildry, Dupre, and Cormier should have been allowed, and on the further ground that the comparison of the defendant to the Mexican outlaw, Villa, in the district attorney's address to the jury, was an unfair appeal to their passion and prejudice.

(73 Fla. 635)

#### JARVIS v. STATE.

(Supreme Court of Florida. March 13, 1917.)

(Syllabus by the Court.)

#### 1. PERJURY $\S$ 19(2)—SUFFICIENCY OF INDICTMENT.

An indictment for perjury is sufficient which is not so vague, indistinct, or indefinite as to mislead the accused, or embarrass him in the preparation of his defense, or expose him to substantial danger of a new prosecution for the same offense.

[Ed. Note.—For other cases, see Perjury, Cent. Dig.  $\S$  66, 71.]

#### 2. INDICTMENT AND INFORMATION $\S$ 86 — MATTERS OF DEFENSE.

Matters that are not essential elements of the offense charged in an indictment or information, but are in the nature of a defense, need not be negatived.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig.  $\S$  188.]

#### 3. CRIMINAL LAW $\S$ 1129(3)—ASSIGNMENTS OF ERROR—PRESENTATION.

Assignments of error based upon the exclusion of proffered testimony, in order to be available, must be so presented to an appellate court as to make it appear that such excluded testimony was relevant and material, or otherwise proper to be admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  2957, 2959.]

#### 4. CRIMINAL LAW $\S$ 829(1)—GIVEN INSTRUCTIONS—REQUESTED INSTRUCTIONS.

A requested instruction is properly refused when the matters of law embraced therein have

been fully and more correctly covered in the charge and instructions previously given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

#### 5. SUFFICIENCY OF EVIDENCE.

Evidence examined, and found sufficient to support the verdict.

Error to Circuit Court, Jackson County; Cephas L. Wilson, Judge.

W. B. Jarvis was convicted of perjury, and he brings error. Affirmed.

W. E. B. Smith, of Marianna, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

**SHACKLEFORD, J.** W. B. Jarvis seeks relief here from a conviction of the crime of perjury. The first assignment is based upon the overruling of the motion to quash the indictment. The indictment is quite lengthy, and it would serve no useful purpose to set it out in its entirety. Suffice it to say that it alleges the pendency of a certain chancery cause in the circuit court in and for Jackson county, wherein M. L. Dekle was complainant and W. B. Jarvis was defendant, in which H. A. Bowles had been appointed receiver, and in the order appointing such receiver W. B. Jarvis was required forthwith to surrender to the receiver a certain described contract and note. The indictment further alleges that such receiver had made a report to the court in which he set forth that Jarvis had failed and refused to surrender to such receiver such papers, whereon the court made an order, commanding the sheriff to bring Jarvis forthwith before the court to show cause why he should not be held in contempt of court and punished therefor. The indictment then proceeds with the following allegations:

"And thereafter on the said 25th day of September, A. D. 1916, the said W. B. Jarvis, appeared in custody of H. A. Bowles, sheriff of Jackson county, Florida, in the said court and before the Honorable Cephas L. Wilson, judge of said court, the said court being then and there open and sitting in Jackson county, Florida, at Marianna, the county seat, to show cause why he should not be held in contempt of said court and punished therefor. And it then and there became and was a material matter of which the said court then and there had jurisdiction for the said court and judge to know and be informed why the said W. B. Jarvis had not surrendered forthwith to the said receiver the said contract or lease and the said note. And the said W. B. Jarvis, then and there in Jackson county, Florida, with his own consent, in due form of law, was sworn as a witness in his own behalf by the Honorable Cephas L. Wilson, judge of said court, and he the said W. B. Jarvis then and there voluntarily, with his own consent, took an oath as a witness to tell the truth, the whole truth, and nothing but the truth, the said oath being administered by the said judge, touching the said matter of disobedience of the order of said court; and he the said W. B. Jarvis then and there, upon his oath as a witness aforesaid, did willfully, wickedly, corruptly, designedly and falsely swear and depose that the reason he did not deliver the said contract or lease, and the said note, to the said receiver was, that at the time the

said receiver made demand for the said contract or lease and the said note, the same were locked in a safety deposit box in the Bank of Greenwood, at Greenwood, Fla., and that it was late Saturday evening, September 23, 1916, when said demand was made, and that said bank was closed, and that he could not get to said papers on account of their being locked in said safety deposit box in the said bank and the said bank being then closed.

"That the said statements, depositions, and testimony of the said W. B. Jarvis so made and given under his oath aforesaid, to the effect that the said contract or lease and the said note, at the time the said receiver made demand for same, were locked in a safety deposit box in the Bank of Greenwood, at Greenwood, Fla., and that he could not get to said contract or lease and said note on account of their being locked in said safety deposit box in said bank, were then and there knowingly, designedly, willfully, wickedly and corruptly perjured, false and untrue, and the said W. B. Jarvis then and there well knew the said statements, depositions and testimony, in the particulars aforesaid, were false, perjured and untrue, but notwithstanding, he the said W. B. Jarvis then and there, in the said court, in said cause, then and there the same, upon their oath aforesaid, testified and swore for the purpose of deceiving the said court, and cause the said court to release him from arrest and punishment for the said contempt of court.

"That whereas, in truth and in fact, the truth of the said matters then and there so sworn and testified to by the said W. B. Jarvis was that the said contract or lease and the said note were not in a safety deposit box in the Bank of Greenwood, at Greenwood, Fla., when the said receiver made demand upon the said W. B. Jarvis for the same, but were in some other place to the grand jurors unknown, and this fact the said W. B. Jarvis then and there well knew to be true.

"So the grand jurors aforesaid, upon their oath aforesaid, say the said perjury he, the said W. B. Jarvis, did in manner and form aforesaid then and there commit.

"Contrary to the form of the statute in such cases made and provided, to the evil example of all others in like case offending, and against the peace and dignity of the state of Florida."

The motion to quash is as follows:

"Now comes defendant and moves the court to quash the indictment herein upon the following grounds, to wit:

"1. Because said indictment is vague, indefinite, uncertain, and does not sufficiently allege any offense to have been committed by defendant.

"2. Because said indictment fails to allege that defendant had access to the papers mentioned.

"3. Because said indictment fails to allege that defendant knew where the papers mentioned were.

"4. Because said indictment fails to allege that defendant did not know or have reason to believe that papers in question were as stated."

[1, 2] We have carefully read the brief of the defendant in support of this assignment, and have also examined the following authorities which he cites and upon which he relies: *Craft v. State*, 42 Fla. 567, 29 South. 418; *Brown v. State*, 47 Fla. 18, 36 South. 705; *Markey v. State*, 47 Fla. 38, 37 South. 53; *Fudge v. State*, 57 Fla. 7, 49 South. 128, 17 Ann. Cas. 919. We are of the opinion that these authorities fail to support his contention. The indictment would seem to measure up to the requirements which we laid down in *Fudge v. State*, supra. Also see the excellent note to this case on page 921 of 17

Ann. Cas., wherein numerous authorities are cited from other jurisdictions. As we held in *Bennett v. State*, 65 Fla. 84, 61 South. 127:

"An indictment for perjury is sufficient which is not so vague, indistinct or indefinite as to mislead the accused or embarrass him in the preparation of his defense or expose him to substantial danger of a new prosecution for the same offense."

Also see *Goff v. State*, 60 Fla. 13, 53 South. 327, and *Butler v. Perry*, 67 Fla. 405, 66 South. 150, for a discussion concerning the essential elements of indictments generally, wherein we held that:

"Matters that are not essential elements of the offense, but are in the nature of a defense, need not be negatived in charging the offense."

*State v. Pearce*, 14 Fla. 153, will also be found instructive. This assignment must be held to have failed.

[5] The only other assignment is the second, which is based upon the overruling of the motion for a new trial. It is contended that the evidence is insufficient to support the verdict. We cannot agree with the defendant in this contention. It would be a fruitless task indeed to set out all the evidence adduced at the trial, or even to attempt a synopsis thereof. A careful reading of the evidence convinces us that it is amply sufficient; therefore we feel constrained to concur with the jury and the trial judge in so holding.

[3, 4] The defendant took the witness stand in his own behalf and proceeded to testify, during the course of which he stated that he "was bothered," whereupon the following question was propounded to him by his counsel, "What were you bothered about?" The state interposed an objection to this question, which was sustained, and one of the grounds of the motion for a new trial is that this ruling constitutes reversible error. Again we find ourselves unable to agree with the defendant. We have repeatedly held that assignments based upon the exclusion of testimony to be available must be so presented to an appellate court as to make it appear that the excluded testimony was relevant and material, or otherwise proper to be admitted. See *Palmore v. State*, 65 Fla. 539, 62 South. 581, where numerous prior decisions of this court are cited. It is sufficient to say that the defendant has failed to comply with this requirement, as laid down in the cited cases. *Leaprot v. State*, 51 Fla. 57, 40 South. 616, cited and relied upon by the defendant, is not in point, as no such failing condition of the defendant's mind and memory is shown to have existed in the instant case.

The fifth ground of the motion is based upon the refusal of the trial court to give the following requested instruction, which ruling was duly excepted to:

"The defendant is presumed to be innocent throughout the trial of his case until the state proves his guilt, and the fact his testimony may

have been untrue does not of itself mean he is guilty of this offense."

No error is made to appear here, as the principle had been fully and more correctly embraced in the charges and instructions previously given.

The judgment will be affirmed.

BROWNE, C. J., and TAYLOR, WHITEFIELD, and ELLIS, JJ., concur.

(73 Fla. 652)

#### JARVIS v. STATE.

(Supreme Court of Florida. March 14, 1917.)

(Syllabus by the Court.)

#### 1. LARCENY — 3(4) — REQUISITES — INTENT.

In larceny it is essential to a conviction that the property was taken "animo furandi"; and where it clearly appears that the taking was perfectly consistent with honest conduct, although the party charged with the crime may have been mistaken, he cannot be convicted of larceny.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 6-10.]

#### 2. LARCENY — 14(1) — REQUISITES — POSSESSION.

A person who has lawful possession of property cannot commit larceny thereof; the possession, however, must have been originally obtained lawfully and without the intent to appropriate the property to his own use; one who obtains the possession by trick, device, or fraud, with intent to appropriate the property to his own use, the owner intending to part with the possession only, commits larceny when he subsequently appropriates it. The consent of the owner in surrendering the possession of property must be as broad as the taking.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 34, 37.]

#### 3. CRIMINAL LAW — 338(1) — ADMISSIBILITY OF EVIDENCE — RELEVANCY.

Proffered testimony is properly excluded which is clearly irrelevant and not pertinent to the issues.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 752.]

#### 4. CRIMINAL LAW — 829(1) — GIVEN INSTRUCTIONS — REQUESTED INSTRUCTIONS.

Requested instructions are properly refused when the matters of law included therein have been fully and correctly covered in the charge and instructions given by the court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011.]

#### 5. LARCENY — 65 — SUFFICIENCY OF EVIDENCE.

Evidence examined, and found sufficient to support the verdict.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 160.]

Error to Circuit Court, Jackson County; Cephas L. Wilson, Judge.

W. B. Jarvis was convicted of grand larceny, and he brings error. Affirmed.

W. E. B. Smith, of Marianna, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

SHACKLEFORD, J. W. B. Jarvis seeks relief here from a conviction of the crime of grand larceny and a sentence to confinement



in the state prison for a term of two years. The sole error assigned is the overruling of the motion for a new trial, which is based upon six grounds, and which we shall treat in the order in which they are argued.

[1, 2] The first two grounds, which are argued together, are that "the verdict is not supported by the evidence," and that "the verdict is contrary to law." The first count in the indictment charges the defendant with the larceny of a contract entered into by the defendant and M. L. Dekle, of the value of \$1,500, the property of M. L. Dekle, and the second count charges the defendant with the larceny of a chattel mortgage, executed by the defendant to M. L. Dekle, of the value of \$500 the property of M. L. Dekle. The defendant entered a plea of not guilty. Very concisely stated, the evidence establishes that, in compliance with a request of the defendant, M. L. Dekle brought the contract and chattel mortgage with him to Greenwood for the purpose of meeting the defendant and having a full settlement of the amount due. Upon the meeting between the defendant and Dekle, after some conversation between them, the defendant requested Dekle to hand him (the defendant) such two instruments in order that the defendant might write a note to Mr. Lewis Smith, the cashier of the Bank of Greenwood, who was temporarily absent at Marianna, nine miles away, to get such cashier to advance the money to the defendant with which to take up the mortgage and contract; that Dekle complied with the defendant's request, and the defendant began to write, but after a few minutes stopped writing, crumpled the paper up which he was writing, dropped it on the floor, folded up the contract and chattel mortgage, and put the same in his pocket, stating to Dekle, "I believe I will keep these papers and you can mark them paid out of the money I paid you last year." Further conversation took place between Dekle and the defendant, but it would serve no useful purpose to set it out. Suffice it to say that the evidence establishes that the defendant retained such papers of which he had thus possessed himself and refused to return them to Dekle. The defendant contends that this did not constitute larceny, and cites decisions of this court, as well as of other jurisdictions, which, he claims, support his contention. We have examined these authorities, but find ourselves unable to agree with the defendant. It is undoubtedly true, as we held in *Bird v. State*, 48 Fla. 3, 37 South. 525, that:

"In larceny it is essential to a conviction that the property was taken 'animo furandi'; and where it clearly appears that the taking was perfectly consistent with honest conduct, although the party charged with the crime may have been mistaken, he can not be convicted of larceny."

It is also true, as this court held in *Long v. State*, 11 Fla. 295:

"A taking by mistake or accident, where the animus furandi forms no part, is not felony."

We also approve of the holdings by this court in the other decisions which the defendant cites and upon which he relies: *Charles v. State*, 36 Fla. 691, 18 South. 369; *Finlayson v. State*, 46 Fla. 81, 35 South. 203; *Lowe v. State*, 44 Fla. 449, 32 South. 956, 103 Am. St. Rep. 171; *Minor v. State*, 55 Fla. 77, 46 South. 297—but do not see wherein they help the defendant. In *Finlayson v. State*, supra, we held that:

"A bailee who has lawful possession cannot commit larceny; the possession, however, must have been originally obtained lawfully and without the intent to appropriate the property to his own use; one who obtains the possession by trick, device or fraud with intent to appropriate the property to his own use, the owner intending to part with the possession only, commits larceny when he subsequently appropriates it."

We might well repeat here what we said in the opinion rendered in that case:

"It cannot be said, therefore, that the owners 'consented' to part with the possession of their money; there was no *conventio mentium*, the one party intending only to part with the bare possession, the other intending to acquire the property in the thing itself; the consent was not as broad as the taking. The fraud vitiated whatever right might otherwise have been acquired by virtue of the apparent voluntary parting with the possession by those rightfully entitled thereto. Such act was at the common law larceny, and no statute was needed to make it a crime; nor does it come within our *embezzlement act*."

Also see *Flowers v. State*, 59 Fla. 16, 52 South. 11, which is well in point. We must hold that the contention of the defendant in support of the first two grounds of his motion for a new trial has not been sustained.

[3] The third ground of the motion for a new trial is based upon the refusal of the trial court to permit the defendant to introduce the following proffered testimony of himself:

"That something like two years prior to the signing of this contract the defendant had agreed to buy what is known as the Roberts place from Mr. Dekle; the rental value of that place was \$400 per year; that during the two years immediately before this paper was signed that Mr. Jarvis had paid on that place approximately \$3,000; that at the time this particular paper was signed Mr. Dekle had attached and brought suit against Mr. Jarvis under the original contract, and in order to get his property released from this contract, they agreed on a compromise settlement, agreeing to the terms mentioned in this particular contract. In this contract there were certain things Mr. Jarvis was to do and certain things Mr. Dekle was to do; Mr. Dekle's attorney, Mr. W. B. Farley, acting as his attorney in preparing this contract, advised the defendant that if either one of them failed to perform their part of the contract the contract would be void. And further, 'That while Mr. Dekle and Jarvis were in the drug store and at the time Mr. Jarvis was handed these particular papers in question by Mr. Dekle that Jarvis said to Dekle that the contract required him (Dekle) to do certain things, among which was to build him (Jarvis) a house; that he hadn't done that; that he (Jarvis) had been forced to live off the place about two miles, and that the proper deduction should be made therefor, and that his attorney, Mr. Farley—the same attorney who drew this particular contract—had told him (Jarvis) that if either one failed

to comply with the contract the contract would be void, and that Jarvis told Mr. Dekle he would just hold the papers until they could agree on some just settlement."

No error is made to appear in this ruling, as such proffered testimony was clearly irrelevant and not pertinent to the issues. It simply was an attempt on the part of the defendant to justify his retaining in his possession the papers which had been handed to the defendant by the prosecuting witness for a specific purpose, which could not have availed him in the way of a defense to the crime for which he was being tried.

The fourth ground of the motion is as follows:

"4. The court erred in refusing to permit witness Dekle to answer following question on cross-examination, viz.: 'Didn't Mr. Jarvis tell you at the time he put the papers in his pocket that Mr. Farley, who drew the papers for you, had told him that if either one of you failed to comply with your part of the contract that the same would be null and void?'"

There was no error in this ruling. What possible light could have been thrown as to the guilt or innocence of the defendant by what he might have said to the prosecuting witness, at the time of the taking of the papers, as to any advice which might have been given to the defendant by Mr. Farley?

The fifth ground of the motion is as follows:

"5. Court erred in refusing to permit witness M. L. Dekle in cross-examination to answer the following question, viz.: 'And as a matter of fact, you hadn't built the house which you in the contract agreed to build, had you?'"

No discussion of this ground seems to be called for, as what we have just said in treating the third and fourth grounds is sufficient to dispose of it adversely to the contention of the defendant.

[4] The sixth and last ground of the motion is that "the court erred in refusing to give special charges numbered 2 and 3." This ground is very lightly urged before us, the defendant contenting himself with stating in his brief:

"Each of these charges go directly to the question as to whether or not the defendant possessed the felonious intent at the time the papers were handed to him. It seems useless to argue these questions. The authority above cited is sufficient on this point."

Suffice it to say that we have examined the two requested instructions, and no error is made to appear to us in their refusal. The matters embraced therein had been fully and correctly covered in the charges and instructions given by the court.

[5] As we are of the opinion that the evidence adduced is amply sufficient to support the verdict rendered, and as no errors of law or procedure have been made to appear to us, the judgment must be affirmed.

BROWNE, C. J., and TAYLOR, WHITFIELD, and ELLIS, JJ., concur.

(73 Fla. 663)

# GOODBREAD v. THOMAS.

(Supreme Court of Florida. March 20, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR  $\Rightarrow$  1169(8)—JUDGMENT—REVERSAL.

Where the judgment in ejectment contains material adjudications that are not in accord with the evidence and are contrary thereto, the judgment will be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4538.]

Error to Circuit Court, Columbia County; M. F. Horne, Judge.

Ejectment by Mrs. Nettie Goodbread for the use of S. C. Cole against H. R. Thomas. Judgment for defendant, motion for new trial denied and plaintiff brings error. Reversed.

Guy Gillen, of Lake City, for plaintiff in error. J. B. Hodges, of Lake City, for defendant in error.

PER CURIAM. An action of ejectment was brought by Mrs. Nettie Goodbread for the use of S. C. Cole against H. R. Thomas, who pleaded not guilty. The jury found for the defendant, and the following judgment was rendered:

"This cause having been tried at the last term of this court, which trial resulted in a verdict for the defendant, and the plaintiff made a motion for a new trial, which motion was by the court continued until this present term of this court, and the same being further argued, the court overruled said motion, whereupon it is considered, ordered, and adjudged by the court that the plaintiff take nothing by his said suit, and that the title to the property sued for, the E.  $\frac{1}{2}$ , N. E.  $\frac{1}{4}$  section 10, and W.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$ , section 11, all in township 2, south, range 17 east, is in the said defendant, and that he is entitled to the possession thereof," etc.

On a motion for new trial by the plaintiff the following order was made:

"November 2d. Motion for a new trial made and argued, and upon consideration it is ordered that the motion be granted on the first day of the next term of court, unless in the meantime, the defendant shall pay plaintiff the amount due on the mortgage, with principal, interest and attorney's fees, and the sum of one hundred dollars, with interest mentioned in equitable plea tendered, and if these payments be made, the motion will be overruled.

"On 4/27/18 motion denied."

The plaintiff took writ of error.

At the trial the plaintiff showed a legal title to the land in controversy and the value of mesne profits.

The defendant offered testimony as to an agreement with the usee that the lands which were sold under an execution obtained by A. S. Goodbread against the defendant, would be bought in for the defendant who had previously mortgaged the lands to the usee. There was other testimony as to the desire of the defendant to buy the land after it was sold under the Goodbread execution to Mrs. Nettie Goodbread.

As the judgment "that the title to the property sued for is in the said defendant" is not in accord with the evidence and is not a proper adjudication in this case, and as the conditions imposed by the order denying a new trial were unauthorized, and as the verdict is manifestly contrary to the evidence, the judgment is reversed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

(73 Fla. 660)

FLORIDA BREWING CO. v. SENDOYA.

(Supreme Court of Florida. March 14, 1917.)

(Syllabus by the Court.)

PARTNERSHIP §219(4)—JUDGMENT—LIEN.

In an action against partners where the service of process is made on one partner, the judgment obtained in the action may be a lien on the partnership land and on the individual lands of the partner who was served with process, but not on the individual lands of the partner who was not served with process in the action.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 436, 437.]

Appeal from Circuit Court, Hillsborough County; F. M. Robles, Judge.

Proceeding by C. A. Sendoya against the Florida Brewing Company. Decree for plaintiff, and the Company appeals. Affirmed.

Knight, Thompson & Turner, of Tampa, for appellant. J. T. Watson, Jr., of Tampa, for appellee.

PER CURIAM. In appropriate proceedings the court ordered that a judgment in favor of the Florida Brewing Company against Serafin Montiel and Clements A. Sendoya, copartners as Montiel & Sendoya, "is decreed to be null and void as against Clements A. Sendoya individually and declared to be no lien or incumbrance whatsoever on the individual real estate . . . of the said C. A. Sendoya." The defendant company appealed. The decree is correct in that the service on which the judgment was rendered was made on the partner Montiel and not on the partner Sendoya; therefore, while the judgment is a lien on the partnership lands and the individual lands of Montiel, the partner who was served, it is not a lien on the individual lands of Sendoya, the partner who was not served. See section 1404, Gen. Stats. 1906; Compiled Laws 1914; Thomas v. Nathan, 65 Fla. 386, 62 South. 206; Nathan v. Thomas, 63 Fla. 235, 58 South. 247, Ann. Cas. 1914A, 387; First Nat. Bank v. Greig, 43 Fla. 412, 31 South. 239.

Affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

(73 Fla. 663)

SEABOARD AIR LINE RY. v. CALLAN.  
(Supreme Court of Florida. March 21, 1917.)

(Syllabus by the Court.)

1. RAILROADS §346(2)—CROSSING ACCIDENT—PRESUMPTION AND BURDEN OF PROOF.

Whether an allegation that the defendant railroad company negligently propelled one of its trains backwards without any warning be regarded as a general or a special allegation of negligence, upon proof that the plaintiff was injured by the train when it was being propelled backwards without any warning, the statute, section 3148, Gen. St. 1906, raises a presumption that the defendant railroad company was negligent as alleged, and the burden was thereby cast upon the defendant company to overcome such presumption by proof that it was in fact not negligent in the manner alleged.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1118.]

2. RAILROADS §346(2)—CROSSING ACCIDENT—PRESUMPTION AND BURDEN OF PROOF.

The fact that there was conflicting evidence as to lack of warning does not prevent the operation of the statute imposing upon the defendant railroad company the burden to "make it appear" that it did not negligently propel the train backwards without any warning when the plaintiff was injured.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1118.]

3. RAILROADS §348(1)—CROSSING ACCIDENT—NEGLIGENCE—EVIDENCE.

In determining whether the defendant was negligent as alleged, the jury under the statute were to consider the statutory presumption in connection with the evidence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138, 1140, 1141.]

4. APPEAL AND ERROR §1002—FINDING—CONFLICTING EVIDENCE.

Conflicts in the evidence are determined by the jury; and, where the finding is not manifestly against the weight of the evidence and the justice of the cause, it will be allowed to stand unless errors of law or procedure make the verdict erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937.]

5. APPEAL AND ERROR §1064(1), 1067—HARMLESS ERROR—INSTRUCTIONS.

Where the charges given conform substantially to the law and the evidence, and the charges refused are in the main covered by other charges given, and the verdict and entire record indicate that error, if any, in giving or refusing charges were harmless, the judgment will not be reversed; no material error of law or procedure appearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4229; Trial, Cent. Dig. §§ 475, 525.]

6. NEGLIGENCE §101—CROSSING ACCIDENT—APPORTIONMENT OF DAMAGES.

Where damages are to be apportioned under the statute, the recovery should be such a proportion of the entire damages sustained as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant in the premises.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164, 167.]

7. APPEAL AND ERROR §1004(1)—EXCESSIVE DAMAGES—VERDICT.

A verdict is not so excessive as to require interference by the appellate court, where the amount awarded is not clearly more than could

reasonably have been found on the evidence as to the nature and extent of the injury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944, 3946.]

Error to Circuit Court, Manatee County; F. A. Whitney, Judge.

Action by T. C. Callan against the Seaboard Air Line Railway. Verdict and judgment for plaintiff, and defendant brings error. Affirmed.

John B. Singeltary, of Bradentown, for plaintiff in error. H. S. Glazier, of Bradentown, and N. B. K. Pettingill and Howard P. Macfarlane, both of Tampa, for defendant in error.

**WHITFIELD, J.** In an action for personal injuries, Callan alleges in the first count of his declaration that, while he was in a wagon crossing a street called Manatee avenue in the city of Manatee, Fla., "the defendant by its servants and employes wrongfully, carelessly, and negligently caused the cars of one of its trains to be propelled backward without any warning across said avenue at and on said crossing and towards and upon the said wagon of plaintiff, and thus wrongfully, carelessly, and negligently caused the rear car of its said train to collide with said wagon in which plaintiff was then and there riding and to overturn the same; whereby the plaintiff was" injured. The distinct allegations of the second and third counts need not be here stated. Trial was had on pleas of not guilty and contributory negligence. Verdict and judgment for \$1,500 were rendered for the plaintiff, and the defendant took writ of error.

[1-4] In effect, the complaint is that the defendant railroad company negligently propelled one of its trains backwards without any warning and thereby injured the plaintiff. The gist of the negligence alleged is propelling the train backwards without any warning. Whether this be regarded as a general or a special allegation of negligence, upon proof that the plaintiff was injured by the train when it was being propelled backwards without any warning, the statute raises a presumption that the defendant railroad company was negligent as alleged; and the burden was upon the defendant company to overcome such presumption by proof that it was in fact not negligent in the manner alleged. The plaintiff was injured as the train was being propelled backwards, but it is argued that the evidence does not show that the train was propelled backwards "without any warning" as alleged, so as to raise the statutory presumption of negligence; and that if such presumption was raised it was overcome by evidence that the defendant did give warning and exercised all ordinary and reasonable care and dili-

gence in propelling the train backwards when the injury occurred. There is some substantial evidence that the engine bell was not ringing to given warning, and no flagman gave notice of the backward movement of the train across the street where the defendant knew or should have known the plaintiff was attempting to cross the railroad track on the street. The fact that there was conflicting evidence as to lack of warning does not prevent the operation of the statute imposing upon the defendant railroad company the burden to "make it appear" that it did not negligently propel the train backwards without any warning when the plaintiff was injured. The jury could have found from the evidence that no warning was given. In determining whether the defendant was negligent as alleged, the jury were to consider the statutory presumption in connection with the evidence. Conflicts in the evidence are determined by the jury; and, where the finding is not manifestly against the weight of the evidence and the justice of the cause, it will be allowed to stand unless errors of law or procedure make the verdict erroneous.

[5-7] This discussion in effect disposes of the contentions made on charges given and refused. The charges given conform substantially to the statute, and those refused were in the main covered by the other charges given. In so far as the charges referred to awarding damages in relation to the life expectancy of the plaintiff, when there was no evidence on that subject, the error, if any, is obviously harmless in view of the nature of the injury and the amount of the verdict. The plaintiff testified before the jury, who could have observed his apparent age, and also his physical condition as affected by the injury. Even though the plaintiff were himself negligent, there is evidence on which the jury could find the defendant was also negligent; and it cannot be said with confidence that the damages awarded are not in just proportion to the negligence of the defendant that with the plaintiff's negligence proximately caused the injury.

The statute contemplates that the amount of the recovery shall be such a proportion of the entire damages sustained, as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant on the premises. Section 3149, Gen. Stats. 1906, Compiled Laws 1914; Seaboard Air Line Ry. v. Tilghman, 237 U. S. 499, 35 Sup. Ct. 653, 59 L. Ed. 1069; Newkirk v. Pryor (Mo. App.) 183 S. W. 682.

As the verdict is not clearly excessive, and as no substantial or harmful errors of law or procedure appear, the judgment is affirmed.

**BROWNE, C. J., and TAYLOR, SHACKLEFORD, and ELLIS, JJ., concur.**

(73 Fla. 648)

**SENDOYA v. CHATTANOOGA BREWING CO.**

(Supreme Court of Florida. March 14, 1917.)

*(Syllabus by the Court.)***1. ACCORD AND SATISFACTION §19—PLEA—REQUISITES.**

The plea of accord and satisfaction, to be effective, must be supported by a new contract, expressed or implied, between the same parties to the original agreement, and the last contract must be executed to have the effect of satisfaction.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 136-139.]

**2. ACCORD AND SATISFACTION §27 — PAYMENT ON JUDGMENT.**

Where a payment is made on a judgment, and it is not shown to have been made in accord and satisfaction of the judgment, but there is evidence that a payment merely was made on the judgment, a directed verdict for the plaintiff on an issue of accord and satisfaction made by the defendant is proper.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 31, 59, 83, 97, 110, 135, 150.]

**3. COURTS §52—TRANSFER OF COUNTY TO ANOTHER CIRCUIT.**

The transfer by law of a county from one judicial circuit to another does not affect the validity of judgments obtained in the county or proceedings thereon.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 184-192.]

Error to Circuit Court, Hillsborough County; F. M. Robles, Judge.

Scire facias by the Chattanooga Brewing Company against C. A. Sendoya. Judgment for plaintiff, and defendant brings error. Affirmed.

J. T. Watson, Jr., of Tampa, for plaintiff in error. E. B. Drumright, of Tampa, for defendant in error.

**WHITFIELD, J.** The following writ of scire facias was issued:

"Chattanooga Brewing Co., a Corp. v. Serafin Montiel and C. A. Sendoya, Copartners Doing Business as Montiel & Sendoya.

"In the name of the state of Florida:

"To the Sheriff of Hillsborough County—Greetings:

"Whereas, the Chattanooga Brewing Company, a corporation, heretofore in our circuit court for the said county of Hillsborough, on the 23d day of June, 1909, by the consideration and judgment of the same court recovered against Serafin Montiel and C. A. Sendoya in a certain action of assumpsit, suit on note, the sum of \$943.42, and also the cost of said plaintiff in that behalf, and taxed the sum of \$5.58 whereof the said Serafin Montiel and C. A. Sendoya, copartners as Montiel & Sendoya, were convicted, as appears to us of record, and now on behalf of the said Chattanooga Brewing Company we have been informed that, although judgment was given as aforesaid, yet execution for the damages and costs aforesaid still remains to be made to it, the said plaintiff, whereof the said Chattanooga Brewing Company has sought to provide a proper remedy in this behalf. We do therefore command you, as you have many times heretofore been commanded, that you make known to the said Serafin Montiel and C. A.

Sendoya that they be before our said circuit court for Hillsborough county, at the courthouse in Tampa, Fla., in the county aforesaid, on the first Monday in March next, to show cause, if any they have, why the said Chattanooga Brewing Company ought not to have execution against them for the damages and costs aforesaid according to the form and effect of the said recovery. And have you there then this writ.

"Witness W. P. Culbreath, clerk of our circuit court, and the seal thereof at Tampa, Fla., aforesaid, this 10th day of February, 1916.

"W. P. Culbreath, Clerk Circuit Court,  
[Seal.] By Helen Irsch, D. C.

"Service accepted on behalf of C. Sendoya, Feb. 10, 1916.

"J. T. Watson, Jr., Attorney."

A plea was filed as follows:

"And now comes the defendant C. A. Sendoya in the above-entitled cause, and for plea to the pluries writ of scire facias which has been issued therein says that after the issuance of the judgment described in said writ, and before the commencement of this revivor proceeding, the plaintiff, Chattanooga Brewing Company, in a certain stipulation and agreement between counsel representing several judgment creditors of the late firm of Montiel & Sendoya, through its attorney, one F. M. Simonton, accepted a payment in full accord and satisfaction of the said judgment which is by said writ sought to be revived, the amount paid under said agreement and accepted as aforesaid by said plaintiff being to this defendant unknown, all of which the said defendant stands ready to verify; wherefore he prays judgment of the court."

At the trial the jury under instruction from the court rendered the following verdict:

"We, the jury, find in favor of the plaintiff and against the defendants, and that the judgment upon which the scire facias herein issued has not been satisfied or discharged, and that the amount, of \$243.62 has been paid thereon as of the date of January 10, 1910. So say we all."

On writ of error taken by the defendant C. A. Sendoya it is contended that the defendant's plea of accord and satisfaction was proven; that the judgment was rendered in Hillsborough county, in the Sixth judicial circuit, while the order herein was made in Hillsborough county, in the Thirteenth judicial circuit, and the execution is to issue on the original judgment of the Sixth judicial circuit; that the verdict does not follow the issues; and that the judgment rendered is bad in form and in substance.

[1] The plea of accord and satisfaction, to be effective, must be supported by a new contract expressed or implied between the same parties to the original agreement, and the last contract must be executed to have the effect of satisfaction. Sanford v. Abrams, 24 Fla. 181, 2 South. 373.

[2, 3] There is evidence that a payment as found was made on the judgment and the finding is not contrary to, but is in accord with, the entire evidence. Jordy v. Maxwell, 62 Fla. 236, 56 South. 946. The facts that the firm of Montiel & Sendoya was insolvent and had dissolved and that the defendant Sendoya was at the time insolvent are imma-

terial, and there is no agreement or binding circumstance shown making the payment on the judgment an accord and satisfaction. This being so, a directed verdict was proper. Hillsborough county was in the Sixth judicial circuit, and is now in the Thirteenth judicial circuit; but this does not affect the validity of this proceeding or the legality and propriety of the judgment or the execution to be issued in the premises. The verdict is a substantial determination of the issue presented, and the judgment is not fatally defective if not entirely appropriate and proper in form and substance. See *Brown v. Harley*, 2 Fla. 159.

Judgment affirmed

BROWNE, O. J., and TAYLOR, SHACKLEFORD, and ELLIS, JJ., concur.

(73 Fla. 563)

SANDERS, City Marshal, v. HOWELL.  
(Supreme Court of Florida. March 6, 1917.  
On Petition for Rehearing, April  
19, 1917.)

(Syllabus by the Court.)

1. STATUTES  $\S$  162—REPEAL—GENERAL AND PARTICULAR STATUTES.

The maxim of *leges posteriores priores contrarias abrogant* is not applicable to cases where the precedent act is special or particular, and the subsequent act is general, the rule being that a later general act does not work any repeal of a former particular statute.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig.  $\S$  235-237.]

2. STATUTES  $\S$  162—REPEAL—GENERAL ACT.

In the construction of general and special acts the maxim *generalia specialibus non derogant* applies, and a general act will not be held to repeal or modify a special one embraced within the general terms of the general act, unless the general act is a general revision of the whole subject, or unless the two acts are so repugnant and irreconcilable as to indicate a legislative intent that the one should repeal or modify the other.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig.  $\S$  235-237.]

3. STATUTES  $\S$  159—REPEAL—REPUGNANCY.

One statute will not be held to repeal a former one, unless there is a positive repugnancy between the two, or the latter was clearly intended to prescribe the only rule which should govern the case provided for, or it revises the subject-matter of the former, or expressly repeals it.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig.  $\S$  229.]

4. STATUTES  $\S$  159—REPEAL BY IMPLICATION.

The invariable rule of construction in respect to the repealing of statutes by implication is that the earliest act remains in force, unless the two are manifestly inconsistent with and repugnant to each other.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig.  $\S$  229.]

5. STATUTES  $\S$  159—REPEAL BY IMPLICATION—REPUGNANCY.

Repeals by implication are not favored, and in order that the court may declare that one statute repeals another by implication, it must appear that there is a positive repugnancy between the two, or that the last was clearly in-

tended to prescribe the only rule which should govern the case provided for, or that it revises the subject-matter of the former.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig.  $\S$  229.]

6. STATUTES  $\S$  162—GENERAL LAWS—FORCE OF SPECIAL LAWS.

Where there are valid local or special laws relating to the powers and government of particular municipalities that are in conflict with the general statutory law, such local or special laws prevail.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig.  $\S$  235-237.]

On Petition for Rehearing.

(Additional Syllabus by Editorial Staff.)

7. LICENSES  $\S$  8(2)—SPECIAL AND GENERAL STATUTE—CONSTITUTIONAL PROVISIONS.

Under Const. art. 8,  $\S$  24, requiring Legislature to establish a uniform system of municipal government to be applicable except where local or general laws are inconsistent therewith, Acts 1909, c. 6087,  $\S$  1, authorizing city to levy license taxes, was not repealed by Acts 1915, c. 6924, exempting farm products from all license taxes, and not expressly referring to or repealing any existing law.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig.  $\S$  17.]

Browne, O. J., dissenting.

Error to Court of Record, Escambia County; Kirke Monroe, Judge.

Habeas corpus by Ira C. Howell against Frank D. Sanders, as Marshal of the City of Pensacola. Motion to quash the respondent's return to the writ sustained, and petitioner discharged from custody, and respondent brings error. Reversed, and petitioner remanded to custody.

John B. Jones, of Pensacola, for plaintiff in error. John P. Stokes, of Pensacola, for defendant in error.

SHACKLEFORD, J. Ira C. Howell filed a petition for a writ of habeas corpus, the material allegations of which are as follows:

"1. That your petitioner is detained in custody and deprived of his liberty in Escambia county, Fla., by Frank D. Sanders as city marshal of the city of Pensacola, a municipal corporation chartered by the Legislature of the state of Florida, upon the charge that your petitioner has violated the ordinances of the city of Pensacola, in that since October 1, A. D. 1916, in the said city of Pensacola, he has sold milk without first paying to the city of Pensacola the license tax required by said city of persons engaged in selling milk in said city.

"2. That your petitioner is possessed of a farm consisting of fifty acres, located in Escambia county, Fla., without the confines of said municipality, on which petitioner lives with his family consisting of a wife and four children, on which petitioner is, and has been for several years past, cultivating and raising crops of corn, hay, potatoes, watermelons, peas and peanuts, and different kinds of vegetables; that petitioner does now, and for many years past, own about forty head of cows, about twenty head of which are milk cows, all of which were raised by petitioner upon his said farm and are there kept by him; that as a part of petitioner's business as a farmer, and upon his said farm he produces a certain quantity of sweet milk, which he sells in the said city of Pensacola to persons who

might desire to purchase the same; that petitioner does not sell any milk whatever other than that produced upon his farm by his said cows.

"3. That the milk sold by petitioner in the said city of Pensacola was a farm product produced by him upon his said farm, and that said municipality of Pensacola has no right in law to impose upon him or require him to pay any license tax whatever for the privilege of selling said milk.

"That your petitioner, therefore, alleges that the said Frank D. Sanders, as such city marshal, has deprived him of his liberty without authority of law and contrary to the statutes of the state of Florida in such case made and provided."

Then follows the usual prayer for the writ.

The court issued the writ, and the respondent filed his return, to the effect that he had arrested the petitioner and held him in custody for trial before the police court of the city of Pensacola upon the affidavit and warrant, copies of which are attached. The material allegations of the warrant are as follows:

"Whereas, complaint on oath has been made before me that Ira C. Howell on the 31st day of October, 1916, in the state and county aforesaid, and within the corporate limits of the city of Pensacola, did violate the ordinances of said city, to wit: Section 112 of the license ordinance as amended September 26, 1916, by engaging in the business and occupation of peddling, selling and delivering to customers milk and cream without first having paid the license required by said section and by section 1 of an ordinance to regulate the production and sale, and to perfect the purity of milk in the city of Pensacola, passed June 14, 1915, in violation of the ordinances of said city, in such case made and provided."

The petitioner moved to quash the return upon the following ground:

"That it affirmatively appears from the petition, writ and return, that petitioner is held in custody without authority of law and contrary to the statute of the state of Florida, because petitioner is held in custody upon the charge of having violated the ordinances of the city of Pensacola exacting a license tax of him for the privilege of selling farm products in the violation of the act of the Legislature of 1915, exempting from such license tax the sale of farm products by the farmer who produces same."

The court entered the following order or judgment upon the motion:

"This cause came on to be heard upon the petitioner's motion to quash the respondent's return to the writ of habeas corpus issued in this cause, after argument of counsel, the court being fully advised in the premises, it is ordered and adjudged that said motion to quash said answer be, and the same is hereby, sustained; and the respondent not desiring to plead further, it is ordered and adjudged that the petitioner be discharged from custody of respondent, and that respondent do pay the cost of this proceeding as taxed by the clerk; to which ruling the respondent, by his attorneys, excepted, and respondent is allowed a writ of error returnable before the Supreme Court of Florida to review the order and judgment herein.

"Done and ordered in chambers at Pensacola, Florida, this 4th day of November, A. D. 1916."

It is conceded by the plaintiff in error and the defendant in error in their briefs that two questions are presented upon this writ of error for determination: First, does chapter 6924 of the Laws of Florida (Acts 1915, vol. 1, p. 267) repeal pro tanto section 1 of

chapter 6087 of the Laws of Florida (Acts 1909, p. 583)? Second, is the milk produced upon the farm of Howell "a farm product" within the contemplation of chapter 6924?

Section 1 of chapter 6087 is as follows:

"That the mayor and city council of the city of Pensacola are hereby authorized to levy and impose license taxes for municipal purposes upon any and all occupations and upon any and all privileges and to grade and fix the amount to be paid as fully and to the same extent and in the same manner that the Legislature could impose such licenses and taxes, for city purposes and without regard to any of the provisions of the general revenue law of this state not specially repealing this act."

The ordinances of the city of Pensacola for the alleged violation of which the petitioner was arrested are not specifically set out in the transcript, but are so set out in the briefs of each of the parties. As is therein stated:

"The ordinance of the city of Pensacola, passed June 14, 1915, 'to regulate the production and sale, and to perfect the purity of milk in the city of Pensacola,' provides:

"Section 1. That all dairymen who sell or supply milk or cream in any way to or for the people of Pensacola shall be required to pay an annual license, and this license shall in no way affect, interfere with or be a substitute for any vehicle license which may be imposed by the city of Pensacola."

"Section 112 of the license tax ordinance, as amended September 26, 1916, is as follows:

"Section 112. Dairies or persons peddling, selling or delivering to customers, milk, cream or dairy products, for the products from one to two cows, two dollars per year; for three to five cows, five dollars per year; and in addition thereto the sum of fifty cents per head for every cow exceeding five in number. Dairies or persons keeping any place for the sale of milk, cream or dairy products, the sum of five dollars per year in addition to the amount of the license tax herein imposed upon dairies or persons peddling or selling and delivering the products to customers, and apportioned accordingly."

Section 11 of chapter 4513 of the Laws of Florida (Acts 1895, p. 333) provides that:

"The courts in this state shall take judicial cognizance of the ordinances of the city (Pensacola) and the printed copy."

There can be no question that the city of Pensacola under the authority of section 1 of chapter 6087, which we have copied above, could adopt these ordinances. See *State ex rel. Niles v. Smith*, 62 Fla. 93, 57 South. 426; *Ferguson v. McDonald*, 66 Fla. 494, 63 South. 915; *Hardee v. Brown*, 66 Fla. 377, 47 South. 834. What effect upon the power of the city to adopt these ordinances did chapter 6924 of the Laws of Florida have? This chapter is as follows:

"Chapter 6924—(No. 118).

"An act to exempt all farm and grove products from all forms of license tax.

"Be it enacted by the Legislature of the state of Florida:

"Section 1. That all farm and grove products, and products manufactured therefrom, except intoxicating liquors, wine or beer, shall be exempt from all forms of license tax, state, county and municipal, when the same is being offered for sale or sold by the farmer or grower producing the said products.

"Sec. 2. That this act shall go into effect immediately upon its passage and approval by the Governor.

"Approved June 1, 1915."

[1-4] As will be seen, this chapter became effective on the 1st day of June, 1915, whereas the two ordinances in question, which we have copied above, were adopted on the 14th day of June, 1915, and the 26th day of September, 1916, respectively. The plaintiff in error cites and relies upon *Stewart v. De Land Lake Helen Special Road & Bridge District*, 71 Fla. 158, 71 South. 42, wherein we held as follows:

"The maxim of *leges posteriores priores contrarias abrogant* is not applicable to cases where the precedent act is special or particular, and the subsequent act is general, the rule being that a later general act does not work any repeal of a former particular statute.

"In the construction of general and special acts the maxim *generalibus specialibus non derogant* applies, and a general act will not be held to repeal or modify a special one embraced within the general terms of the general act, unless the general act is a general revision of the whole subject, or unless the two acts are so repugnant and irreconcilable as to indicate a legislative intent that the one should repeal or modify the other.

"One statute will not be held to repeal a former one unless there is a positive repugnancy between the two, or the latter was clearly intended to prescribe the only rule which should govern the case provided for, or it revises the subject-matter of the former, or expressly repeals it.

"The invariable rule of construction in respect to the repealing of statutes by implication is that the earliest act remains in force unless the two are manifestly inconsistent with and repugnant to each other."

[5] We fully approve of this holding. We would also call attention to the fact that chapter 6924 contains no repealing clause. Unless, then, chapter 6924 and section 1 of chapter 6087 of the Acts of 1909 are so repugnant and irreconcilable as to indicate a legislative intent that the former should repeal pro tanto or modify the latter, both statutes must be permitted to stand. In *Florida East Coast Ry. Co. v. Hazel*, 43 Fla. 263, 31 South. 272, 99 Am. St. Rep. 114, we held that:

"Repeals by implication are not favored, and in order that the court may declare that one statute repeals another by implication, it must appear that there is a positive repugnancy between the two, or that the last was clearly intended to prescribe the only rule which should govern the case provided for, or that it revises the subject-matter of the former."

See, also, *State v. County of Gadsden*, 63 Fla. 620, 58 South. 232.

[6] In *Ferguson v. McDonald*, 66 Fla. 494, 63 South. 915, we held that:

"Where there are valid local or special laws relating to the powers and government of particular municipalities that are in conflict with the general statutory law, such local or special laws prevail."

Under these authorities, we must hold that section 1 of chapter 6087 of the acts of 1909 has not been modified or repealed by chapter 6924 of the Acts of 1915.

Having reached this conclusion, it becomes unnecessary for us to pass upon the second question and determine whether or not milk is a farm product.

The judgment of the court of record is hereby reversed, and the defendant in error hereby remanded to the custody of the officer detaining him to be dealt with according to law, at the cost of the defendant in error.

TAYLOR, WHITFIELD, and ELLIS, JJ., concur.

BROWNE, C. J. (dissenting). The principles governing the repeal of statutes by implication laid down in *Stewart v. De Land Lake Helen Special Road & Bridge District*, 71 Fla. 158, 71 South. 42, cited approvingly in the opinion of the majority of the court, as well as the principles laid down in prior decisions, impel me to a different conclusion from that reached by this court.

The court has said:

"While statutes may be impliedly as well as expressly repealed, yet the enactment of a statute does not operate to repeal by implication prior statutes unless such is clearly the legislative intent. An intent to repeal prior statutes or portions thereof may be made apparent when there is a positive and irreconcilable repugnancy between the provisions of the later enactment and those of prior existing statutes." *State v. Gadsden County*, 63 Fla. 620, 58 South. 232, and cases cited.

It seems to be settled by the cases cited supra, and by the opinion in this case, that a general act will be held to repeal a prior special act when "the two acts are so repugnant and irreconcilable as to indicate a legislative intent that the one should repeal or modify the other."

The case of *Florida East Coast Ry. Co. v. Hazel*, quoted from in the majority opinion, recognizes the doctrine that a special statute may be repealed by a general one if there is a "positive repugnancy" between the two, or if "the last was clearly intended to prescribe the only rule which should govern the case provided for"; and this, notwithstanding "repeals by implication are not favored."

In the case of *Ferguson v. McDonald*, 66 Fla. 494, 63 South. 915, the right of the city of Miami to impose a license tax on a telegraph company was upheld, notwithstanding the provisions of the general state revenue license law, which provided that "no further license tax shall be imposed by any county or municipality"; but that was based upon the provision of the general revenue license law that:

"Nothing in this act shall be construed as in any way abridging or limiting the powers which have been granted or may be granted to any municipal corporation by special act or by charter act for the purpose of requiring the payment of license taxes."

Chapter 6924, Laws of Florida, Acts 1915, does not contain such a reservation or exception. It is positively prohibited, and the



permissive authority of the Pensacola charter is so repugnant and irreconcilable to the later act "as to indicate a legislative intent that the former should repeal, pro tanto, the latter." I know of no language by which the Legislature could have expressed its intention more forcibly, more emphatically, more unequivocally, than that used in the act which this decision nullifies so far as the city of Pensacola and other cities having similar charters are concerned.

The rules governing the construing of legislative enactments are prescribed for the purpose of ascertaining the legislative intent, and should not be applied to thwart it, particularly in a case in which the intention is so clear and unequivocal, and I am reluctant to declare any act of the Legislature or any part thereof void or inoperative, except when it is so clearly so as to leave no ground for a reasonable difference of opinion. I think the decision of the lower court should have been affirmed.

#### On Petition for Rehearing.

**PER CURIAM.** [7] In a petition for rehearing it is said the court misapplied the judicial rule of construction as to conflicts in special and general laws covering the same subject. The construction in this case is controlled by the state Constitution, as was stated in the case of *Ferguson v. McDonald*, 66 Fla. 494, 63 South. 915, referred to as the authority for the decision in this case.

Section 24, article 3, of the Constitution ordains that:

"The Legislature shall establish a uniform system of county and municipal government, which shall be applicable, except in cases where local or special laws are provided by the Legislature that may be inconsistent therewith."

Chapter 6924, Acts 1915, is a general law affecting the powers of municipalities to impose license taxes, and it does not expressly refer to or repeal any existing law. Chapter 6067 is a local or special law applicable to the subject here involved; and by the mandate of the organic law, the general law is not applicable "where local or special laws are provided by the Legislature that may be inconsistent therewith."

Rehearing denied.

(73 Fla. 708)

#### STEPHENS et al. v. FUTCH.

(Supreme Court of Florida. March 24, 1917.)

(Syllabus by the Court.)

#### 1. TAXATION §30—TAX LAWS—GUIDANCE OF OFFICERS—PROTECTION OF CITIZENS—VALIDITY OF PROCEEDINGS.

A failure to comply strictly with those provisions of tax laws which are intended for the guidance of officers in the conduct of business devolved upon them, designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected, will not usually render the proceedings void; but where the

requisites prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and a disregard of them might and generally would injuriously affect his rights, they cannot be disregarded, and failure to comply with them will render the proceeding invalid.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 80.]

#### 2. COUNTIES §47—COUNTY COMMISSIONERS—CONSTITUTIONAL PROVISIONS.

Under the provision of section 5 of article 8 of the Constitution that powers and duties of county commissioners "shall be prescribed by law," the authority of such officials is only such as may be conferred by statutory regulations.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 55.]

#### 3. TAXATION §660—TAX SALES—PUBLICATION OF NOTICE—CONSTRUCTION OF STATUTE.

The provision of section 50 of chapter 5596 of the Laws of Florida (Acts of 1907, p. 27), Compiled Laws of 1914, § 558, that notice of tax sales shall be published in a newspaper "to be selected by the board of county commissioners at their first regular meeting in February of each year" requires such newspaper to be selected annually, and such requirement is not met by the board of county commissioners making an order wherein a certain named newspaper was designated the county official paper to continue for the full term of two years, as the county commissioners are not authorized to designate a "county official paper," but only to select the newspaper in which the delinquent tax list is to be published.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1338-1340.]

#### 4. TAXATION §660—TAX SALE—PUBLICATION OF NOTICE—CONSTRUCTION OF STATUTE.

The statutory provision as to the selection of a newspaper in which the delinquent tax list is to be published was designed, in part at least, for the benefit of the taxpayer by giving him notice in what paper he shall look to see whether proceedings have been commenced against his land, and a failure to comply with such provision will render the further proceedings invalid.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1338-1340.]

Error to Circuit Court, Bradford County; Jas. T. Wills, Judge.

Ejectment by J. E. Futch against John K. Stephens and others. Findings and judgment for plaintiff, and defendants bring error. Reversed.

W. S. Broome, of Gainesville, for plaintiffs in error. Joe Hill Williams and J. E. Futch, both of Starke, for defendant in error.

SHACKLEFORD, J. J. E. Futch instituted an action of ejectment against John K. Stephens and R. B. Roberts for the recovery of the possession of lot 1 and the north half of lot 2 of block 39 in Worthington, in section 32, township 6 south, range 19 east. The declaration is in the usual statutory form, to which the defendants filed a plea of not guilty. A jury was waived, and the case tried before the circuit judge upon an agreed statement of facts, which resulted in a finding and judgment in favor of the plaintiff. The judgment has been brought here by the defendants for review.

We see no occasion to set out the agreed statement of facts. It is sufficient to state

that the plaintiff's title is based upon a tax deed executed to him on behalf of the state of Florida by W. T. Weeks, the clerk of the circuit court in and for Bradford county, on the 22d day of March, A. D. 1915. This tax deed embraces several different parcels of land, covered by different tax certificates, and includes the two parcels in question as having been covered by certificate No. 169, assessed to John K. Stephens. All of such lands are stated therein to have been sold by the tax collector of Bradford county on the 1st day of July, A. D. 1912, for unpaid taxes for the year 1911. Nine errors are assigned, but the plaintiff and the defendants agree that only two points are presented for determination, which are stated in the briefs as follows:

"One is whether or not the failure of a board of county commissioners to select at a proper time in each year a newspaper in which to publish the delinquent tax list, as provided by section 50 of chapter 5596, Acts of 1907, section 558, Compiled Laws 1914, is a fatal defect and such as will invalidate a tax deed issued on a certificate for the sale of lands for unpaid taxes in that year.

"The other main question is whether or not at a sale of land for unpaid taxes under the provisions of said section 50, c. 5596, Acts of 1907, aforesaid, there can be added to the tax upon the land the taxes due by the same person upon the personal property assessed to him upon the same assessment roll, and such land can be sold under said section 50 for the unpaid tax upon both the real and personal property; in other words, can you add the tax for personal property to the land and sell the land for both the tax on real estate and personal property, under this section of the law? These are the main issues to be reviewed or decided by this court."

The agreed statement of facts upon which the cause was submitted for determination contains the following statement:

"It is agreed that the minutes of the board of county commissioners of Bradford county, Fla., do not show that they selected any newspaper at any time during the year 1912 in which to publish a sale of real estate in the year 1912 for the unpaid taxes of 1911, as provided by section 50, c. 5596, Acts of 1907.

"It is agreed that the said board of county commissioners did at their regular meeting in January, 1911, pass the following order, to wit: 'The Bradford County Telegraph was designated the county official paper to continue for the full term of two years, and the clerk was instructed to notify the secretary of state the action of said board.'

"That said order constitutes the only action of said board in selecting any newspaper until after the expiration of the year 1912, so far as shown by the minutes of said board. The notice of tax sale in 1912 was published in the Bradford County Telegraph."

The statute regulating the selection of a newspaper in which the advertisement of the tax sale was to be published, then in force, was section 50 of chapter 5596 of the Laws of Florida (Acts of 1907, p. 27), Compiled Laws of 1914, § 558, which reads as follows:

"If the taxes upon any real estate shall not be paid before the first day of April of any year, the tax collector shall advertise and sell in the manner following: He shall make out a statement of all such real estate, specifying the amount due on each parcel, together with the cost of advertising and expense of sale, in the

same order in which the land was assessed, and such list shall be published once each week for five consecutive weeks in some newspaper published in the county, if there be a newspaper, said newspaper to be selected by the board of county commissioners at their first regular meeting in February of each year, and the newspaper so selected shall have been continuously published in the county for a period of not less than one year prior to its selection: Provided, that should there be no such newspaper a newspaper published for a less period of time may be selected, and if there be no such newspaper published in the county, then by posting in three public places in the county, one of which shall be at the court house, and the newspaper's charge for advertising shall be fifteen cents per line for the five insertions, per single column, and the tax collector shall receive the same for posting at three public places, but in neither case shall there be any charge for the head notice; Provided, that this act shall not apply to lands sold for nonpayment of taxes for the year 1906. The comptroller is authorized to audit said publisher's charges and draw his warrant for same out of any moneys in the treasury not otherwise appropriated. The editor, publisher or owner shall have attached to his account an affidavit that he has not directly or indirectly paid or promised to pay any tax collector or any other person any consideration whatever, or any compensation of any description for having said tax notice published in his paper."

[1, 2] We had occasion to discuss this statute in *Townsend v. Brown*, 69 Fla. 155, 67 South. 869, wherein we held:

"The provision of the statute requiring a publication in a newspaper, 'said newspaper to be selected \* \* \* in February,' is not mandatory as to the time of the selection, but the duty continues till properly performed."

We also held therein:

"A failure to comply strictly with those provisions of tax laws which are intended for the guidance of officers in the conduct of business devolved upon them, designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected, will not usually render the proceedings void; but where the requisites prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and a disregard of them might, and generally would, injuriously affect his rights, they cannot be disregarded, and failure to comply with them will render the proceeding invalid."

In this holding we followed our prior decisions in *Starks v. Sawyer*, 56 Fla. 593, 47 South. 513, and *Clark-Ray-Johnson Co. v. Williford*, 62 Fla. 453, 56 South. 938. Also see *Hightower v. Hogan*, 69 Fla. 86, 68 South. 669. In *Parker v. Evening News Publishing Co.*, 54 Fla. 544, text 548, 45 South. 309, we held that under the provisions of section 5 of article 8 of the state Constitution, as amended, the powers and duties of county commissioners are purely statutory, and cited in support of such holding *Board of Commissioners of Escambia County v. Board of Pilot Commissioners of Port of Pensacola*, 52 Fla. 197, 42 South. 697, 120 Am. St. Rep. 196. We also held in *Parker v. Evening News Publishing Co.*, supra, that:

"The county commissioners are not required to make a contract for the public printing but only to select the newspaper in which the delinquent tax list is to be published."

In *Bowden v. Ricker*, 70 Fla. 154, 69 South. 694, we held that:

"Under the provision of section 5 of article 8 of the Constitution that powers and duties of county commissioners 'shall be prescribed by law,' the authority of such officials is only such as may be conferred by statutory regulations."

[3] It necessarily follows from the reasoning and holding in these cited cases that the county commissioners were not authorized or empowered to select or designate "the county official paper," as was attempted to be done in the instant case, but only to select the newspaper in which the delinquent tax list shall be published. In *City of Orlando v. Equitable Building & Loan Association*, 45 Fla. 507, 33 South. 986, we held:

"The official publication of notice of tax sales in two newspapers, where the law requires it to be published officially in one only, renders the sales invalid."

In the same case we also held:

"Failure to comply strictly with those provisions of tax laws which are intended for the guide of officers in the conduct of business devolved upon them, designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected, will not usually render the proceedings void; but where the requisites prescribed are intended for the protection of the citizen and to prevent a sacrifice of his property, and a disregard of them might and generally would injuriously affect his rights, they cannot be disregarded, and failure to comply with them will render the proceedings invalid."

As is said in *Black on Tax Titles* (2d Ed.) § 212, on page 267:

"The statutes commonly provide that the newspaper in which the delinquent list and tax sale notice are to be published shall be designated by the authorities of the county or city. This requirement is mandatory. Without a proper and sufficient designation of the paper selected for this purpose, made by the officers or board charged with this duty, there can be no lawful publication, and consequently no validity in any of the further proceedings."

See *Eastman v. Linn*, 26 Minn. 215, 2 N. W. 693; *Powers' Appeal*, 29 Mich. 504; *Wren v. Nemaha Co.*, 24 Kan. 301; *Hall v. County of Ramsey*, 30 Minn. 68, 14 N. W. 263; *Russell v. St. Paul, M. & M. Ry. Co.*, 36 Minn. 366, 31 N. W. 692; *Brown v. Corbin*, 40 Minn. 508, 42 N. W. 481; *Merriman v. Knight*, 43 Minn. 493, 45 N. W. 1098; *State v. Cronin*, 75 Neb. 738, 106 N. W. 986; *Cronin v. Cronin*, 94 Neb. 353, 143 N. W. 214.

[4] Evidently the statutory provision as to the selection of a newspaper in which the delinquent tax list was to be published was "designed, in part at least," as was said in *Merriman v. Knight*, *supra*, "for the benefit of the taxpayer by giving him notice in what paper he shall look to see whether proceedings have been commenced against his land." We are constrained to the conclusion that it clearly appears from the agreed statement of facts that there was not a compliance with the statutory requirement by the county commissioners as to the selection of a newspaper for the publication of the de-

linquent tax list; therefore there can be no validity in any of the subsequent proceedings based upon such publication, and the tax deed must be held to convey no title. We have examined *Continental Trust Co. v. Link*, 79 Neb. 29, 112 N. W. 352, cited to us by the defendant in error, but cannot follow the reasoning which leads to the conclusion announced therein.

Having found that the tax deed conveyed no title to the defendant in error by reason of the fatal defect in the proceedings which we have pointed out, there is no occasion to determine the other point presented.

Judgment reversed.

BROWNE, C. J., and TAYLOR, WHITFIELD, and ELLIS, JJ., concur.

(73 Fla. 665)

QUEEN INS. CO. v. PATTERSON DRUG CO.

(Supreme Court of Florida. March 20, 1917.)

(Syllabus by the Court.)

1. INSURANCE §372—NONWAIVER—AGREEMENT—WAIVER.

A nonwaiver agreement may itself be waived by the same acts and doings of an insurance company's adjuster or representative, or by such transactions with the insured as would amount to a waiver of a forfeiture clause of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 941.]

2. INSURANCE §390—FORFEITURE—WAIVER.

Where an insurance company, with full knowledge of the facts out of which a forfeiture arose, by its acts recognized the policy as a valid and subsisting contract, and induced the insured to act in that belief and incur trouble or expense, such action will be a waiver of the condition under which the forfeiture arose.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1037, 1038.]

3. INSURANCE §378(2)—ACTS OF AGENT—LIABILITY.

Where a duly authorized agent of an insurance company places insurance with the assistance of another whom he employs to solicit the insurance, and who delivers the policy, collects the premium, and does all the things which the agent himself might do, and to whom he gives the power and authority of a subagent with whom the insured deals in all matters connected with the application for the policy and its receipt, and to whom he pays the premium, the insurance company cannot escape responsibility for his acts, even if he is not designated or regularly appointed by the agent of the company, as an agent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 971, 973, 974, 977-997.]

4. INSURANCE §421, 505—FIRE INSURANCE—DUTY OF INSURED—RISK—THEFT.

It is the duty of the insured to use all reasonable means to save and preserve insured property from impending loss or damage from fire, and if while moving it from threatened destruction or damage, or after it is removed, and before he has had time to put it in a place of safety, any of the goods are stolen, the theft is a consequence flowing from the peril insured against and incident thereto, and the insured may recover for the loss of goods by theft.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1126, 1133, 1134, 1136, 1140-1143, 1291, 1292.]

# 5. INSURANCE ~~421~~ — FIRE INSURANCE — RISK—THEFT.

The restriction in an insurance policy against loss of goods by theft is incompatible with the requisite that the insured shall use all reasonable means to save them from impending destruction or damage from fire.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1126, 1133, 1134, 1136, 1140-1143.]

# 6. INSURANCE ~~146(3)~~ — CONSTRUCTION OF POLICY—CONFLICTING CLAUSES.

Where there are conflicting clauses in an insurance policy, the one which affords the most protection to the insured will control.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 295.]

# 7. INSURANCE ~~421~~ — CONSTRUCTION OF POLICY—CONFLICTING CLAUSES.

Where an insurance policy under penalty of nonrecovery, requires the insured to do something which will almost inevitably result in a loss, the company cannot escape liability by a restriction in the policy that it will not be liable for a loss occurring as a result of the insured performing the required act.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1126, 1133, 1134, 1136, 1140-1143.]

Error to Circuit Court, Jackson County; Cephas L. Wilson, Judge.

Suit by the Patterson Drug Company against the Queen Insurance Company. Verdict and judgment for plaintiff, and defendant brings error. Affirmed.

Paul Carter, of Marianna, for plaintiff in error. Smith & Davis, of Marianna, for defendant in error.

BROWNE, O. J. The defendant in error, the plaintiff below, brought suit against the Queen Insurance Company of America in the circuit court of Jackson county upon a fire insurance policy. A trial was had on the issues, which resulted in a verdict and judgment for plaintiff, and defendant sued out writ of error. The declaration is substantially in statutory form, and a copy of the insurance policy sued on is attached thereto and made a part of the declaration.

Five pleas were filed by the defendant, which are in substance as follows: The first plea denies that plaintiff was damaged as alleged; the second plea avers that plaintiff did not within 60 days render such a statement of the loss and circumstances surrounding same as required by the policy; the third plea avers that plaintiff "allowed" gasoline on the premises without an agreement permitting it being indorsed on the policy; the fourth plea is to the same effect, except that it charges that gasoline was "used" on the premises without indorsement of the agreement permitting it; the fifth plea avers that plaintiff did not protect the property and did not separate the damaged and undamaged property, but negligently permitted it to remain unprotected and unseparated and in bad order.

The plaintiff filed eight replications, joining issue on the first and fifth pleas, and de-

fending as to the others. A demurrer was interposed to the second, third, fourth, fifth, sixth, and seventh replications, which was sustained as to the fourth replication, and overruled as to all the others.

The first error assigned is based on the court's overruling this demurrer. The plaintiff in error abandons any claim of error in this ruling as to all but the sixth and seventh replications.

The sixth replication in substance admits that the store in which the insured articles were kept was lighted by artificial gas or vapor generated from gasoline kept in a tank outside the building, and more than three feet from any opening in the building, and was conducted into the store through pipes connected with a gas machine outside the building, and alleges that the lighting apparatus was standard in design and installation of a type approved by the National Board of Fire Underwriters and permitted without extra charge by all fire insurance companies writing business in the town of Malone, Fla., including the defendant; that the gasoline kept for sale was outside the building in street near premises; that the system of lighting had been in use and operated in the building, and gasoline so kept for sale for a period of three years or more before the policy was issued and was apparent to any one, including defendant's agent and subagent inspecting the building, all of which was known and should have been known to defendant at the time of delivering the policy and accepting the premium for same; that the policy was issued upon the verbal application of plaintiff, and no question was asked nor representations made as to the existence or nonexistence of the lighting system, or keeping gasoline, and no notice was given the plaintiff that the continued use of said lighting system or keeping of gasoline would render the policy void; that the gasoline used and allowed on the premises was gasoline allowed and permitted by the fire insurance companies, including the defendant, without extra charge; that the adjuster sent by defendant to Malone to investigate the origin and extent of the fire and all matters alleged in the pleas, with full knowledge of matters and things set forth in the pleas, never raised any question as to any of the matters set forth in either of said pleas as being prohibited, nor has defendant, with full knowledge of the alleged use of gasoline, ever in any manner protested against such use, or as being prohibited by the terms of the policy before the suit was brought. The plea concludes with the allegation that the matters set up in the third and fourth pleas, if they ever existed, were before this suit waived by the defendant.

The waiver contended for by this replication is based upon two sets of acts, the one, those of the agent who procured the policy

and who had knowledge of the use of gasoline before and at the time he procured and delivered the policy, and the other the non-action or passiveness of the adjuster who went to Malone after the fire. The plaintiff in error attacks the ruling of the court for overruling his demurrer to this replication because mere passiveness on the part of the insurance company or its adjuster is not enough. It is true that this court quoted from *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410, to the effect that "a waiver cannot be inferred from its mere silence," but mere passiveness may be sufficient under certain circumstances, to amount to a waiver.

It is not necessary, however, to determine whether or not the passiveness of the adjuster in this case amounted to a waiver, because the other averments in the replication show acts of the agent of the insurance company which clearly do so. Further, the plaintiff in error admits that, "if the agent of the defendant saw the gas machine before the policy was written, such fact would tend strongly to support the claim of waiver." The knowledge of the agent of the facts set forth in this replication was the knowledge of the insurance company, and when it delivered the policy to the insured with full knowledge of these conditions, it consented to the continued use of gasoline outside the building for generating an illuminating gas or vapor for use in the building, and also for the continued sale by the insured of gasoline which was kept in a tank outside the building and more than three feet away from it. The demurrer to this replication was properly overruled.

It is contended that the demurrer to the seventh replication should have been sustained because it is a mere affirmation that the plaintiff did the things which defendant says in his fifth plea he did not do. Whether this is so or not, no harm was done the defendant by the court refusing to sustain the demurrer to the replication upon that ground alone. It may have been bad pleading, but we are not prepared to say that bad pleading which works no harm is reversible error. Further than this, the plaintiff joined issue on the third plea. The demurrer to this replication was properly overruled.

The defendant filed a rejoinder to the plaintiff's second, third, fourth, fifth, sixth, and seventh replications, in which he avers substantially that before defendant made any investigation of the loss, and took any documents or data or other matter set up in the fourth replication, the plaintiff and defendant entered into an agreement and stipulated in writing in substance and to the effect that any action taken by defendant, or request made, or information received in and while investigating and ascertaining the cause of the fire, the amount of the loss, or damage or other matter relative to plaintiff's claim, should not change, waive, validate, or forfeit any of the terms, conditions, or requirements of the policy sued on; that the agreement

further stipulated that it was the intention of the plaintiff and defendant to permit an investigation of plaintiff's claim and a determination of the amount of the loss or damage, without prejudice of any right or defenses which defendant might have, and that a copy of the agreement was attached and made a part of the rejoinder. To this rejoinder plaintiff filed the following demurrer:

"(1) Said rejoinder is vague, indefinite, uncertain, and does not sufficiently set forth facts which in law will avoid the allegations of said replication.

"(2) A copy of said nonwaiver agreement is not attached to said rejoinder nor does said rejoinder purport to give all the terms and stipulations of said agreement.

"(3) The rejoinder does not allege any consideration of the said alleged nonwaiver agreement.

"(4) It is not alleged that said nonwaiver agreement was entered into without notice on the part of the defendant and its agents of the existence of the facts constituting the forfeiture of said policy as alleged in defendant's said plea of rejoinder.

"(5) That said nonwaiver in said rejoinder is simply declaratory of the nonwaiver stipulation already contained in said policy, and does not constitute a bar to the waiver created by the defendant's adjuster proceeding to investigate said loss with a view to adjustment, and take proofs, and requiring the plaintiff to submit proofs touching plaintiff's alleged loss, the liability of the defendant therefor, and the amount of damages thereby."

[1] The circuit judge sustained this demurrer, and his ruling is made the basis of the second assignment of error. We find no error in this ruling. The matters stated in the rejoinder, in substance, amounted to a repetition of the nonwaiver stipulation contained in the policy. There was no consideration moving the plaintiff to enter into this new agreement. The nonwaiver agreement is not attached to the rejoinder, and it does not purport to give all the terms and stipulations of the agreement. As a nonwaiver agreement may itself be waived by the same acts and doings of the insurance company's adjuster or representative, and by such transactions with the assured as would amount to a waiver of the forfeiture clause of the policy, we cannot see that this agreement would have afforded the defendant any defense which he did not have on the issues presented by the anterior pleadings. As to nonwaiver agreement itself being waived, see *Pennsylvania Fire Ins. Co. v. Draper*, 187 Ala. 103, 65 South. 923; *Tillis v. Liverpool & L. & G. Ins. Co.*, 46 Fla. 268, 35 South. 171, 110 Am. St. Rep. 89; *Eagle Fire Co. v. Lewallen*, 56 Fla. 246, 47 South. 947; *Pennsylvania Fire Ins. Co. v. Hughes*, 108 Fed. 497, 47 C. C. A. 459.

In the case of *Corson v. Anchor Mut. Fire Ins. Co.*, 113 Iowa, 641, 85 N. W. 806, the court said:

"Appellant contends, however, that by the signing what is called a 'nonwaiver agreement' the insured cut himself off from relying on these acts of the adjuster as constituting a waiver of the forfeiture. It appears that the adjuster, after having acquired knowledge of how the books had been kept, insisted that before he would proceed with the adjustment of the loss

the insured should sign this agreement, by which it was stipulated that 'nothing said adjuster may do or say or write shall in any way be construed as waiving any of the rights or defenses of said company, or any conditions or requirements of said policy as to proofs of loss or otherwise.' With reference to the forfeiture in question, it seems to us that this agreement was wholly immaterial. The adjuster must be presumed to have had the power to waive a forfeiture. *Brown v. Insurance Co.*, 74 Iowa, 428, 38 N. W. 135, 7 Am. St. Rep. 495; *Ruthven v. Insurance Co.*, 102 Iowa, 550, 580, 71 N. W. 574; *Brock v. Insurance Co.*, 106 Iowa, 30, 75 N. W. 683. He did not proceed to adjust the loss, and required the insured to furnish proofs, including the procurement of the duplicate invoices, notwithstanding his knowledge of the facts amounting to a forfeiture. The nonwaiver clause was in itself a part of the adjustment. It had nothing to do with the fact of forfeiture, and was entered into with knowledge of that fact. The adjuster could not by his own stipulation deprive himself of the power to waive this forfeiture; nor could he, for that matter, deprive himself of the power to waive his own stipulation for nonwaiver. It is well settled that even the stipulations of a policy to the effect that they shall not be waived except in writing may themselves be waived by an officer or agent having authority. *Viele v. Insurance Co.*, 26 Iowa, 9, 59, 96 Am. Dec. 83."

[2] We quote approvingly from the opinion of Granger, J., in the case of *Antes. Gain & Co. v. Western Assurance Co.*, 84 Iowa, 355, 51 N. W. 7:

"Where the company, with full knowledge of the facts out of which the forfeiture of the policy arose, by its acts recognized the policy as a valid and subsisting contract, and induced the plaintiff to act in that belief, and to incur trouble and expense, such action would be a waiver of the condition under which the forfeiture arose."

[3] The third, fourth, and fifth assignments relate to questions propounded to N. B. Solomon, a witness for the plaintiff. Solomon was cashier of the Bank of Malone, and was also engaged in writing fire insurance. He placed the policy sued on through W. H. Milton, who wrote the insurance. He delivered the policy to plaintiff, who paid him the premium, which he sent to Mr. Milton, less his brokerage. He says at the time and before this policy was written he knew the place of business of the plaintiff, and was familiar with the store, its contents and what was inside of it, and so on; that the property was across the street from his place of business, and he went over there quite often. Five questions were propounded to him which were objected to by defendant on the ground that the witness was not the agent of the defendant and his knowledge would not bind him, but he was permitted to answer them, and upon this the errors in these assignments are predicated. The answers of the witness were very full and clear that he had knowledge of the lighting system used by plaintiff, that he knew he sold gasoline which he kept outside the building, and that he had never seen in the published tariffs of the insurance companies any extra charge for permitting the lighting system used by plaintiff, or for the sale of gasoline outside the building, and

he did not think a permit was required for these things.

The question raised by these assignments is: Was there such a relation between this witness and the insurance company as would bind the company by his acts? The testimony was very material, for it went to show the knowledge of the defendant at and before it issued its policy of the facts upon which it relies for a forfeiture, whereby the plaintiff claims the insurance company waived its right thereto.

Section 2765, General Statutes of Florida 1906, provides:

"Any person or firm in this state, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual, aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them, as agent or representative of such company, association, firm or individual, or who in any wise, directly or indirectly makes or causes to be made, any contract or insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm or individual." Chapter 1863, Acts of 1872, § 7, amended by chapter 4380, Acts of 1895, § 7.

Section 2777, General Statutes 1906, provides:

"Any person who solicits insurance and procures applications therefor shall be held to be agent of the party issuing a policy upon such application, anything in the application or policy to the contrary notwithstanding." Chapter 4677, Acts of 1899, § 3.

Under these provisions of our law the witness Solomon was unquestionably the agent of the Queen Insurance Company in so far as this policy is concerned.

Texas has a statute of similar effect to ours. It provides:

"Any person who solicits insurance on behalf of any insurance company, whether incorporated under the laws of this or any other state or foreign government, or who takes or transmits other than for himself any application for insurance or any policy of insurance to or from such company, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk, or receive, or collect, or transmit any premium of insurance, or make or forward any diagram of any building or buildings, or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company other than for himself, or who shall examine into, or adjust or aid in adjusting any loss for or on behalf of any such insurance company, whether any of such acts shall be done at the instance or request, or by the employment of such insurance company, or of or by any broker or other person, shall be held to be the agent of the company for which the act is done, or the risk is taken, as far as relates to all the liabilities, duties, requirements and penalties set forth in this chapter." Article 3093, Rev. Stat. Tex. 1896.

In passing on this statute the Court of Civil Appeals of Texas said:

"The insurance on the building was solicited and effected by one Lee Lacy, who, the testimony tends to show, was informed and knew of certain incumbrances on the property when he procured its insurance; and the court charged the jury 'that if, from the evidence, they should believe that Lee Lacy, at the time he procured the insurance to be written, knew of such incumbrances, to return a verdict for the full amount of the policy.' This charge is assigned as error upon the ground that it assumes Lee Lacy was the agent of the company, and the evidence shows that he was a mere insurance broker, and his knowledge could not and did not bind the insurance company. Lacy may have been technically merely an insurance broker, yet the fact that he solicited the insurance on behalf of appellant company requires him to be held its agent." *German Ins. Co. v. Everett*, 36 S. W. 125.

In a Dakota case for the loss by fire of a hotel in Crescent City, Fla., our statute of 1872, before its amendment in 1895, was offered in evidence, and its provisions invoked in support of the contention that a firm of insurance brokers who placed the insurance were the agents of the company. The court held that:

"They were such agents of the insurance company 'as to have the power to waive the matter of incumbrances, which were known to them at the time of negotiating and accepting the risk for the company, irrespective of the Florida statute offered in evidence.'" *Lyon v. Insurance Co. of Dakota*, 6 Dak. 67, 50 N. W. 483.

Where a duly authorized agent of an insurance company places insurance with the assistance of another whom he employs to solicit the same and who delivers the policies, collects the premium, and does all things which the agent himself might do, and to whom he gives the powers and authority of a subagent with whom the insured deals in all matters connected with the application for the policy, and its receipt, and to whom he pays the premium, even if he is not regularly appointed by the agent or the company as an agent, the company cannot avoid responsibility for his acts. In a Vermont case this question was presented, and the court said:

"The first question presented by the exceptions is whether J. D. Butler in the matter of taking the application for the insurance in question was so far acting for the defendant company as to make his knowledge of errors in such application knowledge in the company, and thus estop the company from claiming a forfeiture therefor. It appears that Manley was a duly authorized agent of the company at West Rutland, that Butler was in his office, and engaged to some extent in drumming for insurance, and that he and Manley divided the fees payable upon accepted applications in a proportion agreed upon between them. Butler, however, was not himself appointed or recognized by Manley or the company, as an agent. When the application of the plaintiff was returned by the company for further information respecting the occupancy of the store and the ownership of the goods therein, Manley handed it to Mr. Butler and requested him to go and get the reply, and that Mr. Butler took the same and shortly after brought it back with the additional answers in Mr. Butler's handwriting." This is the defendant's evidence on this point, and upon it we are clear that the act of obtaining the reply to the company's questions was in legal significance the act of Manley, rather than Butler. Butler was expressly directed by Manley to do this service, and in doing it he acted merely as

the hand of Manley, and as the latter was confessedly the defendant's agent, this act was one done by its agent and in obedience to the company's direction. It is thus wholly unnecessary to consider the able argument of the defendant's counsel upon the question of Manley's power to create a subagent, or whether Butler had any of the functions of agency in the transaction. The business was done by Manley, and he ran the risk of any perils that might affect the company incident to it. It would be a dangerous doctrine to promulgate if we held that the company could avoid its responsibilities by repudiating the acts of its own agents if they happened in large towns to be done in part by the assistance of persons employed by such agents." *Mullin v. Vermont Mutual Fire Ins. Co.*, 58 Vt. 113, 4 Atl. 817.

What the court said about the acts of agents if they happened in large towns applies with equal force to an agent who may be the only agent of the company in a county, and who authorizes and employs persons in other towns in the county to solicit insurance, deliver the policies, and collect the premiums.

It is clear that by virtue of sections 2765 and 2777, General Statutes 1906, Solomon was an agent of the company, and these statutes in that respect are but the legislative expression of the law as laid down in well-reasoned authorities. In dealing with him the insured dealt with the company itself; his knowledge was the company's knowledge; his consent was its consent. *Eagle Fire Ins. Co. v. Lewallen*, 56 Fla. 246, 47 South. 947; *Hartford Fire Ins. Co. v. Brown*, 60 Fla. 83, 53 South. 838.

"Where it is known to the insurance agent at the time the policy was effected that the assured kept a prohibited article, and intended to keep it, in the building insured, the keeping it would not render the policy void, whether permission to keep it was indorsed, or intended to be indorsed." *Peoria Marine Ins. Co. v. Hall*, 12 Mich. 202.

The sixth and eighth assignments refer to questions propounded to Dr. Patterson when testifying in his own behalf, on the ground that they called for testimony in relation to an offer of compromise. The questions objected to and the answers are as follows:

"Q. Did they raise any protest, or kick, or deny liability on account of either of those? A. They did not. Q. After they went there and made all investigations did they make you an offer or either of them make you an offer at all? A. They did. Q. How much? A. Mr. Dorgan offered me \$600."

There is nothing in this testimony to show that there was any proposition in the nature of a compromise; but if there had been, the plaintiff in error concedes that this testimony may have been admissible upon the question of the waiver of proofs of loss set up in the second replication. If it was admissible for this or any purpose, there was no error in allowing it to go to the jury.

The ninth and tenth assignments are based on the refusal of the circuit judge to give two charges requested by defendant, as follows:

"(1) The insurance company, is not liable for loss of goods through theft, and if any of the



goods were stolen the defendant is not liable for those goods.

"(2) The plaintiff must prove by a preponderance of the evidence that the goods and fountain were damaged or destroyed by moving from the fire. If he has failed to show you in what manner he lost the goods, whether by breakage or theft, you cannot allow in your verdict for any goods except those shown to have been broken or damaged."

The first charge is entirely too broad, and to meet the issues should have stated the circumstances under which any theft occurred. Clearly the insurance company is not liable for any and all thefts which may occur, and this charge is not so framed as to meet the issues presented by the testimony.

The second charge is open to the objection that it combined two distinct and separate propositions of law. The first sentence in the charge is good law, and the court had fully covered it in his general charge. The second part of the charge assumes that the testimony showed that part of the goods were stolen. The testimony as to theft was entirely negative, and to have given this charge would have only confused the issues, as there was no testimony to support the theory of theft.

On cross-examination Mr. Patterson, the plaintiff below, said:

"I don't know whether any of the goods were stolen." "If there were any goods stolen I don't really know it."

Mr. Von Hasseln, the adjuster, testified:

That he asked Mr. Patterson to explain the discrepancy in the amount of goods in his inventory and the amount of goods saved, and he "said he couldn't account for it. He said he presumed the goods were either stolen or broken."

Dr. Patterson's testimony about the goods being removed from his store was:

"This fire occurred between 2 and 3 o'clock in the morning. I think it was about the time. I would not suppose it was more than an hour and a half after the goods were moved into the street before they were moved from the street. It was still in the night when they were being moved. Just my friends and neighbors moved the goods. Just the public generally. Yes, sir; and my wife and the boy working in the store and one or two helped to watch after them to keep any from being carried away; in fact, there were several detailed to watch to see that none were carried away."

Notwithstanding our opinion that the evidence did not show that any of the goods were stolen, it may be well for us to determine the question raised by the rejection of these charges: Did this policy cover losses from damage, breaking, and theft while removing the stock or after it was so removed from impending destruction or damage by fire, and before there had been sufficient time to remove it to a place of safety, if such damage, breaking, and theft were the natural results of such removal? We answer that question in the affirmative. There is some conflict of authorities on this point, but we think that those which hold that the policy covers loss by theft of goods removed or being removed in an effort to save them from

impending peril from fire are supported by wisdom and justice, and are in line with the tendency of the courts to hold that conditions in a policy of insurance limiting or avoiding liability will be strictly construed against the insurer, and liberally in favor of the insured. *Queen Ins. Co. v. Young*, 86 Ala. 424, 5 South. 116, 11 Am. St. Rep. 51; *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 20 South. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17; *L'Engle v. Scottish Union & National Fire Ins. Co.*, 48 Fla. 82, 37 South. 462, 67 L. R. A. 581, 111 Am. St. Rep. 70, 5 Ann. Cas. 748; *Caledonian Ins. Co. v. Smith*, 65 Fla. 429, 62 South. 595, 47 L. R. A. (N. S.) 619.

The policy sued on contains this condition:

"This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises."

The testimony shows that a fire occurred between 2 and 3 o'clock in the morning of February 23, 1915, which burned the buildings adjoining the plaintiff's store, and that the building his insured goods were in was about to be on fire, and caught on fire, and that he moved his goods to save them from the fire.

[4, 5] It was clearly the duty of the insured to remove the goods when the danger of destruction was so imminent and impending as to create a reasonable apprehension that unless he did so they would be destroyed, and the circumstances as they exist at the time must determine the necessity for removal; and if while so doing, or after such removal, any of the goods are stolen, the theft, being a consequence flowing from the peril insured against and incident thereto, is attributable to the peril itself.

In the case of *Leiber v. Liverpool, London & Globe Ins. Co.*, 6 Bush. (Ky.) 639, 99 Am. Dec. 695, the policy sued on contained this condition:

"That this company will not be liable for any loss or damage to goods contained in the show window when the loss or damage is caused by the light in the window; nor shall the company be liable for loss by theft."

There was a fire in an adjoining building, and the insured commenced removing his goods, and in doing so some were stolen. The court held that the policy covered loss by theft in the necessary and prudent removal of goods to save them from threatened destruction by fire. It is true the court reached its conclusion by construing the condition against loss by theft to apply to "theft from the show windows." While we quite agree with the decision in that case, we think it could have been put on much stronger grounds.

There are many decisions which hold that the insured is protected against loss by theft



when he is using all reasonable means to save the property from destruction by fire, as he is required by the policy to do under penalty of forfeiture. The following extracts are enlightening upon this point:

"We cannot doubt that where there is an actual fire and the goods are removed by reason of imminent danger, occasioned by such fire, and the insured exercises his utmost exertions to protect and secure the property, any loss arising from a larceny of the goods is within the risks insured against, and must be borne by the insurer." *Witherell v. Maine Ins. Co.*, 49 Me. 200.

"The liability of an insurance company for losses by thefts occurring at the time of a fire is not restricted to such losses occurring during the continuance of the fire merely; if the loss by theft be occasioned directly by the fire, the insurer will be liable though it happen after the extinguishment of the fire." *Newmark v. Liverpool & London Fire & Life Ins. Co.*, 30 Mo. 160.

"Throwing the water and removing the goods were acts done for the purpose of saving them, and the injury caused by the goods being thereby wet and soiled certainly constituted a part of the damage, and we think the value of the goods that were stolen falls under the same principle, being a loss incident to the attempt to save them. For whose benefit was the attempt made? For that of the defendant; and as the goods that were saved were allowed in mitigation of the damages, the objection that the portion of them that were lost ought not to be paid for is made with an ill grace. Had the plaintiff and his wife, instead of exerting themselves in removing the goods, and putting them back as soon as the danger was over, stood listlessly by and permitted them to be burnt up, they would have been obnoxious to the charge of gross negligence. Underwriters are liable when the fire is the act of an incendiary, and a fortiori are they liable for the depredations of thieves who avail themselves of the exposure which is unavoidable on such occasions, and which is incident to the attempt to save the goods for their benefit." *Whitehurst v. Fay. M. Insurance Co.*, 51 N. C. 352.

In *Talamon & Co. v. Home & Citizens' Mut. Ins. Co.*, 16 La. Ann. 426, the court quoted approvingly from the case of *Caballero v. Home Ins. Co.*, 15 La. Ann. 217:

"When the policy compels the assured to labor for the protection of the goods, and they are injured or stolen in the attempt to avoid the fire, the insurer is responsible."

"Where the policy requires the insured, in case of exposure to loss or damage by fire, to use all possible diligence to preserve his goods, and provides that in case" he does not do so "the insurers shall not be liable for any loss sustained in consequence of such neglect, if the insured shall remove his goods, the circumstances as they existed at the time the removal was made must determine the necessity for the removal; and whatever loss or damage is necessarily sustained by the removal of the property insured, when the danger of its destruction by fire was so direct and immediate that a failure to have made the removal while he had the power would have been gross negligence on his part, he is entitled to recover under the policy." *Case v. Hartford Fire Ins. Co.*, 13 Ill. 676.

In *Tilton v. Hamilton Fire Ins. Co.*, 14 N. Y. Super. Ct. 367, a fire destroyed the building in which the goods were kept, and if they had not been removed, they would have been entirely consumed by fire. The goods were taken out by the insurance watch

and put across the street. In discussing what is meant in an insurance policy by "a loss by fire" the court said:

"The fire created a necessity of immediately removing the goods, in order to save the whole or a part of them from being burned up. In making such removal, even if all be removed before the fire reaches that part of the building from which they were taken, a loss, in spite of all precautions, may be produced by at least two causes incident to such an act. One is a partial injury of some of the goods themselves, by their hurried removal, and the confused state in which they may necessarily for a time be thrown together. Another is from a theft or abstraction of some part of the goods. If these are not natural results, it is believed that common experience shows that both, in large cities, are almost invariably inevitable results."

It might be sufficient to rest our decision of this point on the case of *Leiber v. Liverpool, London & Globe Ins. Co.*, cited supra, and held that the words "or by theft" mean theft from the place where they were kept, independent of fire being the proximate cause of the loss, but we think we can place it upon sounder grounds. In the same clause of the policy which attempts to exempt the insurer from loss "by theft," there is a disclaimer of liability for loss caused "by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises," and the obligation is thus placed on the insured to "use all reasonable means" to try to save it from destruction by fire. It cannot be expected that the insured alone would be able to remove much of a stock of goods when the building where they were kept, or neighboring premises were on fire, and he must avail himself of all proffered help. He has no time to test the skill or integrity of those who may volunteer to help him, nor can he so direct operations as to designate exactly where the goods shall be put; and common experience teaches us that, where the public assists in saving goods from impending fire, they are generally scattered over considerable area, where it is impossible for the insured to guard them, and in communities which have no fire police or adequate police protection to meet the extraordinary contingencies of a conflagration losses by theft may reasonably be expected. In the case of *Tilton v. Hamilton Fire Ins. Co.*, 14 N. Y. Super. Ct. 367, the court said that common experience shows that theft, or abstraction of some part of the goods, when removed from a building to save them from impending destruction by fire, are almost invariably inevitable results.

[6, 7] Theft therefore being an "almost invariably inevitable result" from the efforts of the insured to save the property from destruction by fire, we are confronted with the proposition that the insured under penalty of forfeiture must do certain things, the inevitable result of which is to bring about a

condition under which he cannot recover. The restriction against recovery from loss of goods by theft, while being removed or after their removal from impending peril from fire, is incompatible with the requisite that he shall use all reasonable means to save them, and if one or the other must be rejected, the more reasonable should remain. Which of these two conflicting claims afford the most protection to both insurer and insured? Unquestionably it is better that part of the goods removed to save them from destruction by fire should be lost by theft than that they should be left to be entirely consumed. Wisdom and reason support our construction, and we do not have to resort to the rule that insurance contracts will be construed most strongly against the insurer, for the construction which we place on that clause is in his interest, rather than in the interest of the insured. Construing these two provisions of the policy together, we are forced to the conclusion that the insurer is liable for theft which occurs as the result of the insured removing the goods from a building where they are threatened with destruction by fire, whether such thefts occur while removing them, or after they are removed, and before the insured has had time to put them in a place of safety.

In *L'Engle v. Scottish Union & National Fire Ins. Co.*, 48 Fla. 82, 37 South. 462, the doctrine governing the construction of conflicting clauses in an insurance policy was thus laid down:

"In construing the different provisions of a contract of insurance, all must be so construed, if it can reasonably be done, as to give effect to each. Where two interpretations equally fair may be given, that which gives the greater indemnity will prevail. If one interpretation looking to the other provisions of the contract and to its general object and scope would lead to an absurd conclusion, such interpretation must be abandoned, and that adopted which will be more consistent with reason and probability. In all cases the policy must be liberally construed in favor of the insured so as not to defeat without a plain necessity his claim to the indemnity which in making the insurance it was his object to secure."

It is apparent that these two provisions of the policy cannot both be strictly enforced, and to hold that the insured under penalty of nonrecovery must do something which will inevitably cause a loss for which he cannot recover would be an absurd interpretation which this court has said must not be adopted.

The eleventh and twelfth assignments are abandoned. The thirteenth relates to the refusal of the circuit judge to grant a new trial. As all the points of law raised therein have been fully covered in this opinion, there only remains the ground that the verdict was contrary to the evidence. We do not so find. There was sufficient evidence to support the verdict.

The judgment of the circuit court is affirmed.

TAYLOR, SHACKLEFORD, WHITFIELD,  
and ELLIS, JJ., concur.

(73 Fla. 644)

**SHEPPARD et al. v. LIVINGSTON.**  
(Supreme Court of Florida. March 14, 1917.)

(Syllabus by the Court.)

**1. EQUITY ⚡324—HEARING—ISSUES.**

At the hearing upon a plea in equity and a general replication, no fact is in issue but the truth of the matter pleaded.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 635-640.]

**2. EQUITY ⚡176—AMENDED PLEA—ORDER TO ANSWER.**

Where at the hearing in equity upon a plea and a general replication, the plea, as pleaded, is not supported by the testimony, it must be overruled, and the defendant ordered to answer the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 412.]

**3. EQUITY ⚡178—RIGHT TO ANSWER—DENIAL.**

Under equity rule 51 the right of the defendant to answer the bill of complaint is not a mere formal or technical right, but it confers authority to answer the bill as provided in the rule which is a substantial and duly prescribed right that cannot be lawfully taken from a defendant except by due course of procedure.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 414.]

**4. EQUITY ⚡176—ANSWER—TIME.**

A defendant has a right to answer after an issue of fact, joined on a plea, has been determined against him.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 412.]

Appeal from Circuit Court, Alachua County; Jas. T. Willis, Judge.

Foreclosure proceedings by R. B. Livingston against L. E. Sheppard and others. Decree pro confesso for plaintiff, and defendants appeal. Reversed.

Evans Haile and Thomas W. Fielding, both of Gainesville, for appellants. W. S. Broome, of Gainesville, for appellee.

**WHITFIELD, J.** On July 30, 1915, Livingston brought foreclosure proceedings. The defendants being nonresidents of the state, there was publication of process. The defendants filed the following plea:

"And the said above-named parties, defendants, show to the court that they are nonresidents of the state of Florida, and are residents of the state of Michigan; that no process has been or could be issued against them in the above-entitled suit in chancery, either personally or by publication, because these said parties say that no bill of complaint ever has been filed in the office of the clerk of the circuit court of Alachua county, Fla., against them, the said parties above named, in the above-entitled cause, and these said parties have never appeared either in person or by attorney in or to the said above-entitled cause, or suit, or action.

"All which matters and things these said parties doth aver to be true, and they plead them, and pray the judgment of this court whether there is anything further for them to do or answer in the premises."

On October 15, 1915, this plea was held to be sufficient on argument, and the complainant was ordered to file a replication by the November rule day. A general replication

was filed. On January 29, 1916, the examiner reported that, pursuant to an order "to take and report to the court the testimony herein," it made report of testimony taken. The testimony relates to the issue made by the plea and to the merits of the foreclosure suit with an agreement as to counsel fees if final decree is for complainant. On February 2, 1916, the defendants asked leave to file an answer. This was denied on February 8, 1916, and on the same day a decree was rendered in part as follows:

"This cause coming on to be heard upon the bill of complaint, plea, replication, and master's report for a final hearing and final decree, and it appearing to the court that the bill of complaint was delivered to the clerk of this court and received by him to be filed, and that an order of publication was duly made thereon, and that the court obtained jurisdiction over the persons of the defendants, and that the defendants have failed to prove their plea, and it further appearing to the court that the defendants have filed no answer or other pleading denying the allegations of the bill as to the indebtedness upon the notes mentioned and the mortgage given to secure same, it is therefore ordered that the bill be taken as confessed against the defendants; and it appearing from the testimony in said cause that the defendants are indebted to the complainants in the sum of \$2,963 principal and interest upon the three notes filed in evidence herein, and the further sum of \$350 as a reasonable attorney's fee which is hereby allowed, and the court finding the equities in this case to be with the complainant, and the premises considered, it is ordered, adjudged, and decreed" accordingly.

The defendants appealed.

[1] At the hearing upon a plea in equity and a general replication no fact is in issue but the truth of the matter pleaded. *Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. Ed. 684.

[2] Where at the hearing in equity upon a plea and a general replication the plea, as pleaded, is not supported by the testimony, it must be overruled, and the defendant ordered to answer the bill. *Dalzell v. Dueber Watch Case Mfg. Co.*, 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749.

[3] "Under equity rule 51 the right of the defendant to answer the bill of complaint is not a mere formal or technical right, but it confers authority to answer the bill as provided in the rule which is a substantial and duly prescribed right that cannot be lawfully taken from a defendant except by due course of procedure." *Dennard v. Monroe*, 66 Fla. 254, 63 South. 423.

[4] A defendant has a right to answer after an issue of fact, joined on a plea, has been determined against him. See Equity Rule 51; *Westervelt v. Library Bureau*, 118 Fed. 824, 55 C. C. A. 436. The quoted rule was not applied in *Kennedy v. Creswell*, 101 U. S. 641, 25 L. Ed. 1075. See *Westervelt v. Library Bureau*, supra.

As there was no issue in the cause except on the plea averring want of proper service on the defendants, and as no decree pro con-

fesso was granted when the testimony was taken, the mere fact that testimony was taken on the merits of the cause as well as on the dilatory plea did not authorize the court at the final hearing to grant a decree pro confesso and to enter final judgment; there being no default and no issue as to the merits of the cause.

Reversed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and ELLIS, JJ., concur.

(73 Fla. 661)

STATE ex rel. TOWNSEND et al., County Com'rs, v. FLORIDA COAST LINE CANAL & TRANSPORTATION CO.

(Supreme Court of Florida. March 20, 1917.)

(Syllabus by the Court.)

CANALS §17 — BRIDGE — AUTHORITY OF COUNTY COMMISSIONERS—MANDAMUS.

In proceedings brought by county commissioners as relators, a canal company will not by mandamus be required to construct a drawbridge over its canal at a point where a road existed before the canal was constructed, when the evidence shows that a bridge in use at another point over the canal meets all reasonable requirements and the benefit to the public will not bear some fair relation to the expense to the canal company of another bridge and to the inconvenience and risk the bridge would be to the public use of the canal for transportation purposes, particularly when it does not clearly appear that the road was in fact a public road over which the county commissioners had authority.

[Ed. Note.—For other cases, see Canals, Cent. Dig. § 25.]

Error to Circuit Court, St. Johns County; Chas. S. Adams, Referee.

Mandamus by the State of Florida, on

the relation of C. P. Townsend and others, County Commissioners of St. Johns County, against the Florida Coast Line Canal & Transportation Company. Judgment for respondent, and relators bring error. Affirmed.

MacWilliams & Bassett, of St. Augustine, for plaintiffs in error. C. M. Cooper, of Jacksonville, for defendant in error.

PER CURIAM. The county commissioners of St. Johns county brought mandamus proceedings in the circuit court to compel the canal company to build a drawbridge over its canal at a point where a road existed when the canal was constructed. A referee heard the case on the pleadings and the evidence, and gave judgment for the respondent. The relators took writ of error.

The evidence shows that a bridge over the canal in use at another point meets all reasonable requirements, and that the benefits to the public of another bridge over the canal at the point named will not bear a fair relation to the expense to the canal company of another bridge and to the risk and inconvenience the bridge would be to the public use of the canal for transportation purposes; and it does not clearly appear that the road was in fact a public road over which the county commissioners had authority. Under these circumstances the canal company will not by mandamus be required to construct the drawbridge.

Affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(114 Miss. 144)

**NEW ALBANY WHOLESALE GROCERY  
CO. et al. v. WELLS, Sheriff.  
(No. 19045.)**

(Supreme Court of Mississippi, Division A.  
April 23, 1917.)

**1. SHERIFFS AND CONSTABLES §91—INDEMNITY BOND—NECESSITY OF RETURNING.**

Under Code 1906, § 2143, requiring the sheriff upon returning an execution to return an indemnity bond taken by him when the property was claimed to be exempt, a failure to return the bond for three or four years, and not until suit was started upon it, invalidates the bond.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 131-133.]

**2. SHERIFFS AND CONSTABLES §163—LIABILITY ON BOND—FAILURE TO RETURN EXECUTION OR ATTACHMENT BOND.**

Where a sheriff fails to return an indemnity bond after selling property claimed to be exempt, as required by Code 1906, § 2143, the sheriff and his official bond remain liable as if the indemnity bond had not been taken.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 391.]

Appeal from Circuit Court, Union County;  
J. L. Bates, Judge.

Action by W. M. Wells, Sheriff, for the use of J. A. Jumper, against the New Albany Wholesale Grocery Company and others. Judgment for plaintiff, and defendants appeal. Reversed, and judgment entered for defendants.

Stephens & Kenneday, of New Albany, for appellants. S. R. Knox, of New Albany, for appellee.

**SYKES, J.** Suit was instituted in the circuit court of Union county by W. M. Wells, sheriff, for the use of J. A. Jumper, against the New Albany Wholesale Grocery Company and Z. M. Stevens, for the sum of \$250, based upon a bond signed by the defendants in accordance with section 2143 of the Code of 1906. W. M. Wells, the sheriff, had levied on a stock of merchandise which belonged to J. A. Jumper, and was about to sell the same under two writs held by him, when Jumper filed in accordance with law his claim to certain of this property as exempt. Whereupon the sheriff then demanded of the plaintiffs in execution a bond under section 2143 of the Code of 1906. This bond was signed by the defendants to this suit. The sheriff then proceeded with the sale, but failed to return the bond upon which this suit is based with his execution and attachment to the justice of the peace court under whose writs he had made the sale. Shortly after the sale was made this suit was instituted. It is unnecessary to set out in full the pleadings in the case. Suffice it to say that the testimony showed that this bond was not returned with the papers to the proper justice of the peace court. On the other hand, the testimony of the sheriff shows that he considered that the

bond was given to him to secure him personally from any liability, and that it was not his duty to file the same or return it to court, and that he put it in a safe in the sheriff's office. After the institution of this suit, and three or four years after the execution of the bond, at the request of the attorneys for the appellee, this bond was then filed in the justice of the peace court. At the conclusion of the testimony the defendants in the court below, the appellants here, made a motion to exclude the testimony and for a peremptory instruction because of the failure of the sheriff to return this bond with the execution or attachment in accordance with section 2143 of the Code.

[1, 2] This motion should have been sustained. This exact question was settled in the case of *Butler v. Alcus*, 51 Miss. 47. In that case there was a special plea setting up the fact that the bond sued on was not delivered, because it was not returned with the attachment mentioned in the declaration, nor was it ever filed among the papers in said suit. The statutes relating to bonds in the Code of 1871 upon the proposition here involved are the same as section 2143, Code of 1906. In passing upon this question the court said:

"The third plea denies that any such bond was ever returned with the attachment, and the plaintiff, in his replication, avers and affirms that the bond was taken and returned with the attachment. The plaintiff therefore holds the affirmative of the issue and must prove it, and, having failed to do so upon the trial of the cause, the court did not err in excluding the bond as evidence. And it is believed that it should have been returned with the attachment, and that there was no error, therefore, in overruling the demurrer to said third plea."

The bond which may be taken under this section of the Code is one especially for the benefit of the sheriff. If he return it with the papers into the proper court, then he and the sureties on his official bond are protected from liability, provided this special bond is a solvent one. Being primarily for the protection of the sheriff, if the sheriff desire to take advantage of this bond, then it is his duty to return it into the proper court with the attachment or execution papers. If he fail to return it, then no vitality attaches to the bond. The sheriff and his official bond remain liable to the same extent as if no bond had been demanded by him under this section. The plaintiff has therefore sued the wrong parties.

The record fails to show that appellants are estopped to make this defense. The motion of the defendant to exclude the testimony and for a peremptory instruction should have been sustained. The judgment of the lower court is reversed, and a judgment will be entered here on behalf of the appellants.

Reversed, and judgment here.

(114 Miss. 150)

**ECKERT v. SEARCY et al.** (No. 19132.)(Supreme Court of Mississippi, Division A.  
April 23, 1917.)**1. PLEDGES**  $\S$  4—**WHAT IS—NOTES AS COLLATERAL—"FORFEIT."**

Deposit of notes with intention that they are to be a pledge, and with understanding that if debt is not paid within a certain time creditor is to become absolute owner, constitutes a pledge or "forfeit."

[Ed. Note.—For other cases, see Pledges, Cent. Dig.  $\S$  6-13, 30.]

For other definitions, see Words and Phrases, First and Second Series, Forfeit.]

**2. PLEDGES**  $\S$  30(5) — **NOTES PLEDGED — WRONGFUL COMPROMISE WITH MAKER.**

A pledgee, with whom notes have been deposited as security for a debt, who turns over the notes to the maker on payment of less than face value without notice to pledgor, must account for their face value; the maker being solvent and notes secured by a lien.

[Ed. Note.—For other cases, see Pledges, Cent. Dig.  $\S$  82-85.]

**3. EQUITY**  $\S$  24—**FORFEITURES—RELIEF.**

Equity will not enforce a forfeiture, but will relieve against it.

[Ed. Note.—For other cases, see Equity, Cent. Dig.  $\S$  69-76.]

**4. PLEDGES**  $\S$  50 — **PROVISION FOR FORFEITURE—VALIDITY—REDEMPTION.**

A provision in a contract of pledge that upon default pledgee shall have absolute property in goods is invalid, and the pledgor on paying what he owes may redeem.

[Ed. Note.—For other cases, see Pledges, Cent. Dig.  $\S$  118-121.]

**5. PLEDGES**  $\S$  41—**NOTES—BONA FIDE PURCHASER.**

A maker with knowledge that his notes have been deposited as collateral, who without inquiry pays pledgee \$125 for notes worth at least \$300, is not a bona fide holder; the circumstances being sufficient to put an ordinarily prudent man on inquiry.

[Ed. Note.—For other cases, see Pledges, Cent. Dig.  $\S$  100.]

Appeal from Chancery Court, Hinds County; O. B. Taylor, Chancellor.

Bill by Mrs. K. Eckert against R. J. Searcy and another. Bill dismissed, and plaintiff appeals. Reversed and remanded, with instructions.

Percy L. Olifton and Phil Christman, both of Jackson, for appellant. Howie & Howie, of Jackson, for appellees.

**HOLDEN, J.** From a decree of the chancery court of the First district of Hinds county, dismissing the bill of complaint filed by the appellant against the appellees, the appellant, Mrs. Eckert, appeals here.

The case is, briefly, this: On May 4, 1914, the appellant, Mrs. K. Eckert sold to J. M. Lewis, one of the appellees herein, a certain lot of household goods and furniture. The consideration of the sale was \$300 in cash and the execution of eight promissory notes by the said J. M. Lewis to the said Mrs. K. Eckert for \$100 each, the first of which was due and payable 30 days after date, and one

due each 30 days thereafter until all of said notes should be paid, and, if default was made in the payment of any one of said notes, then all of the remaining unpaid notes should then and there become due, at the option of the holder. Title was reserved in the vendor of said property, who was Mrs. K. Eckert, appellant, to secure the payment of said notes. Subsequently, on June 30, 1914, the appellant became indebted to R. J. Searcy, the other appellee herein, in the sum of \$98.70. This claim of indebtedness was placed in the hands of Allen Thompson, an attorney, for collection. To prevent suit, and to secure the payment of said indebtedness of \$98.70, the appellant, Mrs. Eckert, through her son and agent, E. C. Christman, deposited as security with said Allen Thompson, attorney, on June 20, 1914, three of the above-mentioned notes executed by the said J. M. Lewis to the said Mrs. Eckert. These notes were for \$100 each, all dated May 4, 1914, and none of them due until August 4, 1914. Christman, acting for appellant, Mrs. Eckert, testified that he pledged the three notes with Allen Thompson, the attorney for Searcy, as collateral security for the said indebtedness of \$98.70 due by Mrs. Eckert to the said R. J. Searcy. The appellee R. J. Searcy testified, which must be taken as true on the finding of fact by the chancellor:

"That E. C. Christman, on June 20, 1914, placed with said attorney, Allen Thompson, in his (the said R. J. Searcy's) presence, three notes of \$100 each, made by J. M. Lewis (appellee) to Mrs. K. Eckert (appellant) said notes being indorsed by the said Christman and Mrs. Eckert, with the understanding that if he, the said Christman, did not pay said indebtedness of \$98.70 to the said Searcy by July 5, 1914, that he, the said Searcy, was to become absolute owner of said three notes placed with said Allen Thompson, attorney, in payment of said debt of \$98.70."

It appears further that on or about the 5th day of July, 1914, the said Allen Thompson, attorney, turned over to the said R. J. Searcy the three notes deposited with him as security, as aforesaid; whereupon, the said R. J. Searcy took said three notes, of the face value of \$100 each, none of them being due at that time, and without notice to the said Christman, agent, or without notice to Mrs. Eckert, sold the said three notes to J. M. Lewis, the maker thereof, one of the appellees here, for the sum of \$125. The said Searcy then and there marked said notes "paid" across the face of them, and delivered the same to the said J. M. Lewis, maker. It also appears that, two or three days before the sale of said notes by Searcy to Lewis, the maker, the appellee Lewis was informed by one J. W. Green, in conversation, that Searcy did not have the notes, the said Christman having already informed Green that the notes were deposited as collateral security with the attorney of the said Searcy, at which time, and during which conversation, the said J. M. Lewis, appellee, re-

marked that he "did not care where Searcy got the notes so long as Searcy turned them over to him and they were marked 'paid.'" It appears that the three notes signed by Lewis, for \$100 each, payable to Mrs. Eckert, were good and were secured by a lien on the furniture, the purchase money for which had been partly paid, and the maker was solvent.

When the appellant, Mrs. Eckert, discovered that the three notes signed by appellee Lewis for \$100 each which had been pledged as collateral security to pay the \$98.70 indebtedness due Searcy had been surrendered to the maker, Lewis, and marked "paid," and considered redeemed by Lewis, she filed this bill in the chancery court, asking for relief and recovery against the appellees R. J. Searcy and J. M. Lewis for the difference due her on the three notes of \$100 each; and, on the hearing of the cause, the relief sought was denied and the bill dismissed, and this appeal is prosecuted from this decree.

It appears to us that there are really but two questions in the case that deserve consideration and discussion by us. They are: First, were the three \$100 notes left with Thompson, attorney for appellee Searcy, by Christman, for Mrs. Eckert, to secure the payment of the indebtedness of \$98.70 due by Mrs. Eckert to Searcy, a pledge as collateral security for the payment of the \$98.70 indebtedness due Searcy on July 5, 1914? If the transaction was a pledge of the notes as collateral security, then there can be no question as to the liability of the appellee Searcy to account to Mrs. Eckert for their wrongful disposition. Second, if the transaction was a pledge, as security, and Lewis, appellee, the maker of the notes had notice of, or was put upon inquiry, as to the fact that his notes were being held as a pledge of collateral security by Searcy, and he knew, or should have known, that Searcy had no right to dispose of the notes at such a great sacrifice and in such manner and without notice, and knowing this when he purchased, or pretended to purchase, the notes from Searcy for \$125, his own notes, which were worth \$300, and thus participating in the wrong, did Lewis become a trustee "in invitum" and accountable to the appellant, Mrs. Eckert, for the amount called for by the three notes of \$100 each executed by him, less the debt due by the appellant, Mrs. Eckert, to the appellee R. J. Lewis, which was \$98.70?

[1, 2] Taking the whole testimony in this record, and viewing it from the most favorable standpoint for the appellees, we are clearly of the opinion that the transaction here of leaving the three \$100 notes with Attorney Thompson to secure the \$98.70 indebtedness due Searcy was nothing more or less than a pledge of the three \$100 notes as collateral to secure the payment of the \$98.70 indebtedness due to Searcy by the appellant, Mrs. K. Eckert. It is plain, from the testimony of the appellee Searcy, that the

deposit of the notes with Allen Thompson, attorney, was intended as a pledge to secure the \$98.70 indebtedness, or that he pledged them as security and as a forfeit, all based upon "the understanding that if he, the said Christman for Mrs. Eckert, did not pay said indebtedness of \$98.70, to the said R. J. Searcy by July 5, 1914, that he, the said R. J. Searcy, was to become absolute owner of said three notes placed with Allen Thompson, his attorney, in payment of said debt of \$98.70." Certainly this constitutes a pledge, or "forfeit," to secure the indebtedness of \$98.70, and it must be treated as such, and appellee Searcy held accountable to Mrs. Eckert for the face value of the notes.

[3, 4] A court of equity will grant relief to the pledgor, whose securities he has pledged as collateral and which have been wrongfully sacrificed or compromised with the maker to his injury and damage. Equity will not enforce a forfeiture, but will relieve against it. *Pomeroy's Eq. Jur.* (3d Ed.) vol. 1, § 433.

"A provision in the contract of pledge that upon default the pledgee shall have an absolute property in the goods and the pledgor shall have no equity of redemption is invalid, and notwithstanding such a provision the pledgor may pay what he owes the pledgee and redeem." 22 Am. & Eng. Enc. Law (2d Ed.) p. 877; 31 Cyc. 859, and cases cited; *Swofford Bros. v. Randolph*, 151 Mo. App. 385, 132 S. W. 255; *Vickers v. Battershall*, 84 Hun, 496, 32 N. Y. Supp. 314; *McLemore v. Hawkins*, 48 Miss. 715; *Boswell v. Thigpen*, 75 Miss. 317, 22 South. 823.

In *Boswell v. Thigpen*, *supra*, Justice Terrel said:

"The right of property in the thing pledged does not pass to the pledgee, but remains with the pledgor, subject to the lien of the pledgee. 2 Kent, 581. The pledgee's character is that of a trustee for the pledgor—first, to pay the debt, and, second, to pay over the surplus to the pledgor—and he cannot deal with the property so as to destroy, or even impair, its value. The pledgee cannot sell the subject of the pledge unless he is specially authorized so to do. His authority to deal with the pledge is determined by the law. In the case of promissory notes, and other negotiable instruments, he is *prima facie* bound to collect the full face value of them, with interest, unless under special circumstances of excuse, to be shown by him. He should use reasonable and ordinary diligence for their collection, and, when collected, he should reimburse himself to the extent of his lien upon them, and pay over the surplus to the pledgor. If the pledged notes be assigned by the pledgee to some third person, with notice of the pledge, such person can take no greater right in the pledge than his assignor had, and, upon the collection of the notes, must pay to the pledgor the surplus after satisfying the debt for which they were originally pledged. Neither the pledgee nor his assignee can impose a greater burden on them than the satisfaction of the principal debt for which they were originally pledged, except by the consent of the pledgor. *Wheeler v. Newbould*, 16 N. Y. 392; *Fletcher v. Dickinson*, 7 Allen (Mass.) 23; *Nelson v. Wellington*, 18 N. Y. Super. Ct. 178; *Lamberton v. Windom*, 12 Minn. [Gil. 151] 232, 242 [90 Am. Dec. 801].

"It seems to us that the subject-matter of litigation is of equity cognizance. Kelly & Mills had no authority to discount the notes of Mrs. Roby. By so doing they committed a breach of trust and confidence, and Boswell, to whom

the notes were sold at a sacrifice, participated in such wrong, and by so purchasing at a discount he became a trustee in invitum. 2 Pom. Eq. § 1044."

In *De Clark v. Waters*, 10 Wyo. 81, 85 Pac. 855, it was held that the act of a creditor holding amply secured notes of his debtor as collateral, in accepting a less sum than the amount due thereon from a solvent maker in full satisfaction thereof, does not preclude the latter from recovering the balance due from the maker.

In *Powell v. Ong*, 92 Ill. App. 95, that court held that:

"Where the pledgee of a \* \* \* note without authority effects a compromise with the maker, he must respond to the owner of such note for the value of it, and the burden of showing that the true value of the note is less than its face value is on the pledgee." Syllabus.

In *McLemore v. Hawkins*, supra, our court said:

"It is very questionable whether a valid sale of a note could be made to the maker at private sale. Such a transaction, without the consent of the pledgor, would be very suspicious, especially if the maker were solvent."

[5] As to the second question: The undisputed testimony in this record shows that the witness Green had been informed that the three notes for \$100 each belonging to Mrs. Eckert, appellant, had been left with appellee Searcy's attorney, Thompson, as security for the payment of the \$98.70 indebtedness due on July 5, 1914, and that the witness Green had inferentially communicated this information to J. M. Lewis, the maker of the notes, by stating to him that the notes were not in the hands of Searcy. But it seems that the maker, Lewis, was anxious to obtain his notes, regardless of how Searcy had come into the possession of them, so long as the notes were marked "paid," and when he was offered his three good notes, worth at least \$300, for \$125, the very offer was sufficient to cause a reasonably prudent man to be suspicious of the transaction, and of the real ownership of the notes; and, if he had acted as a reasonably prudent man, he would have made inquiry as to the status of the notes; in fact, this was sufficient to put him upon inquiry, which is tantamount to notice. And more especially is this true when all the facts, circumstances, and surroundings of the situation are considered, together with what witness Green had said to the appellee Lewis in regard to where these notes were prior to the time the alleged sale of them took place between the appellees Searcy and Lewis. So, it follows that the appellee Lewis got no more right or title in the three notes than the appellee Searcy had; and the extent of Searcy's interest in the three notes was to secure the payment of the \$98.70 indebtedness due to him by the appellant, Mrs. Eckert, and appellee Lewis is

accountable to Mrs. Eckert for the face value of the three notes. *Boswell v. Thigpen*, supra. The appellee Searcy, under whom the appellee Lewis claims, held the three \$100 notes as security for a pre-existing debt, and was not a purchaser for value. *Bank v. Bank*, 106 Miss. 471, 64 South. 210; *Bank v. Strauss*, 66 Miss. 479, 6 South. 232, 14 Am. St. Rep. 579; *Hinds v. Pugh*, 48 Miss. 268.

One who purchases negotiable paper, without inquiry, when the circumstances are such as would excite the suspicion of a prudent man, does not stand in the position of a bona fide holder. *Mee v. Carlson*, 22 S. D. 365, 117 N. W. 1033, 29 L. R. A. (N. S.) 351, and authorities cited.

In *Jones v. Gordon*, 2 App. Cas. 616, 4 E. R. C. 416, Lord Blackburn says:

"But if the facts and circumstances are such that the jury, or whoever has to try the question, came to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind, 'I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover,' I think that is dishonesty."

It may be said that it must have reasonably appeared to the appellee Lewis in this case that something was wrong, when he was offered his own good paper, which had not matured, and which was secured, for a little more than one-third of its face value. We think that ordinary care and diligence, and a reasonable respect for the rights of the payee in the notes, under the peculiar facts of this case, should have prompted appellee Lewis to make some inquiry as to the true status or ownership of the notes before he paid Searcy the \$125 for the three notes executed by him to Mrs. Eckert.

In *De Witt v. Perkins*, 22 Wis. 474, the court said:

"The buying of a note against a solvent maker, the purchaser knowing him to be such, for a mere nominal consideration, is very strong, if not conclusive, evidence of mala fides. It is constructive notice of the invalidity of the note in the hands of the seller—such as to put the purchaser upon inquiry, which if he fails to make, he acts at his peril."

In view of these conclusions, the decree of the chancery court is reversed, and the case remanded, with instructions to carry out these views, to wit: The appellee Searcy is entitled to satisfaction of his indebtedness of \$98.70; the appellant, Mrs. Eckert, is entitled to the amount represented by the three \$100 notes, less the \$98.70 due to Searcy; and appellees should pay to the appellant, Mrs. Eckert, the amount of the three notes, less the \$98.70 due to Searcy. The appellees should be taxed with all court costs.

Reversed and remanded.



(114 Miss. 185)

**MECHANICS' & TRADERS' INS. CO. v. BOYCE.** (No. 19099.)

(Supreme Court of Mississippi, Division B. April 16, 1917.)

**1. INSURANCE — 328(2) — FIRE INSURANCE — RECOVERY BY MORTGAGEE—PLEDGES OF SECURED NOTES.**

Pledging by mortgagee of secured notes does not bar recovery by him on fire policy on mortgaged property having a mortgage clause in his favor; the stipulation in policy against change in interest, title, or possession of the subject of insurance not applying.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 795.]

**2. INSURANCE — 328(2) — FIRE POLICY — BREACH OF COVENANTS—TAX SALE.**

Sale of insured property for taxes is not a breach of covenants of policy; the two years of redemption not having expired, and the purchaser having no right of possession and owning no title till such expiration.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 795.]

Appeal from Court, Lincoln County; J. B. Holden, Judge.

Action by William A. Boyce against the Mechanics' & Traders' Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

McLaurin & Armistead, of Vicksburg, for appellant. P. Z. Jones, of Brookhaven, for appellee.

STEVENS, J. Appellee, as plaintiff in the court below, instituted this action to recover from appellant \$600 on a fire insurance policy. The policy was issued in favor of Miss A. V. Marshall and on her property, with the usual standard mortgage clause in favor of appellee. The plaintiff sought to recover as mortgagee, and relied upon the contract evidenced by the mortgage clause. Without setting out in detail either the notes and deeds of trust under which the plaintiff claims as mortgagee, or the several pleas of the defendant and demurrers thereto, it is sufficient to state that appellant defended mainly upon the theory that the notes and deeds of trust held by the plaintiff had been assigned to and deposited with the Planters' Bank of Bogue Chitto as collateral security for an indebtedness due by Mr. Boyce to this bank, and that inasmuch as this assignment was without the knowledge or consent of the defendant, and the securities were held by the Planters' Bank at the time of the fire, there was a breach of the covenants of the policy, and plaintiff could not recover.

[1] The issue presents for our consideration the question whether the pledging of the notes held by the plaintiff against Miss Marshall will defeat a recovery. We think not. While the pleadings show that the Planters' Bank held the notes at the time of the fire, they further show that plaintiff was the equitable owner thereof, that the notes due by Miss Marshall had not been paid, and that, while Mr. Boyce was a debtor of the Planters'

Bank, the latter had not foreclosed the collateral which Boyce had pledged to the bank. It is further shown that the assignment or pledging of some of the notes was simply by delivery, and not by written transfer. The plaintiff had not sold the Marshall notes outright, but had simply used them in financing his own affairs, and in a transaction with the Planters' Bank in which neither Miss Marshall nor the insurance company had any interest. Mr. Boyce, as mortgagee, relies upon his independent contract with the insurance company, by the terms of which there is no prohibition against the assignment, transfer, or pledge of the notes which the mortgage clause is designed to protect. Mr. Boyce, as mortgagee, has no direct interest or estate in the mortgaged property, and unquestionably any pledge of the Marshall notes conveyed no interest or estate in the property covered by the policy of insurance. The stipulation against any change in the interest, title, or possession of the subject of the insurance is intended to govern, and does in fact control, the conduct of Miss Marshall, the owner of the property, and not the mortgagee, provided only that the mortgagee shall notify the company of any change in the ownership or occupancy which shall come to his notice. This is the express agreement in the standard mortgage clause. The question is simple and so free of difficulty that any expression from us is really unnecessary.

The case of *Kase v. Hartford Fire Ins. Co.*, 58 N. J. Law, 34, 32 Atl. 1057, relied upon by appellant is not in point. In that case the plaintiff had conveyed his interest in the mortgage to a third party, and therefore at the time of the fire, as expressly held by the court, had no interest to protect. Kase, the mortgagee, had assigned the mortgage, but had not assigned the policy of insurance. In reference to Kase the court observed:

"He has not suffered any loss by reason of the injury to the mortgaged premises, for he had no interest in them when the fire occurred."

And as to Headley, assignee of the mortgagee, the court said:

"So far as Headley, the assignee of the mortgage, is concerned, although it is true that the fire depreciated his mortgage security, and thereby inflicted pecuniary loss upon him, yet, as he had no interest in the policy of insurance at the time of the fire, he has no right to call upon the defendant company to make good the loss which he has sustained. A policy of insurance is a contract of indemnity, personal to the party to whom it is issued."

In the instant case Mr. Boyce did have an interest in the notes secured by the mortgage clause, and at the time of the fire enjoyed the right to pay the Planters' Bank any indebtedness which he owed it, and thereby to redeem his notes altogether. He still possessed the right of a mortgagee, and as such had an interest in the policy, and the right to recover under the terms of his contract. The business of the country is largely done on borrowed capital, and the right to pledge

mortgages and commercial paper as collateral security is a valuable right, freely and frequently resorted to.

[2] We do not think, under the facts of this case, a sale of the premises for taxes was a breach of the covenants of the policy. The two years within which the property might be redeemed had not expired, and the inchoate right or title of the tax purchaser had not ripened into a good title. Mr. Brister purchased at a tax sale made on the first Monday of May, 1915. He would not be entitled to possession, and would in fact own no title, until the time for redemption under our revenue laws had expired.

**Affirmed.**

(114 Miss. 174)

**WARRINER v. FANT.** (No. 18953.)  
(Supreme Court of Mississippi, Division B.  
April 16, 1917.)

**1. ELECTION OF REMEDIES**  $\S$  3(1)—**FINALITY OF CHOICE.**

Ordinarily a party's choice of one of several inconsistent remedies estops him from later resorting to another remedy.

[Ed. Note.—For other cases, see *Election of Remedies*, Cent. Dig.  $\S$  3.]

**2. ELECTION OF REMEDIES**  $\S$  3(1)—**RIGHT TO ELECT.**

A creditor may elect to either proceed individually by attachment proceedings against his debtor or join other creditors in seeking appointment of a receiver, and where he joined others in securing appointment of a receiver, his election to pursue that remedy estopped him from later instituting individual attachment proceedings against the debtor.

[Ed. Note.—For other cases, see *Election of Remedies*, Cent. Dig.  $\S$  3.]

Appeal from Circuit Court, Wothoma County; W. A. Alcorn, Judge.

Action by Ellington M. Fant against B. R. Warriner, receiver. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

W. H. Kier and W. J. Lamb, both of Corinth, for appellant. Maynard & FitzGerald, of Clarksdale, for appellee.

**COOK, P. J.** This action was begun in the circuit court of Coahoma county by Ellington M. Fant appellee, to recover certain money on deposit to the credit of the Tishomingo Tie & Stone Company. An attachment was sued out by Mr. Fant against the Tie & Stone Company, and garnishments were served on the Bank of Clarksdale and the Planters' Bank. B. R. Warriner, receiver of the Tishomingo Tie & Stone Company, intervened, claiming that he, as receiver, was entitled to the funds on deposit in the banks for the benefit of the creditors of the insolvent Tie & Stone Company. The case was submitted on an agreed statement of facts, and the circuit court decided that Mr. Fant, and not the receiver, was entitled to the aforesaid funds on deposit, from which judgment the receiver prosecuted this appeal.

The agreed statement of facts is in these words, viz.:

"It is admitted that the Tishomingo Tie & Stone Company was before the receivership herein an alleged corporation organized by W. M. Cozart, Geo. W. Edwards, and others, for the sole purpose of defrauding stockholders and the general public and of stealing and converting any and all funds which came into its hands to the use of the said Cozart, Edwards, and others, and that all sums procured by said corporation, or any members thereof, for the purchase of stocks was fraudulently procured, and that the said money should be returned to the creditors, either through the hands of the receiver or otherwise, as the court may decide.

"It is further agreed that Ellington M. Fant paid into said corporation, through its agent W. M. Cozart, the sum of \$1,800, and that said corporation is now indebted to the said Ellington M. Fant in a sum in excess of \$1,000.

"It is further agreed that the said Ellington M. Fant, on or about the 21st day of January, A. D. 1914, employed Gerald FitzGerald as his agent and attorney in fact to procure for him, the said Ellington M. Fant, by any means which he, the said attorney, could a return of the said money.

"It is further agreed that on or about the 22d day of January, A. D. 1914, the said Ellington M. Fant, after having employed the said Gerald FitzGerald, made a trip to Corinth, Miss., and Tishomingo, Miss., to ascertain, if possible, the condition of the corporation known as the Tishomingo Tie & Stone Company, above named, and that while there, upon the solicitation of other creditors, the said Ellington M. Fant did, on or about the 29th day of January, A. D. 1914, allow his name to be joined with other creditors of the said Tishomingo Tie & Stone Company, to an original bill in the chancery court of Tishomingo County, Miss., asking for a receiver of the said Tishomingo Tie & Stone Company, said case being styled *E. Fant and Others v. The Tishomingo Tie & Stone Co., and Others*, and being No. 739 on the docket of the said chancery court.

"It is further agreed that said original bill in said chancery court was first taken to Hon. Claude Clayton, a circuit judge, who ordered issuance a writ of injunction on January 29, 1914, enjoining any and all persons having funds belonging to the said Tishomingo Tie & Stone Company, from paying the same out or disposing of them in any way until further order of the court, and said injunction was issued January 31, 1914, but that no receiver was appointed under said bill, and that although the said fiat was signed by said judge on January 29, 1914, the said original bill was not filed in the chancery clerk's office until January 31, 1914; and that said writ of injunction was served on the Planters' Bank, of Clarksdale, Miss., and the Bank of Clarksdale, of Clarksdale, Miss., on the 2d day of February, A. D. 1914.

"It is further agreed that upon the prayer in said original bill the chancellor of said chancery court at Corinth, Miss., did on the 2d day of February, 1914, appoint B. R. Warriner receiver of the said Tishomingo Tie & Stone Company, and he is now duly and legally qualified and acting receiver of said company.

"It is further agreed that on the 31st day of January, 1914, the said Gerald FitzGerald, as agent and attorney of Ellington M. Fant, served a good and valid writ of attachment on the Planters' Bank of Clarksdale, Miss., and the Bank of Clarksdale, of Clarksdale, Miss., except the said receiver may now have prior right thereto, if any, the court should now hold attaching all funds in their hands belonging to the said Tishomingo Tie & Stone Company, W. M. Cozart, Secretary and Treasurer, or Geo. E. Edwards.

"It is further agreed that the said banks had at said dates the following amounts in their hands, to wit: The said Bank of Clarksdale had in its hands to the credit of W. M. Cozart, secretary and treasurer, the sum of \$877.85; and the said Planters' Bank had in its hands the sum of \$112.65 to the credit of G. T. Edwards.

"It is agreed that said money belonged to and was the property of the Tishomingo Tie & Stone Company, on the date when the same was attached.

"It is further agreed that the said banks both made answer in the said attachment suit and in the said chancery court, stating all the facts known to them, and stating that the writ of injunction, as above stated, was served on the 2d day of February, A. D. 1914, and that the said attachment above set out was served on them on January 31, 1914.

"It is further agreed that the sole question involved in the trial of this cause is as to whether or not the rights of the receiver take precedence over the rights of the said Ellington M. Fant."

There is no question of actual bad faith in this case. It appears from the agreed statement of facts that Mr. Fant procured the appointment of a receiver for the insolvent Tie & Stone Company. The bill was filed by him and other creditors. In good faith all of the parties to the application for a receivership pooled their interests. They engaged in the joint enterprise of conserving the assets of the insolvent debtor for the joint benefit of all.

[1] The general rule as to the election of remedies is that, where a party has a right to choose one of two or more appropriate, but inconsistent, remedies, and, with knowledge of the facts, makes deliberate choice, then he is estopped from resorting to the other remedy.

[2] Mr. Fant, in this case, had a perfect right to rely upon his own foresight and initiative and thereby secure a preference over other creditors. He had the election of proceeding by attachment and garnishment, and he had the coexistent right to join in a creditor's bill and the appointment of a receiver. He elected to pursue the latter course, and we think he must stand by his choice of remedies.

"Election is simply what its name imports, a choice shown by an overt act between two inconsistent rights, either of which may be asserted at the will of the chooser alone." *Bierce v. Hutchins*, 205 U. S. 340, 27 Sup. Ct. 524, 51 L. Ed. 828.

From our standpoint, when Mr. Fant secured a preference by the attachment and garnishment proceedings, his action was inconsistent with his former action. There are elements of estoppel in the doctrine of election. The intervening rights of his cocomplainants in the receivership may be seriously affected by the attachment. As before stated, it is not claimed that Mr. Fant was guilty of any actual bad faith. However, it must be obvious that one creditor might induce other creditors to sleep on their rights by inducing them to apply for a receiver or by joining with them in an application for

the appointment of a receiver for the purpose of securing for himself an unfair advantage. He, in this case, elected one remedy, and he will not be permitted to elect another and inconsistent remedy.

The judgment of the trial court will be set aside, and the cause will be remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

(114 Miss. 182)

GILCHRIST-FORDNEY CO. v. THIGPEN  
et al. (No. 19061.)

(Supreme Court of Mississippi, Division B.  
April 16, 1917.)

1. LOGS AND LOGGING  $\S$  3(1)—TIMBER DEED  
—DESCRIPTION OF LAND.

A deed of the timber on "fifty acres on the E.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of" a certain section is void for uncertainty.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig.  $\S$  6.]

2. LOGS AND LOGGING  $\S$  3(9)—RESERVATION  
OF TIMBER.

Reservation of timber from a conveyance must be written into the deed.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig.  $\S$  9.]

3. INJUNCTION  $\S$  35(1)—TITLE TO SUPPORT  
ACTION—CUTTING TIMBER.

Complainant in a suit to enjoin cutting timber and for cancellation of defendants' claim thereto must show title in itself, and cannot rely on the weakness of their title, as knowledge of plaintiffs' claim under a deed void for uncertainty of description when they obtained good paper title.

[Ed. Note.—For other cases, see Injunction, Cent. Dig.  $\S$  77.]

Appeal from Chancery Court, Jasper County; G. C. Tann, Chancellor.

Suit by the Gilchrist-Fordney Company against S. F. Thigpen and others. From an adverse decree, complainant appeals. Affirmed.

Deavours, Hilbun & Deavours, of Laurel, for appellant. Byrd & Byrd, of Newton, for appellees.

ETHRIDGE, J. Appellant filed its bill in the chancery court of the second district of Jones county against S. F. Thigpen and S. L. Williams, praying for an injunction against the cutting of timber by the appellees on the E.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section 10, township 1 N., range 10 E., and for a cancellation of the claims of appellee as to timber growing on said land. The appellant claims title through three different sources: First, the heirs of Benjamin Thompson, deceased; second through deed from C. Thigpen & Co.; and, third, by adverse possession.

The lands in question were patented from the United States to John Crosby in 1858, and afterwards sold on execution to Benjamin Thompson. In 1876 the lands were sold to the state for tax, and on February 15, 1886, the state sold the land to Stafford

Peyton, from whom, by succession of transfers, title passed to C. Thigpen & Co., a mercantile firm composed of C. Thigpen, W. M. Sprinkle, and J. W. Gaston, from which parties the title in this case becomes the common source of title, there having been adverse possession under the tax title for a period of ten years prior to the sale from Thigpen & Co. to either of the parties in this cause.

On the 3d day of February, 1900, C. Thigpen attempted to convey the timber on the lands for C. Thigpen & Co. to G. J. Pope, trustee, who conveyed it to the Kingston Lumber Company, which company conveyed it to the appellant. The deed from C. Thigpen & Co., "per C. Thigpen," described the land on which the timber grew which was attempted to be conveyed as follows: "Fifty acres on the E.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section 10, township 1, range 10, in Jasper county, Miss." In the year 1901 C. Thigpen, W. M. Sprinkle, and J. W. Gaston conveyed the E.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$ , above referred to, to B. F. Crosby, who went into possession of the tract of land so conveyed, and remained in possession until the conveyance to E. L. Ward in 1913. Ward subsequently conveyed to S. F. Thigpen, the appellee, and Thigpen conveyed an interest in the land to the appellee Williams.

In 1906 B. F. Crosby conveyed the timber on the lands to the Gulf States Investment Company, a corporation, who conveyed to another party; and this party cut a portion of the timber therefrom. Under the contract of 1906 for the sale of said timber, it was provided that the timber must be removed within a period of five years from April 5, 1906. A portion of the timber was not so removed because the appellant claimed title thereto from the deed to it, through chain of title from C. Thigpen. B. F. Crosby, while upon the land, cultivated a portion of it, used the timber for fencing, and cleared some of the lands, and exercised general ownership over it. There was proof in the record that Crosby had knowledge at the time he bought, that the timber on the land had been previously sold to Pope, trustee, and from him to the appellants. Also, there was proof that he made several statements that the timber did not belong to him. There was no reservation of the timber in the deed from Thigpen, Sprinkle, and Gaston to Crosby, and none in the conveyance from Crosby to Ward, and from Ward to the appellee. In 1910, some nine years after the conveyance to Crosby, Thigpen, Gaston, and Sprinkle, each gave a quitclaim deed, reciting therein that it was for the purpose of perfecting the deed given by C. Thigpen in 1900 to Pope, trustee.

The appellant's claim of title by adverse possession is not supported by proof of any act of possession of the land by it, or any

one acting for it, for any period of time; and during all the time from the deed to Crosby in 1901 to the filing of the bill in 1914, some other party was in the actual possession of the land; and there is a complete failure to prove any title by adverse possession so far as the appellant is concerned.

[1-3] We think the deed from C. Thigpen & Co., "per C. E. Thigpen," to Pope, trustee, in 1900, is absolutely void for want of certainty in the description. *Early v. Long*, 89 Miss. 285, 42 South. 348; *Tierney v. Brown*, 65 Miss. 563, 5 South. 104, 7 Am. St. Rep. 679; *Lazar v. Caston*, 67 Miss. 275, 7 South. 321. It would be impossible for any person to take this deed, and, from it alone, locate the timber, or what particular timber was intended to be conveyed. When it was attempted to perfect this deed in 1910, no deed was procured from Crosby, and no suit filed to correct the deed within the ten-year term provided under our statutes for the bringing of suits in chancery to perfect titles to real estate. In order to retain the timber from Crosby's conveyance, the reservation would have to be written into the deed; and when Crosby conveyed the land absolutely, with no reservations, to Ward, the full legal title to the timber passed with the land. It was the duty of the complainant to show title in itself to maintain the action here instituted; it cannot rely upon the weakness of the appellees' title. The appellees have a good paper title; and while the proof and witnesses for the plaintiff show that Crosby had knowledge of the alleged claim of the appellants, such proof merely tends to weaken the title of appellees, but does not give the appellant standing in court, and they cannot predicate this action upon the proof in this record. The chancellor having reached the same conclusion, the case is affirmed.

(114 Miss. 185)

#### CLARK v. FRENCH. (No. 19026.)

(Supreme Court of Mississippi, Division B. April 16, 1917.)

#### 1. MORTGAGES $\S$ 239 — ASSIGNMENT — FORECLOSURE.

Where the holder of a deed of trust forged a clause authorizing him to assign it, his assignee secured no title.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig.  $\S$  606, 607.]

#### 2. MORTGAGES $\S$ 257 — ASSIGNMENT AFTER MATURITY—ASSIGNEE'S RIGHTS.

One taking an assignment of a deed of trust after maturity is charged with notice of all infirmities and defects in his assignor's title.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig.  $\S$  682-687.]

Appeal from Circuit Court, Claiborne County; E. L. Brien, Judge.

Replevin action by C. B. Clark, trustee, against O. A. French, trustee. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

R. B. Anderson and J. T. Drake, both of Port Gibson, for appellant. C. A. French, of Port Gibson, for appellee.

ETHRIDGE, J. J. W. Clark, as agent for Charles B. Clark, trustee, sued out a writ of replevin for certain property named in the affidavit alleged to be wrongfully detained by C. A. French, trustee, district 1 of Claiborne county, Miss. The suit originated in a justice of the peace court and was appealed to the circuit court, where the judgment was rendered in favor of the appellee French, trustee. The cause of action grows out of a transaction between J. W. Clark and one Parsons. Clark had been connected with a bank, and the bank was in a condition bordering on insolvency and bankruptcy, and Clark was desirous of making arrangements by which the business of the bank could be taken care of, and Parsons and Clark and others were to organize a new bank and take over the assets of the old bank, and Clark conveyed or assigned to Parsons certain securities held by J. D. Millsaps & Co., a merchandising firm composed of Clark and Clark's wife. At the time of the transaction, the wife had died and her estate was being administered by C. B. Clark, the appellant in this cause. It was agreed in the articles of agreement that, if Parsons and his associates failed to carry out the agreement, all the securities and property transferred to Parsons would be returned to Clark. The agreement provided in its concluding clause that, in the event that no new bank is organized, then this agreement to be null and void and the said described collateral is to be turned back to said Clark. Receipts and papers were given listing the securities and mortgages and things turned over to Parsons. After making this contract, Parsons got into trouble in New Orleans, and McCabe, of Vicksburg, Miss., an attorney, procured the discharge of Parsons from jail at New Orleans, and later Parsons got in jail again at Vicksburg, and McCabe secured his release from the prison there and let him have some money in small amounts and rendered professional services in defending Parsons, and Parsons to secure McCabe transferred to McCabe certain of the deeds of trust turned over to him by Clark. It seems that McCabe knew of the contract between Clark and Parsons and requested information of Parsons with reference to the matter, whereupon Parsons exhibited an instrument on which he had written certain lists of the papers and deeds of trust that Parsons was to have for his own use and benefit to do with as he pleased, and McCabe thereupon accepted said papers in satisfaction of his claims against Parsons. Among the papers embraced in this writing were the papers and deeds of trust on the property involved in this replevin suit, and the transfer to McCabe was made after the maturity of the note and deed of trust

so assigned. Clark claimed that Parsons had forged this writing on the original paper and that it was not authorized and was not written on there at the time the paper was delivered by him to Parsons. French as trustee for McCabe had secured possession of the property under this deed of trust, and Clark, trustee, replevied the property. On these facts the court granted a peremptory instruction in favor of French, trustee, and from this judgment entered on such peremptory instruction this case is appealed here.

[1, 2] We are unable to perceive upon what theory the learned trial judge granted a peremptory instruction. The plaintiffs have shown, if it was accepted as true, that Parsons had forged this clause upon this contract, and it is clear that no person could secure a title under a forged instrument. In the second place, McCabe took this assignment of deed of trust after the maturity thereof and was charged with notice of all infirmities and defects in Parson's title.

The judgment is therefore reversed, and the cause remanded.

Reversed and remanded.

(114 Miss. 190)

WILSON et al. v. VINCENNES-MISSISSIPPI LAND & LUMBER CO.

(No. 19020.)

(Supreme Court of Mississippi, Division B.  
April 16, 1917.)

LOGS AND LOGGING §3(7)—SALE OF TIMBER—AGREEMENT OF VENDOR TO PAY TAXES—CONSTRUCTION—"LAND."

Under a contract for purchase of timber to be removed in six years, providing that possession is given only for purposes above set forth and that vendor agrees to pay all taxes on "land" during continuance of purchaser's right, vendor is liable as to purchaser for taxes on the standing timber, although assessed apart from land; the term "land" embracing timber growing thereon.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9.

For other definitions, see Words and Phrases, First and Second Series, Land.]

Appeal from Chancery Court, Washington County; E. N. Thomas, Chancellor.

Suit between the Vincennes-Mississippi Land & Lumber Company and Calhoun Wilson and others. Judgment for the former, and the latter appeal. Reversed and remanded.

Gardner, McBee & Gardner, of Greenwood, for appellants. Percy Bell, of Greenville, for appellee.

STEVENS, J. Appellant Calhoun Wilson, operating under the trade-name of Wilson Land & Lumber Company, purchased from appellee all the merchantable timber on about 3,100 acres of lands in Washington county with the right to cut and remove the timber so purchased within six years from January 1, 1913. The contract between the parties

bears date of September 14, 1912. By the terms of the contract, 500 acres in one body and all timber thereon are to revert back to the grantor at the expiration of the year 1913, and "500 acres each following year until the tract is finished, with the understanding that during the last year 1918 said party of the first part be required to remove only what is left on said tract, and the said party of the second part is to complete the cutting of the timber as it goes, turning back to the grantor the land which has been cut over and from which the timber has been removed, and thereafter the party of the second part is not to enter upon the said land for the purpose of further cutting. \* \* \* Possession is only given said party of the second part for the purpose above set forth; otherwise, fully retained by party of the first part."

The controversy presented by this appeal arises out of the following clause:

"Party of the first part agrees to pay all taxes on the land above described, payable during the time that said party of the second part's right continues, and upon its failure to pay taxes of any year on or before the 15th day of December of the year in which said taxes become due and payable, the said party of the second part shall have the right to pay said taxes and any sum or sums so expended, together with 6 per cent. per annum interest thereon, shall constitute a lien upon the land above described in favor of the said party of the second part, which lien shall be enforceable through the chancery court of Washington county, Mississippi."

One-half of the total consideration for the conveyance was paid in cash, and the remainder was agreed to be paid in one and two years as evidenced by two promissory notes secured by express vendor's lien, and certain provisions of the contract regulated the manner in which the timber might be cut and also at the same time preserve sufficient security for the unpaid purchase money. One clause of the contract expressly provides:

"That the timber is sold for the purpose of being cut, and the said party of the second part has a right to cut same free from the lien of the purchase money in the manner hereinbefore provided for."

It appears that at the time the conveyance was executed the timber was assessed along with the land to appellee. After the execution of the timber deed, the board of supervisors separately assessed the timber to the appellant. This was done without the consent and against the wish of appellant. Appellee paid the taxes for the year 1914, while appellant Calhoun Wilson was required to pay the same for the year 1913. There is an agreement in the record that, at the time of the execution of the timber deed, neither of the parties had actual knowledge of the enactment of chapter 89, Laws of 1912, providing for a better assessment roll for assessing realty. The question presented is: Who is liable for the taxes on the timber for the years 1913 and 1914, the only tax that had accrued at the time this suit was filed? The answer to this question depends upon the proper construction of that clause of the

contract hereinabove quoted—the express stipulation in reference to the taxes.

The agreement, in our opinion, contemplated and means that appellee, as landowner, was to pay all lawful taxes upon the land and timber. At the time of this agreement, the timber was a part of the realty and assessed along with and as a part of the regular assessment of appellee's lands. The value of the timber then constituted a component part of the taxable valuation of the land. There is no agreement by the parties that the timber is to be separately assessed, and Mr. Wilson by his contract obtained only a qualified or limited interest in the timber purchased. It will be noted that 500 acres of the land was to be returned at the expiration of the year 1913, a little more than one year after the date of the contract, and 500 acres were to be returned each year thereafter. It was reasonable for appellant to require appellee to pay the taxes on the land with all of its fixtures and all the elements of value that conspired to make up the grand total valuation of the land on the assessment roll. There would be no good reason for requiring the landowner to pay upon his own land, the mere soil, in which appellant had no interest. There could in no event be any obligation upon Mr. Wilson to pay the taxes on appellee's lands. If appellee, however, should fail to pay the taxes on its lands or any part thereof, a sale of the land with the timber affixed would place the timber rights of appellant in jeopardy. Under this particular contract there might be difficulty in assessing the timber each year separately from the land. At the expiration of the first year the timber on 500 acres of the land would be removed, and, accordingly, all the timber could not equitably be assessed against appellant for a longer period than the first year. At the expiration of the second year, the timber upon the second 500 acres would be cleared and the land turned back to the grantor. If appellant for any reason failed to cut any of the timber required to be cut during any one year, the uncut timber by the terms of the contract reverted to the landowner along with the land, and the grantee is thereafter forbidden to enter for the purpose of further cutting. The very nature of the contract then suggests that the parties in the clause in controversy used the word "land" in the sense in which the term is generally employed, as meaning, not only the soil, but the timber thereon and everything affixed thereto.

"In this state, for more than 30 years, and since the opinion of this court in *Harrell v. Miller*, 35 Miss. 700, 72 Am. Dec. 154, it has been settled law that trees growing upon land are part and parcel of the realty; that the term "land" embraces, not only the soil, but its natural products growing upon and affixed to it." *McKenzie v. Shows*, 70 Miss. 388, 12 South. 336, 35 Am. St. Rep. 654.

Our court in the later case of *Fox v. Lumber Co.*, 80 Miss. 1, 31 South. 533, observed that:

"Trees growing or standing upon land are not distinguishable in their character of real estate from the soil itself, until they are actually severed from the soil."

The contract before us grants rights and imposes obligations upon both parties, and under the express terms of the contract it was the duty of the appellee to pay all taxes. The learned chancellor reached a different conclusion, and his decree is, accordingly, reversed, and the cause remanded. It will be observed that this is in no wise a controversy between the revenue authorities and the parties to this litigation, but an issue between the parties themselves after all lawful taxes have been paid.

Reversed and remanded.

(114 Miss. 198)

**PARTEE v. PARTEE. (No. 19019.)**

(Supreme Court of Mississippi. Division B. April 16, 1917.)

**CONTRIBUTION — 3 — ACTION BY HUSBAND AGAINST WIFE—WIFE'S SEPARATE ESTATE.**

Where husband gave an option in his own name covering right to cut timber on land belonging to wife and her children by former marriage, the contract being an entirety, and the wife, not having been appointed guardian for the children, not being able to convey their interest, and it not being shown that option holders would have accepted her individual interest, she would not have been liable for breach even though the facts had been embodied in the contract; hence the husband could not recover contribution from her after option holders had secured judgment against him for breach of the option contract.

[Ed. Note.—For other cases, see Contribution, Cent. Dig. §§ 2, 5.]

Appeal from Chancery Court, Quitman County; J. A. May, Chancellor.

Action by C. W. Partee, Sr., against Mrs. Mattie E. Partee. Judgment for plaintiff, and defendant appeals. Affirmed in part, and reversed in part.

P. H. Lowrey, of Marks, for appellant. St. John Waddell, of Memphis, Tenn., for appellee.

**ETHRIDGE, J.** In the year 1908 the appellant and appellee were husband and wife, and Mrs. Mattie E. Partee, the appellant, and her four children were tenants in common of certain lands in Quitman county, Miss., which they had inherited from one Cole, the former husband of Mrs. Partee, and Mrs. Partee was desirous of selling the timber growing upon said land. In May and June of the year 1908 Mrs. Partee was in Centralia, Ill., where she and her former husband had formerly lived, and while there Mr. Partee, the husband and complainant in the present suit, approached Barney & Hines, real estate dealers of Memphis, Tenn., with the proposition of selling the timber on the lands of his wife and his wife's children. He executed an option in his own name which reads as follows:

"Confirming our conversation, I hereby give you option for fifteen days from this date to purchase the timber on sections 6 and 7 and 160 acres in the southern half of section 8, township 8, range 10 west, Quitman county, Miss., at a price of thirty-five hundred (\$3,500.00) dollars on terms of two thousand (\$2,000.00) dollars each, balance in two equal notes, one and two years each, bearing interest at the rate of 6 per cent., with a time limit of removal of timber of five years from this date, together with right of way over, through, and across said land for cutting down and removing said timber therefrom."

On the day prior to the execution of this option Mr. Partee wrote to his wife that Barney & Hines desired an option for 15 days and stated the terms that they proposed of \$2,000 cash and \$1,500 in two annual promissory notes bearing 6 per cent., and that he expected to take such action as he thought best the following day, subject to her approval, in closing or making the deal. On June 6th he again wrote Mrs. Partee a letter in which he advised her not to sign any papers until she saw him with reference to this matter, as he desired to have certain provisions put in the contract. Mrs. Partee returned home after the expiration of the 15 days embodied in the option given by Mr. Partee and in connection with her husband took up with Barney & Hines the closing of this matter. Finally they called up the attorneys of Barney & Hines and insisted that, if the matter was going to be closed up, that they send the contract at once with \$500 as a guaranty of good faith, which they contend that Barney & Hines agreed to do over the phone. The following day a contract was sent, but no check or money for signature, and, the letter not containing a check, they decided that Barney & Hines was delaying with the idea of finding a customer who would buy, but were not intending to carry out their agreement themselves, and then proceeded to make a deal with another party who bought the timber for the sum of \$3,500 cash, and procured an order from the chancery court giving authority and power from the court to convey the interest of the minors to the purchaser, Livingston. Thereupon Barney & Hines sued Mr. Partee in the courts of Tennessee for a breach of his contract and recovered judgment against him in said suit, which was appealed first to the Civil Court of Appeals, and finally to the Supreme Court of Tennessee, and affirmed, and this suit is brought against Mrs. Partee for reimbursement for the money paid in satisfying said judgment and costs. Among the defenses interposed in the suit in Tennessee by Mr. Partee was the plea that at the time that he gave the option that he had no authority to give the option and that this was known to Barney & Hines at the time. In other pleas he pleaded that the option was given for Mrs. Partee and her children, and that Barney & Hines knew this fact and had represented to him that he would not be

personally liable on said contract. Mrs. Partee appeared as a witness on behalf of her husband in the suit in the Tennessee courts, and it is contended now that this was sufficient notice that she was held or would be held liable for this amount for her to appear and defend the suit, or in case of failure that she would be bound by the judgment then rendered. At the time of giving the option of Mr. Partee, and from thence until after the sale to Livingston, there was no authority in either Mr. Partee or Mrs. Partee to represent the children of Mrs. Partee by her former husband, but Mrs. Partee was guardian for the children under a guardianship taken out and existing in Illinois, but was not a guardian in Mississippi under any appointment by the courts of this state. There is no pretense that Mr. Partee had any authority to represent the adult son of Mrs. Partee in this proceeding, and there had been no order of court obtained authorizing the sale of the timber or any proceeding in court whatever with reference thereto until after the sale to Livingston. The chancellor found that there was no authority to bind any of the heirs with reference to the said contract, but found that Mr. Partee was an agent, and represented Mrs. Partee in the sale, and that he had authority to represent Mrs. Partee in giving the option, and that the option was ratified by Mrs. Partee after it was made, and gave judgment against Mrs. Partee for the full amount of the judgment and costs in the Tennessee suit. He also gave judgment against all of the defendants in the suit for an item of \$110.74, which appears to be a merchandise account and for improvements on the property of the defendants made by Partee.

The contract to convey the timber was for the entire timber on the entire tract of land, and it was not made for any particular party's interest in said timber, and was not made in the name of Mrs. Partee and her children, the owners of said timber. No matter how much Mrs. Partee might have tried to carry out the contract, it could not have been done in the absence of authority from the chancery court, and it does not appear that Barney & Hines would have accepted a conveyance of her undivided interest in the contract, or that there was any understanding or agreement that they would do so, nor was there any demand made upon her to make this kind of a conveyance. The contract was an entirety, and Mrs. Partee could not have been sued individually for a breach of this contract if the theory of the plaintiff that Barney & Hines had notice of these facts were true. In other words, if the facts had been embodied in the option as understood and as testified to by the complainant, Barney & Hines could not have recovered for the breach of the contract. Mr. Partee, how-

ever, made the contract as a personal contract, and in so doing assumed all the risk that would be involved in the failure on his part to carry out this contract as made, and was, on his own testimony, in fault in not having the contract embrace the understanding which he claims was had between him and Barney & Hines.

We are therefore of the opinion that the court below erred in granting judgment against Mrs. Partee for the amount paid by Mr. Partee in satisfaction of the judgment of Barney & Hines against him, and as to this the judgment is reversed, and the cause dismissed, but the judgment is affirmed as to the \$110.74, costs of the appeal to be taxed against the appellee, and all costs except suing out the attachment against the complainant below.

So ordered.

(114 Mia. 285)

**MORELAND et al. v. PEOPLE'S BANK OF WAYNESBORO. (No. 18862.)**

(Supreme Court of Mississippi. April 23, 1917.)

**1. PRINCIPAL AND SURETY §115(1) — DISCHARGE OF SURETY — LOSS OF OTHER SURETIES—BANK DEPOSIT.**

A bank does not owe a surety on a note the duty to apply or credit the amount the principal may have on deposit in the bank at or after the maturity of the note to the payment of the note, whether or not the amount be sufficient to satisfy the note.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 244-248, 266-268.]

**2. BANKS AND BANKING §134(1)—DEPOSITS—RIGHT OF SET-OFF.**

A bank has a right to set off the amount it owes a depositor against the amount which the depositor owes to it.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 353.]

**3. BANKS AND BANKING §119, 136—DEPOSIT—NATURE OF RELATION.**

The relation between a bank and a depositor is simply one of debtor and creditor, and the deposit is not a trust fund, nor does the bank have a lien thereon for the payment of a note of the depositor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 289-292, 353-374.]

**4. PRINCIPAL AND SURETY §156—ACTIONS AGAINST SURETY — PLEA — INSOLVENCY OF PRINCIPAL.**

In an action against the principal and surety on a note, a plea by the surety that plaintiff bank knew that the principal had at times overdrawn his account, and was likely to become wholly insolvent at any time, does not allege insolvency and therefore does not raise the question whether a bank owes a surety the duty to apply an insolvent principal's deposit to the payment of the note.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 423-426.]

In Banc. Appeal from Circuit Court, Wayne County; W. W. Venable, Judge.

Action by the People's Bank of Waynesboro against David Moreland and others. Judgment for the plaintiff, and defendants appeal. Affirmed.



L. K. Saul, of Waynesboro, for appellants. Heidelberg & Johnston, of Shubuta, for appellee.

SYKES, J. The appellee bank instituted suit in the circuit court of Wayne county against David Moreland and Rufus P. Cook upon a promissory note for \$350 payable to the order of the said bank and signed by the two appellants. The appellant Moreland filed a special plea in the case, admitting the execution of the note, but claiming: That he signed the note merely as surety for his co-defendant, Cook, which fact was known to the bank. That the defendant Cook had an account with the bank which continued until the maturity of the note and for some time thereafter. That on the date of the maturity of the note Cook had on general deposit to his credit in the bank the sum of \$215.66, and at various times thereafter had money to his credit in said bank. A copy of this bank account is attached to the special plea and shows that at several different times after the maturity of the note the said Cook had on deposit in the bank an amount in excess of the amount owed the bank on said note. That the bank went into liquidation on the 19th day of November, 1914, which was before the institution of this suit. That the defendant Moreland had no notice that this note had not been paid until after the bank went into liquidation. That the bank by virtue of having the money on deposit to the credit of the defendant Cook became a trustee of this money and held it as a trust fund, and that it was the duty of the bank to have appropriated these funds, or so much of them as was necessary to the payment of this note. That the note was made payable at the bank and was in its possession, which was tantamount to a draft on the bank to pay the same out of the funds on deposit to the credit of the said Cook. That the bank knew that Cook's account with it varied by overdrafts for large amounts and that the said Cook was likely to become wholly insolvent at any time and defeat any contribution by the defendant. That, because of all of these reasons, it was the duty of the bank under the circumstances to protect the defendant Moreland who was a surety, and that, because of the alleged negligence and bad faith in not so doing, the bank has relinquished and released the defendant Moreland from any liability on this note. The bank demurred to this special plea, alleging in its demurrer: First, that the plea was not sufficient to release the defendant Moreland; also, that the plea shows affirmatively that the defendant Cook did not have at the time of the maturity of the note a sufficient sum on deposit with the plaintiff to liquidate said note; and, further, that the plaintiff bank was never under any legal obligation to apply any of the funds on deposit with it to the credit of the said Cook to the payment of the note sued on. This demurrer was sustained by the court. There

were also two other pleas filed by the defendant to which demurrers were sustained. The defendant declining to plead further, judgment was entered in favor of the bank for the amount due on the note, from which judgment this appeal is prosecuted.

In this court the only error argued by the appellant is the action of the court below in sustaining the demurrer to the special plea above mentioned. It is the contention of the appellant that, while the note is signed by Cook and Moreland on its face as comakers, as a matter of fact, and one which the plea alleges, Moreland was only a surety of Cook, and as such surety was released when the bank failed to apply the amount to Cook's credit on deposit in bank on the day the note fell due to the payment of this note. It is the contention of the appellee that the appellant Moreland is not a surety but a principal on the note, and further that, even if he be considered a surety, then he was not released by the failure of the bank to apply any amount Cook might have had on deposit in the bank to this note on the day of, or after, its maturity.

[1] It is not necessary for us to pass upon the question of whether or not the appellant Moreland was a principal or a surety, because we are of the opinion that, even if he be treated as a surety, he was not released from his liability on this note because of the failure of the bank to credit the note with any amount Cook may have had on deposit with it on the day of its maturity or thereafter. The decisions of the various states differ as to whether or not a bank is under any duty to a surety to credit a note at the day of, or after, its maturity with any amount the principal of said note may have on general deposit in the bank. A careful examination of the authorities on this question leads us to believe that the great weight of authority is to the effect that the bank is under no duty whatever to the surety to make any such application. A majority of the decisions holding the contrary view hold that at the time of the maturity of the note, if the principal of the note have on deposit an amount equal to or greater than that called for in the note, then it is the duty of the bank to apply a sum sufficient to pay the note in full; that, if it fails to do this, then the surety on said note is released. These cases further hold, however, that, if the amount on deposit the day of the maturity of the note is not sufficient to satisfy the note in full, then the bank is under no duty to the surety whatever to apply pro tanto to a credit on the note the amount on deposit in said bank at that time. There are a few states which hold that it is the duty of the bank to apply whatever amount it has on hand at the maturity of the note and also whatever amount it may have on deposit at a later date to a payment on the note.

[2, 3] It is well settled that the bank itself has a right, if it so desires, to apply what-

ever amount the maker of the note has on deposit with it to a payment on the note. Or, in other words, the bank itself has the right to set off the amount it owes the depositor against the amount owed it by the depositor. The relation existing between a bank and a depositor is simply one of debtor and creditor. Most of the authorities holding that the surety is discharged in this character of cases predicate this right on the fact that the bank has this right of set-off if it so desires. As one court has expressed it:

"When a creditor has in his hands the means of paying his debt out of the property of his principal debtor, and does not use it, but gives it up the surety is discharged."

Because the principal of the note has on deposit funds in the bank in no way gives the bank a lien on these funds for the payment of its note. If it did, then it would be the duty of the bank to hold all funds deposited there before the maturity of the note as well as those deposited at and after its maturity. As is well settled, by virtue of these deposits the relation only of debtor and creditor exists. This deposit is not treated as a trust fund or anything of that nature. The bank, by failing to credit the note with any amount due the principal, in no way releases any security which it holds or any valuable right of any kind to which the surety could be subrogated. It is a well-known fact in the commercial world that many customers of banks have balances to their general credit on deposit with the bank and at the same time owe the bank large sums of money for which they have given notes with sureties, falling due at different times. It would seriously interfere with the banking business and would be an injustice to the banks and to their depositors, if the bank, before cashing their checks, should always be compelled to consult their books and notes to see if any notes of these depositors were falling due on that date with sureties thereon, thereby to keep from releasing these sureties. On the other hand, it is the duty of the surety to know when the note of his principal falls due, and, if he so desire, to take proper steps to see that he is protected at that time. In addition to whatever common-law remedies sureties have, they have statutory remedies under chapter 112 of the Code of 1906.

In the case of *National Mahaiwe Bank v. Peck*, 127 Mass. 298, 34 Am. Rep. 368, the court said:

"Money deposited in a bank does not remain the property of the depositor, upon which the bank has a lien only; but it becomes the absolute property of the bank, and the bank is merely a debtor to the depositor in an equal amount. (Citing cases.) So long as the balance of account to the credit of the depositor exceeds the amount of any debts due and payable by him to the bank, the bank is bound to honor his checks, and liable to an action by him if it does not. When he owes to the bank independent debts, already due and payable, the bank has the right to apply the balance of his general account to the satisfaction of any such debts of his. But if the bank, instead of so applying the balance, sees fit to allow him to draw it out, neither the

depositor nor any other person can afterward insist that it should have been so applied. The bank, being the absolute owner of the money deposited, and being a mere debtor to the depositor for his balance of account, holds no property in which the depositor has any title or right of which a surety on an independent debt from him to the bank can avail himself by way of subrogation, as in *Baker v. Briggs*, 8 Pick. 122, 19 Am. Dec. 311, and *American Bank v. Baker*, 4 Metc. [Mass.] 164, cited for the defendant. The right of the bank to apply the balance of account to the satisfaction of such a debt is rather in the nature of a set-off, or of an application of payments, neither of which, in the absence of express agreement or appropriation, will be required by the law to be so made as to benefit the surety."

This idea has been very well expressed in the case of *People's Bank of Wilkes-Barre v. Legrand*, 103 Pa. 309, 49 Am. Rep. 126:

"While it is true that a bank is a mere debtor to its depositor for the amount of his deposit, and therefore, in an action by the bank against the depositor, on a note upon which he is liable the latter may set off his deposit, yet we do not think the bank is bound to hold a deposit for the protection of an indorser of the depositor. A bank deposit is different from an ordinary debt. In this, that from its very nature it is constantly subject to the check of the depositor, and is always payable on demand. The convenience of the commercial world, the enormous amount of transactions by means of bank checks, occurring on every business day in all parts of the country, require that the greatest facilities should be afforded for the use of bank deposits by means of checks drawn against them. The free use of checks for commercial purposes would be greatly impaired, if the banks could only honor them on peril of relieving indorsers, without an investigation of the state of the depositor's liabilities upon discounted paper. \* \* \* It is beyond question that the bank, in the absence of any special appropriation of the deposit by the depositor, would have the right to apply a general deposit to the payment of any existing, matured indebtedness of the depositor. But that privilege is a right which the bank may or may not exercise in its discretion. \* \* \* We fully recognize the rule that, where a principal creditor has the means of satisfaction actually or potentially within his grasp, he must retain them for the benefit of the surety; but we regard the case of bank deposits as an exception to the rule."

In the case of *First National Bank v. Peltz*, 176 Pa. 513, 35 Atl. 218, 36 L. R. A. 832, 53 Am. St. Rep. 686, in speaking of this same subject, the court uses the following language:

"While money deposited becomes the property of the bank, yet that result flows from the nature of money, which is to be measured by amount and not by physical identity. Hence a deposit of \$100 is returned by another \$100 without regard to the identity of the notes, or the coin, because legally they are the same. Except for this characteristic, a deposit of money to be returned on demand would be, like the deposit of any other article, a mere bailment. But though for this reason the title to money deposited passes to the bank, yet the whole business of banking is founded on the faith of the immediate availability of the deposit, as money, for the use of the depositor, and any rule that interfered with the freedom of action of either bank or customer, by compelling a stop of their dealings with each other to examine the relations of other parties to the deposit, would go far towards destroying that instant convertibility which is the essence of the business."

This question was ably and exhaustively considered in the opinion of the court in the case of Davenport v. State Banking Co., 126 Ga. 136, 54 S. E. 977, 8 L. R. A. (N. S.) 944, 115 Am. St. Rep. 68, 7 Ann. Cas. 1000, in which opinion all the leading authorities are reviewed and discussed. There are found in 115 Am. St. Rep. and 8 L. R. A. (N. S.) exhaustive notes to this case discussing and reviewing all of the authorities.

We therefore conclude that a bank does not owe a surety on a note the duty to apply, or credit, the note with any amount the principal may have on deposit in the bank at, or after the maturity of the note, whether or not this amount be sufficient to satisfy the note.

[4] The appellant in his brief contends that, because of the allegations in his special plea to the effect that the defendant E. P. Cook was likely to become wholly insolvent at any time and defeat an action for contribution, then this is equivalent to charging that he was insolvent at the time of the maturity of the note, and that the bank knew of his insolvency, and because of this insolvency it was the duty of the bank to have applied whatever amount it owed Cook to this note. This is not an allegation of insolvency. This allegation might be made of any one. It is therefore not necessary for us to consider the question of whether or not, if the defendant Cook had been insolvent at the time of the maturity of the note, and this fact had been known to the appellee bank, this would have made any difference in the duty of the bank.

The lower court was correct in sustaining the demurrer, and its judgment is therefore affirmed.

Affirmed.

(114 Miss. 216)

BROWN et al. v. WESSON et al. (No. 19021.)

(Supreme Court of Mississippi, Division B.  
April 16, 1917. On Suggestion of Error, May 14, 1917.)

# 1. EQUITY §452—"BILL OF REVIEW"—STATE OF LIMITATIONS.

A bill filed to secure an examination and reversal of a partition decree for mistake existing at time of entry, but not appearing on face of papers in case or known to parties, is not a bill of review, barred by the two-year statute of limitations.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1101-1109.

For other definitions, see Words and Phrases, First and Second Series, Bill of Review.]

# 2. LIMITATION OF ACTIONS §70(2) — OPERATION AND EFFECT—BILL OF REVIEW.

Suit to review a partition decree must be begun by all but minor within two years, and minority of one will not entitle others to initiate suit, although they may join or consent to suit by minor, and thus secure correction.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 386.]

# 3. EQUITY §442—MUTUAL MISTAKE IN PARTITION DECREE—"BILL OF REVIEW."

A suit to correct erroneous boundaries in a partition decree due to mistake in survey embodied by commissioners in their report, unknown to all parties to suit as well as officers and court at time of entry, is an "original suit" in which equity has power to correct the mistake where no innocent party will suffer, and not a bill of review.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1065-1070.]

# 4. EQUITY §456—MISTAKE—JURISDICTION.

The jurisdiction of equity in cases of mistake is as broad and extensive as its jurisdiction in cases of fraud.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 14.]

# 5. JUDGMENT §333 — EQUITABLE RELIEF — ESTOPPEL.

Complainants by securing entry are not estopped from asserting that partition decree is erroneous, where the mistake was unknown at time of entry.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 635.]

Appeal from Chancery Court, Lee County; A. J. McIntyre, Chancellor.

Bill by W. D. Brown and others against J. W. Wesson, H. C. Stovall and another in which defendants named answered with a cross-bill against unnamed defendant and husband and one of unnamed plaintiffs. From a decree dismissing the bill in part, plaintiffs appeal; defendants filing a cross-appeal. Reversed and remanded.

Complainants filed their bill in the chancery court of Lee county, at the April, 1914, term, against the defendants H. C. Stovall, John W. Wesson, and Mrs. Mary Carruth, setting forth: That at the July, 1909, term the complainants in the present bill and Mrs. Mary Carruth, who was at that time Miss Mary Brown, filed a bill in the chancery court of Lee county, praying for the partition of land belonging to their father George Brown, and mother, Mrs. E. C. Brown, which belonged to them in equal shares by the will of their parents. That at the September, 1909, term of the chancery court of Lee county, a decree was made by the said court for the partition of said lands, which decree provided for partition in kind, and for the purpose of making a partition W. L. Joyner, G. W. Long, and J. S. Thompson were appointed commissioners. That these commissioners, with the assistance of a surveyor, made a partition of the said lands, and made a report thereof in writing, to which report a plat or map of the lands was attached. That in said partition, lands of the said two estates were intended and attempted to be set apart by allotting to Annie Lou Brown, Ruth Brown, and Mildred Brown, and the defendant Mary Carruth, in equal shares of approximately 210 acres each. That the commissioners attempted to lay off said lands in four equal divisions of approximately 210 acres each, divided by due east and west lines, which subdivisions were reported by

the commissioners and numbered on the map 1 to 4, inclusive, beginning at the north end and going to the south boundary line of said tract. That the commissioners intended and attempted to allot to Annie Lou Brown share No. 1, being 210 acres off the north side of the said body; to another complainant, Ruth Brown, share No. 2, being 210 acres adjoining share No. 1 on the south; to the defendant Mary Carruth, lot No. 3, adjoining said lot No. 2 on the south, being 210 acres; and to Mildred Brown, lot No. 4, being 210 acres on the south side of said tract of land, and being the balance of said tract. The bill sets out the description, as contained in the original report and decree, of each particular lot, being a description by metes and bounds; that the commissioners found in their report that each tract was valued at approximately \$8,000, except share No. 4, which was valued at \$7,000, with owelty against the tracts of land awarded to the male complainants to make up share to the value of \$8,000. It is alleged that in making this division the commissioners and surveyor made mistakes by which lot No. 1 actually contained only 181 acres; that share No. 2, to Ruth Brown, contained 208.7 acres; that share No. 3, awarded to Mrs. Mary Carruth, contained 258.4 acres, or 48.6 acres too much; that share No. 4, assigned to Mildred Brown, contained approximately 210 acres, and was correctly described; that these errors occurred by reason of mistake in surveying the land, and were unknown to all the parties at the time of the making of the report and entering of the decree confirming the report; that 210 acres was approximately the real number of acres that should have been, and was intended to be, assigned to each of the said parties; that the mistake was not discovered until shortly before the filing of the present bill, when an accurate survey, by a highly competent surveyor, was made, by which it was shown that each share should be 209.4 acres, and that on this basis the said tracts would be approximately equal in value, if share No. 4 was credited with the amount paid as owelty in the original decree; that if the original decree was permitted to stand there would be an injustice done to the parties by reason of the mutual mistake made in the original partition decree.

It was alleged that Mrs. Carruth had conveyed her lot or tract to Wesson and Stovall, and that they took under an agreement that there were 210 acres in the tract, or approximately that amount, and paid for the land on the valuation of 210 acres and with the belief that it only contained that amount of land; that they took the land subject to the decree, and had knowledge of the intention of the parties in making said division. It was alleged that, some time after the original division, the parties, through their brother, Mr. Brown, were in possession jointly and not in severalty, and the lands were leased out as an entire body and the income divid-

ed equally between the female complainants in the original bill. It is alleged: That the boundaries of the recent survey showed that some of the tracts would overlap; that is, in some of the tracts the same land would be embraced within the calls of more than one deed, leaving a body of disputed land called for by both deeds, and that by reason thereof there was an impossible partition. That the joint arrangement by which the lands were rented and the proceeds divided equally between the four female complainants of the original bill continued up to and included the year 1913, and that on the 10th day of January, 1914, Mrs. Carruth conveyed her share to Wesson and Stovall. It was alleged further that Wesson and Stovall had gone into possession, and had received the use and profits of 48.6 acres more than their proper share, and that this was valued at a rental value of \$350 per annum.

There was a prayer for a correction of the boundaries of the several tracts to conform to the real facts, and a prayer for judgment against Wesson and Stovall for the rental value of the excess of land used and occupied by them.

Wesson and Stovall answered the bill separate from Mrs. Carruth; admitting the description of the land contained in the original bill; admitting that the commissioners in the partition suit laid off and allotted to the complainants the lots by numbers as alleged in the original bill, but denying that the commissioners and surveyor made the errors set out in the original bill; denying that it was the intention of the parties to have each tract contain equal acres; denying that the recent survey was a true and correct survey; denying the allegation as to what would be a true and correct survey of the tract, as set forth in the bill. They denied, also, that there was an overlapping of the said lands. They admit purchasing from Mrs. Carruth her share, and admit the description contained in the deed, as set forth, but deny that Mrs. Carruth sold her land to the said Wesson and Stovall with the distinct understanding that she was selling approximately 210 acres; deny that they bought the said tract of land subject to a survey in order to ascertain the metes and bounds as alleged; deny the right of the complainants to have the original decree amended to correspond to the intention of the parties; and plead the statute of limitation of two years as against a bill of review. They also plead that Annie Lou Brown, minor, defendant, was improperly joined in the cause, and that she had no real interest in the controversy of this suit; and plead that the complainants W. D. Brown, Levy S. Brown, Lem Brown, and Milie Brown were improperly joined. They make their answer a cross-bill as against Mrs. Carruth, Ruth Brown, and Dr. Roy Carruth, husband of Mary Carruth, and pray that the claim of Ruth Brown, for overlap-

ping land, be canceled as a cloud on their title.

Mrs. Carruth answered separately, and admits the filing of the original bill, and the laying off of the land by the commissioners, but denies that the commissioners made the mistake alleged in this bill, and denies that the commissioners attempted or undertook to assign to each of the said parties equal acreages of land, but only tried to assign tracts of land of equal values. She denies the correctness of the recent survey as to what would be embraced in a correct division so as to produce equal areas, as set forth in the bill; denies that the description contained in her deed overlapped the lot of Ruth Brown, as alleged in the bill; and denies that, until her marriage, W. D. Brown, her brother, had the control of the shares of land, as alleged in the bill; admits conveying her interest to Wesson and Stovall; and admits that she sold to Wesson and Stovall with the understanding that she was conveying them her share of the land with the understanding that there were approximately 210 acres; and admits that Wesson and Stovall had gone into possession of said tract conveyed to them; and denies that the complainants have the right to have the decree originally entered interfered with.

There was much testimony taken, and the chancellor found the facts to be, that there was a mistake in the original partition; that it was the intention of the parties in interest in the original suit to have the four female complainants in the original suit assign equal areas or acreages of land, and found that the attorneys in the case, and the court, understood, at the time, that they were being awarded equal amounts of land; that Wesson and Stovall bought this land; that they thought at the time they were getting a one-fourth of the 840-acre tract, and understood that they were getting 210 acres, and that they insisted in their deed that a definite number of acres be fixed in the deed, insisting that the deed read "210 acres," and not "210 acres, more or less," and that when they afterwards discovered that the lands conveyed by Mrs. Carruth contained more than 210 acres, that they were astounded, and sent for Will Brown, one of the complainants, "to come up and see about it," but that they did not surrender any part of this land. The chancellor then recites:

"The question is raised as to whether or not this is a bill of review, or whether an original bill, or whether or not they are estopped by their action, having been parties to the suit in which this land was divided, and whether they have a right to bring this suit as a suit of review, or whether they have any right to bring any other kind of action, except the bill of review. I am rather of the opinion that if this is a bill of review, they are estopped on the grounds of having brought the suit themselves, and am rather of the opinion that it is the only suit that can be brought under the statute. Feeling that way about it, and knowing the case is going up anyway, as to that part, I shall dismiss the bill."

The chancellor further found that as to the 17½ acres claimed by Miss Ruth Brown, and also by Wesson and Stovall, that Ruth Brown's title to this 17½ acres embraced in the overlap between her share and the share of Wesson and Stovall was superior, and awarded to her the 17½ acres of land, and divided the costs equally between complainants on the one side and Wesson and Stovall on the other, and denied relief to other features of the bill.

W. D. & J. R. Anderson, of Tupelo, for appellants. Robins & Thomas and Mitchell & Clayton, all of Tupelo, for appellees Wesson and Stovall. C. P. Long, of Tupelo, for appellee Carruth.

ETHRIDGE, J. (after stating the facts as above). [1] The question as to whether this bill is a bill of review, or whether it is an original suit under the head of mistake, accident, and fraud, arises for consideration. The chancellor's view was, that it was a bill of review, and that it was barred by the two-year statute, and would expire in two years from the date of the decree, in September, 1900. It may be stated, generally, that a bill of review is one filed to procure an examination and reversal of the decree, after its enrollment, for some mistake appearing on the face of the papers in the case, or from some fact arising subsequent to the original decision which would change the status of the parties' rights. In *Vaughan v. Cutrer*, 49 Miss. 782, this court, discussing a question similar to this said:

"With respect to the first question, it is said in the books that a bill of review can only be brought upon error in law, appearing on the face of the decree, without further examination of matters of fact, or upon some new matter, which has been discovered after the decree, and could not possibly have been used when the decree was made. 2 Daniell's Ch. Pr., 1576. If the bill is filed, as in this case, on the ground of new matter, discovered since the decree, it must be by the special leave of the court, first obtained for that purpose. 2 Daniell's Ch. Pr. 1577; Story's Eq. Plead. 379, par. 404."

See, also, 16 Cyc. 532; *Enochs v. Harrelson*, 57 Miss. 465.

[2] It is not pretended in this case that the fact or facts occurred subsequent to the decree rendered, but that the facts existed at that time, but did not appear and were not known at the time by the parties to the suit. If this suit was a bill of review we think that complainants would be barred so far as any of them, except the minor, was concerned, and that the fact that one was a minor would not aid the ones against whom the two-year statute had expired. The right of each to take appropriate action, to bring a bill of review, must be exercised by such party within the two years. It is true that the minor, on reaching majority, may bring suit that would cause the whole partition to be overturned and corrected; but only such party could bring the suit. The ones who

had let the statute expire could not initiate the suit, though they might consent to or join in it.

[3, 4] However, in our opinion, this is an original suit in equity, and not a bill of review. It is founded on the doctrine of mistake. One of the original heads of equity jurisdiction is fraud, accident, and mistake, and this is one of the fundamental jurisdictions of equity. We think the jurisdiction of equity in cases of mistake is as broad and coextensive as its jurisdiction in fraud. Where all the parties in a suit and all the officers of a court, and the court itself, acting on and moved by a belief in a certain state of facts, enters a judgment on such facts which would be proper, but which afterwards, by reason of the mistake, would work injustice and hardship upon some of the parties, equity has and should have power to apply the proper remedy. Fraud vitiates a judgment caused by the active agency of some party to the proceeding, as the court is misled and deceived as to the facts upon which it attempts to administer the law, and mistake is equally efficacious in procuring a wrong, though all the parties are free from turpitude in procuring the judgment. The evidence amply warrants the finding of facts by the chancellor as to what the parties understood in the original proceeding, and it would be not only inequitable, but a gross wrong, to permit a judgment to stand which is clearly founded upon mistaken facts, if no innocent person would suffer by correcting the mistake. In the case of *Webster v. Skipwith*, 26 Miss. 341, which was a suit to annul a judgment, the court, discussing the question, said:

"In the application of the remedial powers of a court of equity to cases of this nature, they appear to have acted rather upon the intrinsic equity of the particular case, than upon any strict rule limiting and restraining the powers so as to prevent them from doing equity. Judge Story lays down the rule thus: 'That in all cases where by accident, mistake, or fraud, or otherwise, a party has an unfair advantage in proceeding in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere and restrain him from using the advantage.' 2 Story's Eq. Jur. par. 885."

Judge Story has the following to say, in volume 1, § 166, *Equity Jurisprudence* (4th Ed.):

"It (equity) will always interfere in cases of mistake in judgments and other matters of record, injurious to the rights of the party."

In 80 Cyc. 304, 305, the rule is laid down as follows:

"Relief may always be sought and secured by an independent suit in equity, for any cause justifying relief in equity from any other judgment affecting the title or the right to the possession of real property, such as mistake or fraud resulting in inequitable allotment."

In *Fore v. Foster's Adm'r*, 86 Va. 104, 9 S. E. 497, the Virginia court held that equity had jurisdiction to grant relief against an erroneous decision by which one party received

ed a considerable portion more, in a partition suit, than it was entitled to, and another party received an amount less than he should have received. The court says:

"The bill in this case is an original bill to correct a mistake of fact, and falls within the general rule that an act done or contract made under a mistake or ignorance of a material fact is voidable and reviewable in equity; and the rule applies, not only to cases where there has been a studied suppression or concealment of facts by the other side which would amount to a fraud, but also to many cases of innocent ignorance and mistake on both sides; and it is a material mistake, involving a large sum of money or a large tract of land, as it may be regarded."

In *Sullivan v. Lumsden*, 118 Cal. 664, 50 Pac. 777, a California case, in which an original bill was filed in equity to correct an error of allotment in a partition suit, the court said in part:

"The same rule applies to mistakes, and to judgments or decrees in partition as well as other judgments. 'A final judgment or decree in partition is not more exempt from the interference and controlling power of courts of equity than are final judgments and decrees in other cases. Hence such a mistake of facts, or such accident as would authorize a court of equity in enjoining or setting aside an ordinary judgment, will authorize it to set aside or correct a judgment or decree of partition. \* \* \* If a mistake in matters of description has been made by the commissioners in drafting their report, and has also been carried into the final judgment, it may be corrected by proceedings in equity.' Freeman, Coten. par. 534; *Smith v. Butler*, 11 Or. 46, 4 Pac. 517; *Marvin v. Marvin*, 52 How. Prac. [N. Y.] 97; *Wilbur v. Dyer*, 39 Me. 169; *Douglas v. Viele*, 3 Sandf. Ch. 439. 'The mistake which will justify this relief may also be the mistake of the court. But wherever it may be found that inadvertence or mistake is held to be ground for setting aside a judgment, it will be noticed that it is not a mistake of the law, or an inadvertent conclusion as to what the law is, but a mistake or inadvertence in doing something not intended to be done.' 1 Black, Judgm. par. 335. Was the mistake here complained of such a one as a court of equity will relieve against? We think it was. It was clearly extrinsic and collateral to the questions examined and determined in the action, and led the court to do what it evidently never intended to do; that is, to confirm to the plaintiffs a piece of land not described or referred to in the complaint or in the findings or interlocutory judgment."

See, also, *Adair v. Cummins*, 48 Mich. 375, 12 N. W. 495.

We think it manifest, from the record in this case, that it was proper for the court to entertain jurisdiction and proceed to grant appropriate relief, and that the court below was mistaken in its conception that only a bill of review would lie in this case. If the matter appeared on the face of the proceedings, where it could be discovered by reasonable diligence within the two-year period, a bill of review would be an appropriate remedy; but on the allegations of the bill in this suit, and the finding of the facts by the chancellor, we think relief should be granted.

[5] We do not think the complainants are estopped by procuring the entry of the decree in the original suit, because the mistake was unknown at that time, and it was not the

conscious doing of a thing, or the taking of a particular step, with knowledge of the appropriate facts upon which an estoppel could arise. Of course, where a party, with full knowledge of the facts, procures a judgment of the court, or suffers a judgment of the court to be entered, with knowledge of facts which he fails to disclose, the principle of estoppel would apply. Very many cases can be imagined where the entry of a judgment on mistake would result in the greatest hardship and the grossest wrong if it should be held that the court had no jurisdiction to correct a judgment founded on a mutual mistake; and while, in this case, one of the heirs had conveyed the land assigned, it is clear from the record that the parties buying the land bought with notice and with the expectation that the heir was only entitled to convey 210 acres; and the chancellor's finding is warranted by the evidence, as to the knowledge of defendants Wesson and Stovall of these facts.

The decree will be reversed, and the cause remanded for appropriate relief on the entire record.

Reversed and remanded.

#### On Suggestion of Error.

It was the purpose of the court in its former opinion to reverse the case, both on direct and cross appeal, so that the chancellor would be untrammelled on the hearing to render appropriate relief on the whole pleadings. The statement in the opinion that the chancellor found that Wesson and Stovall bought with notice, and with the expectation that the heir from whom they purchased was only entitled to convey 210 acres, was intended merely to express the opinion that the evidence warranted the chancellor in so deciding; but, as the case as a whole is reversed, the chancellor will not be hampered by the original decree in administering whatever relief the facts warrant. As the judgment was intended to reverse both direct and cross appeal, the suggestion of error is overruled.

Overruled.

(114 Miss. 236)

#### YAZOO & M. V. R. CO. v. WILLIAMS. (No. 18950.)

(Supreme Court of Mississippi, Division A.  
April 23, 1917.)

#### 1. NEGLIGENCE §101—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Although plaintiff was guilty of gross negligence contributing to his injury in attempting to cross a railroad track, he is entitled to recover something where company is negligent in view of Acts 1910, c. 135, providing that contributory negligence shall not bar recovery.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164, 167.]

#### 2. RAILROADS §827(1)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

One who undertakes to cross a railroad track at a private crossing without first looking or listening or taking any other precaution whatsoever is as a matter of law and fact guilty of gross negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043, 1045.]

#### 3. RAILROADS §850(7)—ACCIDENT AT CROSSING—NEGLIGENCE—EVIDENCE.

In an action to recover for personal injuries and damages to automobile sustained in

collision at a private railroad crossing, whether failure of engineer to sound whistle or ring bell constituted negligence held for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1161.]

#### 4. NEGLIGENCE §101—EXCESSIVE DAMAGES—CONTRIBUTORY NEGLIGENCE—STATUTE.

A verdict of \$10,000 for permanent personal injuries and damages to an automobile is excessive, where plaintiff was guilty of gross negligence, in view of Concurrent Negligence Statute (Acts 1910, c. 135), providing that damages shall be diminished in proportion to amount of negligence of person injured.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164, 167; Damages, Cent. Dig. § 871.]

#### 5. DAMAGES §20—REMOTE DAMAGES.

Damages suffered on account of forced absence from plantation, resulting in loss of 30 bales of cotton and several tenants, are speculative.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 55-57.]

Appeal from Circuit Court, Tunica County; W. A. Alcorn, Judge.

Suit by Burch Williams against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed, providing plaintiff files a remittitur; otherwise, reversed and remanded.

Montgomery & Montgomery, of Tunica, and Charles N. Burch and H. D. Minor, both of Memphis, Tenn., for appellant. Wilson & Armstrong, of Memphis, Tenn., for appellee.

HOLDEN, J. The appellee, Burch Williams, sued the Yazoo & Mississippi Valley Railroad Company in the circuit court of Tunica county for \$15,000 as damages for personal injuries to himself, and the destruction of his automobile, on account of being struck by one of the appellant's trains while crossing the railroad track at Clayton in November, 1914. There was a jury verdict and judgment for \$10,000 in the lower court, from which this appeal is prosecuted.

The facts in the case are stated fully as follows: At Clayton station, an unincorporated village, there is a long passing track, a house track, a depot, and the main line of the appellant railroad company running north and south. A public road runs north and south, parallel with the railroad, on the east side of the depot, main line, and passing tracks, and crosses the railway tracks, from east to west, a short distance north of the depot, and runs thence north along the railroad right of way, and parallel therewith, on the west side for several miles. On the east side of the railway at the point where this public road crosses the railway tracks, another road, commonly known as a plantation or private road, runs north on the east side of the railway track close by and parallel therewith, about 2,400 feet to a point where it turns west and crosses the railway tracks at what is generally understood to be a plantation crossing, which we will designate as the "north crossing," and after crossing the track this road leads into the aforesaid main public road lying on the west side of the railroad. There is also a field road turning



out east into the adjoining plantation at the point immediately east of the said north crossing. It also appears that there is a private road running still further north of this private crossing on the east side of the railroad track. The testimony shows that this plantation road on the east side running from the public crossing, near the depot, which crossing we will designate as the "south crossing," to the north crossing, 2,400 feet north, was frequently and generally used by the public, and that the north crossing was likewise in common use by the public in crossing the railroad track from the east to the west at that point in order to reach the said public road on the west side of the railroad.

The injury occurred to Mr. Williams at what we term this "north crossing." This crossing was not considered a public crossing in the statutory sense that the railroad was required by law to give certain warnings, such as sounding the whistle or ringing the bell, upon approaching it; but it was a private or plantation crossing, which was frequently and habitually used by the public for several reasons, among which was the fact that the south public crossing over the railroad track just north of the depot was frequently and habitually blocked by trains standing on the tracks at that point, which made it necessary for persons desiring to cross the track to travel the east side plantation road north to the north crossing and there cross over to the west in order to get into the public road again on the west side. It is shown that the public crossing just north of the depot, which we have termed the "south crossing," was habitually blocked by standing trains for as long as 20 or 30 minutes at a time, and that this fact was commonly known to persons using the roads and crossings in the Clayton community. These conditions and the frequent and common use of the east side plantation road, and the north crossing, by persons traveling in vehicles, was known to the appellant railroad company.

On the day of the injury, Mr. Williams had come from the south, traveling up the public road on the east side of the railroad in his automobile to the south crossing for the purpose of crossing the track at this public crossing, going from east to west on this public road. When he reached this south public crossing, he found it blocked by appellant's cars, and after waiting about two minutes he decided that he would follow the plantation road north on the east side of the track and cross over the track at the north crossing. He said he knew that it was a common everyday occurrence for this south crossing to be blocked from 15 to 30 minutes at a time, and he decided to not wait longer for the crossing to be opened, but pursued the usual and customary way of crossing the track by going up the plantation road on the east side and crossing over at the north crossing into the public road on the west

side. So, he started north on this plantation road on the east side of the track, and, when he reached the north crossing and turned west on the crossing to cross the track, he and his automobile were struck and injured by the passenger train of appellant which was proceeding north on the main line at a rate of speed of about 37 miles per hour. At the time there were two freight trains on the passing track, one of which was headed south and the other was headed north, and the engine of the north-bound freight train was standing still on the passing track a distance of 533 feet south of this north crossing. It was a clear day, and the track was straight and unobstructed for at least the distance of 533 feet south of the north crossing. The appellee testifies that he was traveling along in his automobile on this road, and that he turned west at the north crossing to cross over and was on the track when he was struck and injured by the train. He says there was no warning given by the engineer of the approach of the train either by bell or whistle, and that the first that he knew of the approach of the train was when the engine struck his car in which he was riding. Other witnesses for appellee Williams testified that no warning by bell or whistle was given by the engineer before the injury occurred.

It appears from the record, including pictures, diagrams, maps, etc., filed here, that the two private or field roads leading north and east respectively immediately east of the north crossing were comparatively dim, unused roads, and that the plantation road leading from the south crossing to the north crossing east of the track appeared to be a plain and much traveled road leading to and over the north crossing. It further appears conclusively from the testimony in this record that the engineer of the passenger train which struck appellee Williams could have seen, and did see, Williams and his automobile traveling north in the road on the east side of the track for a distance of at least 533 feet before the passenger train reached the north crossing. The engineer testified that he saw the automobile and Williams while he was traveling this distance of 533 feet, and that he was watching the automobile closely, and that he observed that Mr. Williams did not look back toward the train.

The engineer testified:

"I was watching the automobile very closely, and just as soon as I seen the left forward wheel make just a turn, why, I thought he was going to try to cross. Why, by his motion of the head that he had never looked around, I could just see the side of his cheek, and it looked to me he did not look to see where I was, or anything else. Q. And you noticed he didn't look back? A. I am positive about it. Q. You are sure of it? A. Yes, sir."

Which testimony shows conclusively that the attention of the engineer was attracted to the traveling automobile and its occupant, and that he had them under observation for



a distance of over 500 feet before the crossing was reached by the train.

The engineer also testified for the railroad company that he had stopped at the Clayton station and then proceeded north on the main line, increasing his speed until he was traveling at the rate of about 37 miles per hour when he passed the north clear end of the passing track at which point the engine of the north-bound freight train was standing. He testified that he sounded the road crossing warning at some point south of the south public crossing, and again about 600 feet south of the north crossing, and that he started his bell to ringing, which was worked automatically, and that it continued to ring until reaching the north crossing; that he saw appellee, Williams, in his automobile traveling north on the plantation road east of the track and observed him closely, but that he did not think Williams was going to cross the railroad track at the north crossing, but he thought Williams would turn out eastward into the field road leading east from the north crossing; that, as soon as he saw Williams turn west toward the north crossing, he immediately applied the brakes and did everything within his power to stop his train and avert the injury; and that at the time he struck the automobile the speed of the train had been reduced to about eight miles per hour.

The undisputed evidence in this case shows that the appellee, Williams, undertook to cross the railroad track without first looking or listening for the approach of trains, nor did he stop or make any effort whatever to discover the approach of any train, but went upon the track without taking any precaution whatsoever for his own safety. By the mere turning of his head to the left he could have seen, or should have seen, the approaching train and avoided the injury; the day was bright, the track clear and unobstructed to his view for several hundred feet south of the crossing, and the least bit of care and energy on his part in looking would have brought to his full view the fast approaching train before he reached the crossing; and he could have stopped his automobile within a short distance and no injury would have occurred.

The proof in the record shows that the appellee, Williams, was seriously injured, which may be permanent, and from which he suffered for a considerable length of time; and that, in addition to the damages for the personal injury, he claimed that he was damaged by being incapacitated and prevented from carrying on the business of his plantation, and that he had to hire another man, for \$195, in his place to look after his business, and that on account of his not being able to give his personal attention to his business he lost 30 bales of cotton which were not picked out of the field, and that several of his tenants left his premises. He also claims damages for the in-

jury to his Ford automobile, and hospital expenses and doctors' bills, etc.

We deemed it necessary to state the facts of this case at length because the case depends upon the whole facts in evidence.

The appellant railroad company assigns several errors of the lower court and urges a reversal of the judgment obtained below; but, after a careful examination of all of these contentions, we think that only two of the grounds presented for reversal are due serious consideration and discussion by us. They are: First, whether the lower court erred in refusing to exclude all of the evidence and grant a peremptory instruction for the railroad company; second, whether the circuit court erred in permitting the testimony to go to the jury with reference to the damages claimed by appellee Williams in the loss of thirty bales of cotton, and the loss of tenants from his plantation; and, also, whether the judgment of \$10,000 is grossly excessive in view of our "concurrent negligence" statute, which provides that damages shall be diminished in proportion to the amount of negligence attributable to the person injured. In other words, whether or not the judgment is excessive.

[1, 2] The main question in the case, which has given us considerable trouble, is whether or not the evidence is sufficient to raise a question of fact for a jury to determine, as to whether the railroad company was guilty of negligence in causing the injury to the appellee. If the act of the railroad company causing the injury constituted mere negligence; then the appellee will be entitled to recover damages, regardless of whether he was guilty of gross negligence which contributed to the injury. We do not hesitate to hold that the conclusive proof in this record shows, as a matter of fact and law, that the appellee, Williams, was guilty of gross negligence in going upon the railroad crossing without using any care or caution whatever for his own safety. But this fact cannot defeat his recovery for some amount of damages, if the railroad company was guilty of negligence. Chapter 135, Acts of 1910.

The condensed facts present this kind of a case: When Williams reached the south public crossing, going west, he found it blocked, as was usual and as was commonly known, at that point. He then proceeded north on the plantation road immediately east of the railroad to the north crossing, where he intended to cross over west into the public road. This plantation road on the east side was used generally and frequently by the public. It was necessarily used a great deal by the public on account of the customary and usual blocking of the south crossing, and also it was commonly used by the public who desired for other reasons to cross over the track at the north crossing. This north crossing, the crossing upon which appellee, Williams, was injured, was used by the public generally and as frequently as the planta-

tion road on the east side of the track. The railroad company had full knowledge of the fact that the south crossing was usually and habitually blocked with trains, and that it was blocked on this occasion, and that parties desiring to cross were compelled to use the north private crossing and the plantation road leading to the north crossing; and the railroad company also knew that the road on the east side was frequently and habitually used by the public. In fact, the railroad company had knowledge of all of these conditions and circumstances connected with the situation at this station of Clayton and the crossings north of it.

Now, let's see, Williams was driving along north in his automobile in the plantation road east of and close by the track, and had not looked back nor toward the track west and south of him. As Williams was traveling along in the road, the engineer on the passenger train started from the depot, coming north, and had increased his speed to about 37 miles per hour at the point where he came in sight of the automobile, which was a distance of over 500 feet before he and the automobile reached the north crossing. The engineer said that he could clearly see the automobile and Williams in it; that he was watching the automobile closely and paying attention to the occupant of it; and that he was observing it so closely that he could state positively that the occupant, Williams, did not turn his head around and look back toward the approaching train at any time. The engineer could plainly see, and he says that he did see, the automobile moving north on the road toward the north railroad crossing; that he watched it while he traveled a distance of more than 500 feet; and that the driver, Williams, did not look back for the train. Williams was therefore evidently unaware of the fact that the train was approaching. But the engineer says that he did not think that the driver of the machine intended to cross the railroad track at the north crossing, but that he thought he would turn out east into the field road, which was a dim, unused road turning to the east at a point opposite the north crossing. Of course, what the engineer thought cannot govern solely in a question of negligence; but the test is, not what he thought, but what a prudent man ought to have thought and done under the circumstances, and whether or not he exercised ordinary care and caution in failing to give some warning, either by bell or whistle, of his approach to the crossing after he saw that appellee, Williams, was paying no attention to him, and was not aware of his impending danger, seeing that he was going toward and approaching the crossing, a place of peril, and would probably attempt to cross the track when he reached it.

The engineer was observing the car; he could see that it would very likely cross the railroad track at the crossing; he knew the driver did not know of his approach, or the

danger and perilous position he was fast placing himself in—the engineer knew all of this and could see and appreciate the whole situation at a point more than 500 feet before he reached the crossing. He knew this road so frequently traveled would lead the traveler across the track at the north crossing. He knew that the south public crossing was blocked as usual and that persons desiring to cross would, as usual, use the north crossing to cross over to the road on the west side. With this situation within his knowledge and plain view, and with plenty of time in which to act, he increased the speed of his train as rapidly as possible, and proceeded ahead toward this crossing without ringing the bell or sounding the whistle, one blast of which would probably have prevented the injury, and made no effort to protect the automobile from collision when he knew the driver of it was unaware of his danger, and would very probably attempt to cross over the track—and struck the appellee, causing the injury and damage sued for in this case.

[3] We think that the acts and conduct of the engineer, according to his own testimony, were sufficient to raise a question of fact, to be determined by the jury, as to whether or not the railroad company was guilty of negligence.

We do not overlook the numerous authorities cited by counsel on both sides of this controversy, and have endeavored to familiarize ourselves with the well-established rules of law announced in the decisions cited by counsel. We know that, as a general rule, the engineer, in the character of case before us, would have a right to assume that a party before crossing the track would exercise due care and caution for his own safety; that the engineer, ordinarily, could rely upon this presumption the same as he could rightfully assume that a party walking upon the track, not in peril known to the engineer, would get off before reached by the approaching train. These rules announce good law and should be followed in proper cases. The case at bar presents the question of fact, to be determined by a jury, as to whether or not, under all the facts and circumstances here, the engineer knew of the impending peril of Williams, and that Williams was not aware of it, and should have given some warning, either by bell or whistle, when he saw that the appellee would very probably reach a dangerous position on this crossing which he was unaware of, and which would result in his injury. The jury could well decide, under the facts and circumstances here, that the engineer did not exercise the care and caution required of a reasonably prudent person, and that he was negligent in the performance of his duty. The jury would have been equally justified, if it had seen proper in its judgment, in finding that the engineer was not guilty of negligence, but that he acted with reasonable care and caution under the circumstances, as any rea-

sonably prudent person should have done under the same conditions as there presented.

These close questions of negligence vel non can only be determined safely and righteously by the juries of the country. A standard of conduct constituting negligence, or due care, in the numerous affairs of life, cannot be safely established from the Bench; but such questions must be left to the logic and reasoning of the laymen who compose the juries, taken from all the walks of life, and who are familiar with ordinary human affairs and general conditions of everyday life. In view of these conclusions, we do not think the lower court erred in submitting the question of negligence to the jury; and, so far as the finding by the jury of the liability of the railroad company for the injuries is concerned, we hold that the judgment of the lower court should be affirmed. *Russell v. Atchison Ry. Co.*, 70 Mo. App. 88; *Hodges v. St. L., K. C. & N. Ry. Co.*, 71 Mo. 50; *Davis v. Louisville Ry. Co. (Ky.)* 97 S. W. 1122; *Cleveland R. Co. v. Baker*, 106 Ill. App. 500; *Jarrel v. N. O. & N. E. R. Co.*, 109 Miss. 50, 67 South. 659; *Hartman v. Chicago, G. W. R. Co.*, 132 Iowa, 582, 110 N. W. 10; *Corder's Adm'r v. C., N. O. & T. P. R. R. Co.*, 155 Ky. 536, 159 S. W. 1144; *Nichols v. Chicago R. Co.*, 125 Iowa, 236, 100 N. W. 1115; *I. C. Ry. Co. v. Dillon*, 111 Miss. 523, 71 South. 809; *Weiss v. Great Northern R. Co.*, 119 Minn. 355, 138 N. W. 433; *Southern Ry. Co. v. Lawler*, 11 Ala. App. 241, 65 South. 859; *Vain v. Milwaukee & N. R. Co.*, 82 Wis. 1, 51 N. W. 1064, 33 Am. St. Rep. 17.

[4] As to the second contention of appellant, that the judgment is excessive, under chapter 135, Acts of 1910, and that no recovery can be had with reference to the cotton left in the fields, we have given these questions very careful consideration, and we cannot escape the conclusion that the verdict and judgment for \$10,000 in this case is grossly excessive.

[5] In the first place, we think that the \$1,350 claimed by appellee as damages suffered by him on account of his forced absence from his plantation which resulted in the loss of 30 bales of cotton and several tenants leaving the place is speculative and too remote for recovery in this case. The amount of money, \$195, which was necessary to pay to the manager who took the place of appellee while he was disabled and incapacitated, is recoverable here; but to say that the railroad must pay for the negligence or incompetency of this hired manager, or for the families leaving the place, which might have happened anyway, or to say that appellant must pay for the cotton left in the fields because no one was hired to pick it, would be to charge the appellant with damages which could not be said to have been proximately caused by its act of negligence, and damages that did not reasonably and naturally result from the injury caused by the negligence of the railroad com-

pany. *Blackman v. Proprietors*, 75 Me. 214; 18 Cyc. 141, note 17.

We are also clearly convinced that the judgment for \$10,000 in this case is excessive, for the reason that the appellee, Williams, contributed to his injury by his own gross negligence, which would bar recovery here if it were not for our concurrent negligence statute (chapter 135, Acts of 1910), which comes to his rescue and saves him from defeat. But we feel certain that the verdict of the jury is contrary to the evidence and the law, and is manifestly wrong, in this, that the jury failed to diminish the damages in proportion to the amount of negligence attributable to the appellee Williams. We do not say that the verdict of \$10,000 is not supported by the testimony as to the damages and personal injuries of appellee, Williams, and we would not disturb this verdict of \$10,000, if the appellee, Williams, had not himself been guilty of negligence. We do not think that Williams was entitled to more than \$10,000 or \$12,000 for his injuries and damages if he had been free of negligence; and we hold that the evidence would not justify a larger verdict than \$10,000 or \$12,000, even if the appellee had been guilty of no negligence at all; but what is very evident and plain to us is that the jury failed to diminish the amount of damages in proportion to the gross negligence of the appellee Williams, and we think this court should take notice of this concurrent negligence statute in its entirety, and see that the juries observe the provisions therein, and diminish the damages in proper cases where the evidence manifestly justifies it.

The appellant railroad company here was guilty only of mere negligence, and appellee, Williams, was guilty of gross negligence; and this court is justified in holding as a matter of law that appellee, Williams, was guilty of gross negligence under the facts in this case, and that the jury failed to diminish the damages on this account, and failed to charge the appellee with his negligence and proportionately decrease the amount of recovery. Therefore the verdict is contrary to the law and the evidence as to the amount of damages assessed. It is rather difficult for us to apportion, and we would not undertake or attempt to apportion the negligence of the parties in any case, unless the case is so plain and the injustice so palpable that we feel safe in acting, as in this case. In which event we shall not hesitate to do so. Therefore we hold that the proof in this case shows that, as a matter of fact and law, the appellee, Williams, was guilty of greater negligence than the appellant railroad company, and as \$10,000 or \$12,000 would have been the maximum amount of recovery allowed to stand in this case, with the claim for the loss of the cotton excluded, we can safely say it is right and just in this case that the judgment should be reduced to \$5,000. The appellee here would be barred from

recovery without the aid of chapter 135, Acts of 1910, and in accepting the benefits of this act he cannot ignore the latter provision contained therein, viz.:

"But damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured."

If the appellee will enter a remittitur here for \$5,000, the judgment of the lower court will be affirmed; otherwise, it will be reversed, and the case remanded.

(16 Ala. App. 3)

**MILLER v. STATE. (8 Div. 408.)**

(Court of Appeals of Alabama. April 3, 1917.)

**1. CRIMINAL LAW § 693 — APPEAL AND ERROR—TIMELY OBJECTIONS.**

Objection of an accused to evidence after witness has answered a question comes too late to authorize this court to review action of lower court.

[Ed. Note.—For other cases, see Criminal Law, Cent. § 1830.]

**2. CRIMINAL LAW § 696(2) — APPEAL AND ERROR—WAIVER OF ERROR.**

Where accused objected to the question asked a witness, but made no objection to the answer nor motion to exclude the same, the error, if any, is waived on appeal.

**3. CRIMINAL LAW § 338(7) — TRIAL—EXCLUSION OF TESTIMONY.**

Refusal to allow accused to show that the prosecution was begun in witness' court by L., who was mad at accused, is not error, where it does not appear that L. was the prosecutor or had testified in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 855.]

**4. CRIMINAL LAW § 829(1) — APPEAL AND ERROR—REFUSAL OF INSTRUCTIONS COVERED BY CHARGE.**

Refusal of an instruction fully covered by the charge as given is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

**5. CRIMINAL LAW § 798(1) — INSTRUCTIONS—REASONABLE DOUBT.**

An instruction that, "if one of you does not believe beyond a reasonable doubt that defendant is guilty, you cannot find defendant guilty," is bad.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1940.]

**6. CRIMINAL LAW § 814(17) — TRIAL — INSTRUCTIONS—ERRONEOUS REQUESTS.**

Where evidence is positive, refusal to grant a requested charge on circumstantial evidence is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979.]

**7. CRIMINAL LAW § 784(4) — TRIAL—CIRCUMSTANTIAL EVIDENCE—MISLEADING AND ARGUMENTATIVE INSTRUCTION.**

An instruction that circumstantial evidence "is always insufficient when, assuming all to be proved which the evidence tends to prove, some other reasonable hypothesis may still be true, for it is the actual exclusion of every other reasonable hypothesis which invests mere circumstances with the force of truth," is erroneous, being misleading and argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1884, 1900.]

**8. CRIMINAL LAW § 815(2) — TRIAL — COMMENTS ON EVIDENCE.**

Where judge does not undertake to tell jury what evidence was, he has a right in his charge

to assume facts for purposes of illustrating the law of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1986.]

Appeal from Circuit Court, Franklin County; C. P. Almon, Judge.

Fayette Miller was convicted of public drunkenness, and appeals. Affirmed.

The following charges were refused to defendant:

(1) "In the application of circumstantial evidence to the determination of a case the utmost caution should be used. It is always insufficient when, assuming all to be proved which the evidence tends to prove, some other reasonable hypothesis may still be true, for it is the actual exclusion of every other reasonable hypothesis which invests mere circumstances with the force of truth."

(2) "I charge you, gentlemen, if one of you does not believe beyond a reasonable doubt that defendant is guilty, you cannot find defendant guilty."

The question to the witness Thompson, objected to, was as follows:

"What was his appearance?"

William Stell, of Russellville, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

SAMFORD, J. The defendant, Fayette Miller, was tried and convicted in the circuit court of Franklin county on the charge of public drunkenness and from a judgment of conviction he appeals.

[1] The objections to the evidence set out on pages 3, 4, and 5 of the transcript, in each instance having been made after the witness had answered the question, came too late to authorize this court to review the action of the lower court. *Smith v. State*, 183 Ala. 10, 62 South. 864.

[2] The defendant objected to the question asked the witness Thompson, as set out on page 3 of the transcript, but he did not object to the answer, nor did he move to exclude the same; therefore any supposed error of the court was waived; besides, the question was entirely proper.

[3] The court did not err in refusing to allow the defendant to show by the witness Sims "that the prosecution was begun in his (Sims') court by Lindley, and that Lindley was mad at Miller," it not having been shown that Lindley was the prosecutor, nor does it appear that he had testified in the case.

[4, 5] Charge D was fully covered by charge X; and therefore its refusal was not error. *Smith v. State*, 165 Ala. 50, 51 South. 610. Besides, the charge was bad. *Diamond v. State*, 72 South. 558.

[6, 7] The court did not err in refusing charge No. 1. The evidence in this case was positive, and this charge was inapplicable, as it charged on circumstantial evidence. *Bailley v. State*, 168 Ala. 4, 53 South. 296, 390. Besides this, the charge was misleading and argumentative, and for these reasons was a bad charge.

[8] We find no error in the general charge of the court. The court did not make the statement or undertake to tell the jury what the evidence was. He only hypothesized, as he had a perfect right to do, in illustrating to the jury the law of the case.

We find no error in the record. It follows, therefore, that the judgment of the lower court must be affirmed.

Affirmed.

(16 Ala. App. 5)

MINOR v. COLEMAN. (7 Div. 140.)

(Court of Appeals of Alabama. Feb. 6, 1917.  
Rehearing Denied April 3, 1917.)

1. ANIMALS  $\S$ 44—ACTION FOR KILLING ANIMALS—PLEADING—"WILLFULLY AND INTENTIONALLY."

In an action for damages for killing a dog, an allegation that defendant willfully and intentionally shot and killed the dog was not demurrable for failure to aver that the killing was wrongful, since the phrase "willfully and intentionally" imports that the act was wrongful.

[Ed. Note.—For other cases, see Animals, Cent. Dig.  $\S$  115-122.]

For other definitions, see Words and Phrases, First and Second Series, Willful—Willfully; Intentionally.]

2. MASTER AND SERVANT  $\S$ 329—TORT OF SERVANT—PLEADING.

In an action for damages for killing a dog, an allegation that the person killing the dog was acting under defendant's instructions was not demurrable, as not alleging that the servant was acting within the scope of his authority.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig.  $\S$  1268, 1269.]

3. PLEADING  $\S$ 208—DEMURRER—SPECIFICATION OF GROUNDS.

In an action for damages for killing a dog, an answer alleging that the dog was engaged in an assault upon defendant's guineas, that he had prior thereto killed and chased the guineas, and was, when killed, upon defendant's premises, destroying his property, and that it was necessary to kill the dog to protect the property, was good as against a demurrer failing to point out the specific errors in the plea, as required by Code 1907,  $\S$  5340.

[Ed. Note.—For other cases, see Pleading, Cent. Dig.  $\S$  513-519.]

4. APPEAL AND ERROR  $\S$ 231(2)—RESERVING GROUNDS BELOW—PLEADING.

Where defects in pleadings are not made ground of demurrer, they will not be considered on review.

5. ANIMALS  $\S$ 85—ACTIONS—EVIDENCE.

In an action for damages for killing a dog, destroying defendant's property, evidence showing that the property had been depredated on by dogs before was competent, as illustrating the character of the act of the dog when it was killed.

[Ed. Note.—For other cases, see Animals, Cent. Dig.  $\S$  297-308.]

6. ANIMALS  $\S$ 85—ACTIONS—EVIDENCE.

In an action for damages for killing a dog, evidence that, after the killing, defendant's property was no longer molested, was improper.

[Ed. Note.—For other cases, see Animals, Cent. Dig.  $\S$  297-308.]

7. ANIMALS  $\S$ 85—ACTIONS—INSTRUCTIONS.

In an action for damages for killing a dog, worrying defendant's guineas, an instruction to find for plaintiff unless the jury believed that at the time the dog was killed the guineas were

in further imminent danger from the dog was properly refused, as being misleading.

[Ed. Note.—For other cases, see Animals, Cent. Dig.  $\S$  297-308.]

8. TRIAL  $\S$ 194(14)—INSTRUCTIONS—PROVINCE OF JURY.

In an action for damages for killing a dog, an instruction that the jury might consider the previous conduct of the dog, in determining whether it was necessary to shoot in order to save defendant's property, was erroneous, as invading the province of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig.  $\S$  464.]

9. TRIAL  $\S$ 191(5)—INSTRUCTIONS—ASSUMING FACTS.

In an action for damages for killing a dog, engaged in worrying defendant's guineas, an instruction that the jury might consider the previous conduct of the dog killed, in determining whether it was necessary to shoot in order to save defendant's property, was erroneous, in assuming that the dog was in pursuit of the guineas.

[Ed. Note.—For other cases, see Trial, Cent. Dig.  $\S$  428.]

10. TRIAL  $\S$ 244(3)—INSTRUCTIONS—UNDUE PROMINENCE TO FACTS.

In an action for damages for killing a dog engaged in molesting defendant's property, an instruction that the jury might consider the previous conduct of the dog in determining whether it was necessary to shoot in order to save defendant's property was erroneous, as giving undue prominence to the fact of previous depredations.

[Ed. Note.—For other cases, see Trial, Cent. Dig.  $\S$  579.]

Appeal from Circuit Court, Greene County; Bernard Harwood, Judge.

Action by Phillip B. Minor against Thomas W. Coleman. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The first count of the complaint is that:

Plaintiff claims of defendant \* \* \* damages for that, heretofore, to wit, \* \* \* defendant did willfully and intentionally shoot and kill one pointer dog, the property of plaintiff, of the value of, to wit, \$150.

The second count, as originally filed charges that defendant did, by and through one Jim Ward, who was the agent of defendant, and acting under his instructions, willfully and intentionally shoot and kill one dog, the property of plaintiff. This was afterwards amended by averring that the said Jim Ward, when he shot and killed plaintiff's said dog as aforesaid, was acting within the scope of his authority. It was also amended by adding the word "wrongfully" next before the word "willfully" wherever the same occurs in each count of the complaint.

Defendant's third plea is as follows:

That, at the time the dog mentioned in the complaint was killed, he was engaged in an assault upon and destroying defendant's property; that, immediately before said dog was shot, it had killed one of defendant's guineas, and, when shot, was pursuing another. Defendant avers that said dog had, on divers occasions prior thereto, depredated on defendant's premises, killing and chasing defendant's guineas, and was, when killed, upon defendant's premises, destroying defendant's property; that it was

necessary to kill said dog to protect defendant's property.

The following charge was refused to plaintiff:

C. You must return a verdict for plaintiff in this case, unless you believe from the evidence that at the time the dog was killed the guineas were in further imminent danger from the dog.

The following charge was given for defendant:

8. You have a right to look at the previous conduct of the dog killed, in determining whether it was necessary to shoot in order to save defendant's property.

McKinley, McQueen & Aldridge, of Tuscaloosa, for appellant. R. B. Evins, of Greensboro, for appellee.

BROWN, J. The rules of law applicable to this case were announced in the following cases: *Kershaw v. McKown*, 12 Ala. App. 485, 68 South. 559; *Means v. Morgan*, 2 Ala. App. 547, 56 South. 759; *Crow v. McKown*, 192 Ala. 480, 68 South. 341, 1 L. R. A. 1915E, 372. In *Kershaw v. McKown*, supra, it was held that a complaint alleging the "wrongful" shooting and killing of plaintiff's dog, of the "value of \$100," stated a good cause of action.

[1] If, therefore, the appellant's contention that the averments of the complaint that the defendant "willfully and intentionally" killed the dog in question imports that the act of the defendant was wrongful, the ruling of the court on the demurrers only resulted in the plaintiff amending both counts of his complaint by adding the word "wrongful" before "willful and intentional," and was without injury.

The second count of the complaint as originally filed avers that:

"The defendant did, by and through one Jim Ward, who was the agent of the defendant and acting under his instruction, willfully and intentionally shoot and kill one dog, the property of the plaintiff, of the value of, to wit, \$150."

The word "willful," in the connection here used, imports more than that the act was intentional. It has been held by our court that "'willfully' is a strong word, much stronger than the word 'intentionally.'" \* \* \* It means governed by the will, obstinate, perverse." *Johnson v. State*, 61 Ala. 9. And again, that an act, to be willful, must be "without lawful excuse." *Harrison v. State*, 37 Ala. 154. "Willful means governed by the will, without yielding to reason." *Hawes v. State*, 88 Ala. 37, 7 South. 302. And by others that it carries the meaning that the act was "with bad or evil purpose, without ground for believing the act to be lawful." *Roby v. Newsom*, 121 Ga. 679, 49 S. E. 694, 68 L. R. A. 601; *State v. Fairbanks*, 115 La. 457, 39 South. 443; *Commonwealth v. Kneeland*, 20 Pick. (Mass.) 220. See also Words and Phrases. 40 Cyc. 938:

"The words 'willful' and 'willfully' are of somewhat varied significance, according to the context in which they are used in particular cases, and the nature of the subject under dis-

cussion or treatment. They are frequently used in the sense of 'intentionally,' or in other words implying purpose or design, or proceeding from a conscious motive of the will, as distinguished from accidental or involuntary, and they are accordingly used in the sense or as equivalent to willingly, designedly, purposely, obstinately, stubbornly, inflexibly, perversely, voluntarily, deliberately with set purpose, being governed by the will, without regard to reason, or without yielding to reason."

"Willfully" and "intentionally," as used in the complaint in this case, import that the act of killing the dog was not only intentional, but wrongful.

[2] While, as we have said, the ruling on the demurrer presenting this phase of the question was error without injury, a decision is here made necessary by the court's sustaining to the second count the demurrer taking the point "that it is not alleged in said count that Jim Ward was acting within the scope of his authority when he shot the dog," in the face of the averment that Ward "was acting under his [defendant's] instructions." If the specific act was directed or commanded to be done by the defendant, as this averment imports, he was liable. *Williams v. Hendricks*, 115 Ala. 277, 22 South. 439, 41 L. R. A. 650, 67 Am. St. Rep. 32; *Smith v. Causey*, 22 Ala. 568.

[3] The defendant's third plea was not subject to the objections pointed out in the demurrers to the plea, and the ruling of the court thereon was free from error. Code 1907, § 5340.

[4] The point, argued in brief, that the value of the property being destroyed by the dog was so greatly disproportionate to the value of the dog that the defendant was not justified in killing the dog was not made a ground of demurrer, and that question is not presented.

The evidence is without dispute that the dog was killed by Ward on the defendant's premises and according to the defendant's instructions, and tends to show that this dog, with two others, at the time it was killed, was in the act of chasing the defendant's guineas. When first seen by Ward, the guineas were flying away from the dogs, and this dog was running in the same, or practically the same, direction that the guineas were flying. After the dog was shot, Ward found a dead guinea near where he first discovered the dogs.

[5] Under the issues formed by the pleadings, the evidence offered by the defendant tending to show that defendant's guineas in this same inclosure had been depredated on by dogs was competent, as this evidence tended to illustrate and give character to the act of the dog on the occasion it was killed, and to illustrate the danger in which the fowls were placed by the conduct of the dog.

[6] The defendant, over the objection of the plaintiff, was allowed to show that, after the plaintiff's dog was killed, the defendant suffered no further depredations on his property by dogs. The only theory that could

justify the admission of this evidence is that it afforded an inference that the plaintiff's dog was the one guilty of the depredations. We are of opinion that this evidence affords no such legitimate inference; that at best it affords room for mere conjecture that plaintiff's dog was the guilty agent. A fortiori, after the killing of this dog, the owner of the guilty dog or dogs, to save them from like doom, confined them. The court erred in admitting the testimony.

The issues were properly submitted to the jury, and the affirmative charge was refused without error.

[7] Charge C possessed misleading tendencies, and was properly refused.

[8-10] There is no positive evidence that the dog in question had been guilty of previous depredations on the defendant's guineas, nor was there any positive evidence that it killed the guinea found by Ward soon after the dog was shot. These were questions for the jury, under the evidence in the case. "Previous conduct," as used in charge 8 given at the defendant's instance, can refer to nothing except the previous depredations by the dogs on the defendant's guineas, and in assuming that the plaintiff's dog was the guilty agent the charge invaded the province of the jury. The charge also assumes that the dog, when killed, was in pursuit of the guineas, and for these reasons it was error to give the charge. *Birmingham Ry. Co. v. Mullen*, 138 Ala. 614, 35 South. 701. The charge is also subject to the vice of giving undue prominence to the fact of previous depredations. *Huskey v. State*, 129 Ala. 98, 29 South. 838; 5 Mayf. Dig. 128, § 16.

For the errors pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

(16 Ala. App. 7)

**DALEY v. STATE.** (8 Div. 491.)

(Court of Appeals of Alabama. March 23, 1917.)

**JURY**  $\Leftrightarrow$  31(5) — **RIGHT TO TRIAL BY JURY—STATUTE—CONSTITUTIONALITY.**

Acts 1915, p. 940, requiring defendant indicted for misdemeanor to file with the clerk of the court a written demand for trial by jury, is not violative of Const. 1901, § 6, guaranteeing in all criminal prosecutions by indictment that accused shall have a speedy trial by an impartial jury of the county or district in which the offense is committed, merely because it requires the demand to be in writing.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 208.]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

John Daley was convicted of an offense, and he appeals. Affirmed.

James C. Phelps and Milo Moody, both of Scottsboro, for appellant. W. L. Martin, Atty. Gen., for the State.

**BROWN, P. J.** The appellant contends that the act approved September 28, 1915

(Acts 1915, p. 940), in so far as it requires the defendant indicted for a misdemeanor to file with the clerk of the court a written demand for trial by jury, is violative of section 6 of the Constitution of 1901, guaranteeing in all criminal prosecutions by indictment the accused shall have a speedy public trial by an impartial jury of the county or district in which the offense is committed, because it requires the demand to be made in writing. This contention is fully answered in the following cases: *Alford v. State ex rel. Attorney General*, 170 Ala. 178, 54 South. 213, Ann. Cas. 1912C, 1093; *Connelly v. State*, 60 Ala. 89, 31 Am. Rep. 34; *Ireland v. State*, 11 Ala. App. 155, 65 South. 443; *Frazier v. State*, 11 Ala. App. 285, 66 South. 879.

There was evidence before the court authorizing the conclusion announced in the judgment of guilt, and a new trial was properly denied. *Mulligan v. State*, 72 South. 761.

Affirmed.

(16 Ala. App. 7)

**JONES v. STATE.** (8 Div. 412.)

(Court of Appeals of Alabama. Jan. 30, 1917.  
Rehearing Denied March 23, 1917.)

**1. JURY**  $\Leftrightarrow$  116 — **QUASHING VENIRE — GROUNDS.**

Under Acts 1909, p. 820, § 32, providing that if the sheriff fails to summon any of the jurors drawn, or any juror summoned fails or refuses to attend the trial, or if there is any mistake in the name of any juror drawn or summoned, none nor all of these grounds shall be sufficient to quash the venire or continue the cause, motion to quash venire because of mistake in names of two jurors, and because name of one juror was not served on the defendant, was properly overruled.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 542, 543.]

**2. HOMICIDE**  $\Leftrightarrow$  166(2) — **MOTIVE—EVIDENCE—ADMISSIBILITY.**

In prosecution for murder, witness was properly allowed to state that a month before the killing, defendant, when told that deceased was going to whip him, said that he was not man enough.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 321, 322.]

**3. HOMICIDE**  $\Leftrightarrow$  167(8) — **EVIDENCE—CARRYING WEAPON—ADMISSIBILITY.**

In prosecution for murder by shooting, evidence that defendant was seen with a pistol a short time prior to the killing was admissible.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 369.]

**4. WITNESSES**  $\Leftrightarrow$  252 — **USE OF PICTURE TO AID TESTIMONY.**

In prosecution for murder by shooting, it was not error to permit a witness to look at a picture of a pistol in order to identify the kind of a pistol he testified to having seen in defendant's possession.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 868, 867.]

**5. HOMICIDE**  $\Leftrightarrow$  178(1) — **EVIDENCE—ADMISSIBILITY.**

Though it is competent for one accused of murder to show that another committed the offense, such proof must be confined to substantial facts and relate to the *res gestae*, so that it was

proper to exclude the question to a witness whether he had been trying to make arrangements to kill deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 307.]

**6. WITNESSES**  $\S$ 268(1)—**CROSS-EXAMINATION—USE OF BLOODHOUNDS.**

When evidence that bloodhounds trailed defendant to his home is admitted, defendant should have the fullest opportunity by cross-examination to inquire into the breeding and training of the dogs, and into all circumstances and details of the hunt.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931, 938, 939.]

**7. WITNESSES**  $\S$ 268(1)—**CROSS-EXAMINATION—USE OF BLOODHOUNDS.**

Where witness testified that he trained bloodhounds, and that they tracked defendant from the place of the murder to his home, it was not error to exclude the question whether he had ever trailed a man by the same dogs where the court stated that he would allow any question as to what witness knew about the dogs, and whether he was there with them.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931, 938, 939.]

**8. CRIMINAL LAW**  $\S$ 665(4)—**TRIAL—EXAMINATION OF WITNESS UNDER RULE.**

It is within the discretion of the court to permit a witness who has violated the rule by remaining in the court to testify.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1559.]

**9. CRIMINAL LAW**  $\S$ 368(2), 448(4)—**EVIDENCE—ADMISSIBILITY—CONCLUSION OF WITNESS.**

In prosecution for murder, question whether defendant and deceased were carrying guns for each other was properly excluded as calling for conclusion, and not part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 815, 1036, 1038.]

**10. CRIMINAL LAW**  $\S$ 789(17)—**INSTRUCTIONS—REASONABLE DOUBT.**

In prosecution for murder, a charge failing to predicate probability of innocence, which would require acquittal as arising out of the evidence, is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1921, 1960, 1967.]

**11. CRIMINAL LAW**  $\S$ 561(1)—**QUANTUM OF PROOF—"REASONABLE DOUBT."**

A reasonable doubt not arising from the evidence or not existing in the face of the whole evidence is not a proper predicate for an acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267.]

**12. CRIMINAL LAW**  $\S$ 1186(4)—**APPEAL—HARMLESS ERROR.**

Where the court charged generally on reasonable doubt, giving accused the benefit of his requested instruction thereon, which was refused, the error, if any, was harmless under Supreme Court rule 45 (175 Ala. xxi), providing that it must be made to appear affirmatively that the error complained of has probably injuriously affected the substantial right of defendant before the case will be reversed.

**13. CRIMINAL LAW**  $\S$ 807(1)—**ARGUMENTATIVE INSTRUCTIONS.**

In prosecution for murder, instruction that if it is not shown that the dogs could take up and carry the trail of a human being after the time shown to have elapsed, the jury should not consider the trailing of the dogs as a circumstance, was properly refused as argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960.]

**14. CRIMINAL LAW**  $\S$ 814(8, 9)—**INSTRUCTIONS—APPLICABILITY TO EVIDENCE.**

In prosecution for murder, instruction that if the jury believed that a witness instead of accused may have killed deceased, or if they were in doubt as to who killed deceased, they should acquit defendant, was properly refused, in the absence of evidence that the witness or any other than defendant killed deceased.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979.]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

La Fayette Jones was convicted of murder in the second degree, and he appeals. Affirmed.

The facts sufficiently appear. The following charges were refused to defendant:

(1) If there is a reasonable probability of defendant's innocence, this may be a just foundation for a reasonable doubt of his guilt, and therefore for his acquittal.

(2) The court charges the jury that if it is not shown that the dogs could take up and carry the trail of a human being after the lapse of the time when deceased was killed to the time of putting them on the trail, then you should not consider the trailing of the dogs as a circumstance in this case.

(3) If the jury find from the evidence that the witness Tom Mullican may have killed deceased, or you are left in a state of doubt and uncertainty as to who killed deceased, then you should acquit defendant.

Milo Moody, of Scottsboro, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

BRICKEN, J. The defendant, La Fayette Jones, was indicted for murder in the first degree, and was convicted of murder in the second degree. There were no eyewitnesses to the killing. The evidence in this case showed that the deceased, Matton Mullican, came to his death by a gunshot wound. It also showed that bad feeling existed between the defendant and the deceased; and that the defendant had made threats against the deceased; and that on the day of the killing, the defendant was in the proximity of the scene of the homicide about the time the offense was committed. Bloodhounds trailed the track of a man from the scene of the killing to the home of the defendant. The track was shown to have measured the same length and width of the track of the defendant. The defendant's first statement as to his whereabouts on the day of the homicide was that he reached his home by 12 o'clock. When testifying as a witness in his own behalf on the trial of this cause, he swore that he reached his home on that day at 3 o'clock. Testimony of other witnesses showed that he did reach his home at or about 3 o'clock in the afternoon on the day of the homicide.

The motive for the crime and the opportunity to commit it by the defendant appear to be established by the evidence beyond a reasonable doubt. There was some effort by the defendant, undertaking to show that an



other, the brother of deceased, did the killing; but no substantive facts were proven in this connection.

[1] The motion to quash the venire because of mistakes in the names of two of the jurors and because the name of one of the jurors had not been served upon the defendant was properly overruled. Section 29 of the act known as the jury law (Acts 1909, p. 317) expressly provides that no objection can be taken to any venire of jurors except for fraud in drawing or summoning the jurors. The same act also provides that:

"If the sheriff fails to summon any of the jurors drawn, or any juror summoned fail or refuses to attend the trial, or if there is any mistake in the name of any juror drawn or summoned, none, nor all of these grounds shall be sufficient to quash the venire or continue the cause." Acts 1909, p. 317, § 32, at page 320.

This court held, in the case of Vincenzo v. State, 1 Ala. App. 62, 55 South. 451, that a motion based upon the same point as this one was without merit. The ruling of the Supreme Court in the case of Smith v. State, 165 Ala. 56, 51 South. 610, is to the same effect.

[2] On the trial of the case, Lonnie Waller, a witness for the state, over the objection of the defendant, was permitted to testify that about a month before the killing the defendant, when told that his uncle (the deceased) was going to whip him, said that he was not man enough. The defendant moved to exclude this testimony on the ground that it was immaterial and irrelevant. The court did not err in permitting this testimony to stand, for the manifest effect of such a statement showed that bad feeling existed between the defendant and the deceased, the tendency of which was to prove a motive for the commission of the offense, which is always permissible.

[3, 4] There is no merit in the objection to the ruling of the court in permitting the state to prove that the defendant was seen with a pistol a short time prior to the killing. The fact of ownership or possession of a weapon may be of some probative force, and may tend to show preparation for the crime, and is therefore admissible. Neither is there any merit in the objection to the court permitting a witness on the stand to look at the picture of a pistol in order to identify the kind of a pistol he had testified to having seen in the possession of the defendant. No injury or harm could have resulted therefrom.

[5] On cross-examination of state's witness T. R. Mullican, the defendant propounded the following question: "You had been trying to make arrangements to kill your brother, had you not?" and excepted to the ruling of the court in sustaining the objection by the state. There is clearly no merit in this contention, for it is a well-settled proposition of law that while it is competent for the accused to show that another committed the offense charged, yet such proof must be

confined to substantial facts, and must relate to the *res gestæ*, and not to conduct, declarations, or alleged confessions of the party on whom it is attempted to cast suspicion. *Tennison v. State*, 183 Ala. 1, 62 South. 780. The question propounded was objectionable because it could not have evoked testimony which would come within this rule.

[6, 7] State witness L. M. Phipps testified that he was in the bloodhound business, and that he kept trained dogs to hunt human beings; that he went with these dogs to where deceased was; that the dogs, after having circled the hill from where the deceased lay, took up a track 8 or 10 feet from the dead man, and followed it  $3\frac{1}{2}$  miles through the mountains into the house where the defendant lived; that in following the trail with the dogs he saw the track of one man all the way in soft places; that he measured the track, and that afterwards he measured the shoe of the defendant, and the measurement was the same, etc. On cross-examination of this witness, the following question was asked: "Did you ever trail a man down by these dogs in this town or this county, or any other?" and defendant excepted to the ruling of the court in sustaining objection interposed by the state. It is a well-settled principle of law that, when evidence of this character is admitted, a defendant should have the fullest opportunity, by cross-examination, to inquire into the breeding and training of the dogs, and into all circumstances and details of the hunt. *Richardson v. State*, 145 Ala. 50, 41 South. 82, 8 Ann. Cas. 108. It is contended that the sustaining of the objection to this question was error, in that it deprived the defendant of this right. The sustaining of this objection might have been error had not the court instructed the defendant that he would allow him to ask witness anything he knew about the dogs, if he was there with them, etc. Under this permission from the court, the defendant was accorded all the rights contemplated by the principle of law above mentioned; therefore there was no error in the court's having sustained objection to the question. The question as propounded was faulty in itself, for the facts or circumstances so sought to be brought out must be such as would have a proximate tendency to shed light upon the conduct of the dogs on the occasion which is the subject of investigation. *Hadnot v. State*, 3 Ala. App. 103, 57 South. 383; *Simpson v. State*, 111 Ala. 6, 20 South. 572; *Allen v. State*, 8 Ala. App. 230, 62 South. 971.

[8] Other questions raised as to the testimony of this witness Phipps are without error. There was no abuse of discretion by the court in permitting Ben Atulp to testify, for it is within the discretion of the court to permit a witness who has violated the rule by remaining in the court to testify. *Jarvis v. State*, 138 Ala. 17, 34 South. 1025; *Huskey v. State*, 129 Ala. 98, 29 South. 838; *Hall v.*

State, 137 Ala. 46, 84 South. 680; Burks v. State, 120 Ala. 387, 24 South. 931.

[8] There was no error in sustaining the objection to the question propounded to defendant's witness Lem Jones, "Will ask you whether or not they were carrying guns for each other?" This question clearly called for a conclusion, and also sought to show an act of the third party not a part of the res gestæ of the crime. *Tennison v. State*, supra.

Other objections to the rulings of the court on the evidence are without merit.

[10-12] Charge 1 was well refused because it did not predicate the probability of innocence which would require an acquittal as arising out of the evidence. *Davis v. State*, 188 Ala. 69, 66 South. 67. A reasonable doubt not arising from the evidence, or not existing in the face of the whole evidence, is not a proper predicate for acquittal. *McClain v. State*, 182 Ala. 81, 62 South. 241. Moreover, the court charged the jury in the general oral charge on the question of reasonable doubt in its several phases, thus giving to the defendant the benefit of the substance of the refused charge; and rule 45, Supreme Court Practice (175 Ala. xxi), requires that it must be made to affirmatively appear after an examination of the entire case that the error complained of has probably injuriously affected the substantial right of the defendant before a case will be reversed. The refusal to give charge 1, under these conditions, could not be seriously argued to have affected the rights of the defendant to this extent.

[13] Charge 2 is argumentative, and is otherwise objectionable, and was therefore properly refused.

[14] Charge 3 was properly refused, as there was no evidence in this case to show that another, other than defendant, committed the offense.

We find no error in the record, and the judgment of conviction will be affirmed. Affirmed.

#### On Rehearing.

We are urged, in the application for rehearing, to re-examine several questions presented in this case. This we have done, and we find no reason to change the conclusion heretofore announced.

First. It is insisted that in stating the case upon the facts this court seemed to entirely overlook evidence offered by the defendant as to his whereabouts on or about the hour deceased came to his death. This insistence is not at all well founded, for all the evidence has been carefully examined and the seeming conflicts noted, and this court held, and now reaffirms, that these questions were for the jury, and that they were properly submitted to the jury for its consideration, and that the lower court did not err in so doing.

Second. We again announce and hold that

the court properly overruled the defendant's motion to quash the venire. The record affirmatively shows that the regular juror Willie Hinshaw had not been summoned at the time of the compliance with the order of the court to forthwith serve upon the defendant a list of the names of the jurors drawn and summoned for the week of the court in which this case was set for trial and a list of the special jurors drawn in this case, together with a copy of the indictment against him, etc. The fact that said Juror Hinshaw was afterwards found, and was in attendance upon court, could in no sense be taken as a meritorious ground for a motion to quash the venire. In addition to this, it was announced by the court that Juror Hinshaw would not be put upon the defendant as a juror over his objection, and the defendant declined the privilege offered, and refused to object or to challenge said juror for cause.

Third. Under the authorities cited in the opinion, this court holds that the rulings of the court in connection with the effort to show that another than the defendant committed the offense of which he was charged were free from error, and the conclusions as announced are sound.

Fourth. There is no merit in the insistence that the court erred in its ruling upon the testimony of witness Phipps. This witness had testified that the dogs used upon this occasion were blooded dogs, and were trained for trailing human beings, etc. The defendant declined to avail himself of the privilege granted by the court to inquire into the training and capacity of the dogs in question, for under the permission granted by the court an almost unlimited scope of inquiry with reference to witness' knowledge of the dogs, their capacity, etc., was accorded the defendant, of which he did not take advantage.

Fifth. The ruling of the court on the testimony of defendant's witness Lem Jones, a brother of defendant, was without error. A proper predicate had been laid, and it was proper to prove the predicate by witness D. O. Austin. 1 Mayf. Dig. 888, § 244; *Burton v. State*, 115 Ala. 1, 22 South. 585.

The application for rehearing is denied. Application denied.

(16 Ala. App. 10)

#### ADDINGTON v. STATE. (6 Div. 16.)

(Court of Appeals of Alabama. Sept. 7, 1916.  
On Application for Rehearing,  
Oct. 19, 1916.)

#### 1. FALSE PRETENSES — 13—MATERIALITY—RIGHT TO RELY.

The false pretense by which a signature to a mortgage is obtained must be of a material fact, calculated to deceive, and on which the party to whom it is made has the right to rely.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 17.]

**2. INDICTMENT AND INFORMATION** **↔71—**  
**ALLEGATION OF PRETENSE.**

In the absence of a statute dispensing with the necessity of stating the false pretenses relied on, the indictment must allege the pretenses in such terms as enable the court to determine whether they are within the statute, and with such certainty as to show that it constitutes an indictable offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 144, 174, 193, 194.]

**3. FALSE PRETENSES** **↔34—**  
**SUFFICIENCY.**

An indictment setting forth a false pretense, and alleging that by means of such false pretense defendant obtained the signature to a mortgage, sufficiently alleges that the false statement was made as a fact, was material, and that it was rightfully relied on by the other party.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 46.]

**4. INDICTMENT AND INFORMATION** **↔110(15)**  
**—STATUTORY FORM.**

An indictment for false pretenses, following the form prescribed by Code 1907, § 7161, form 59, is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 291-294.]

**5. INDICTMENT AND INFORMATION** **↔147—**  
**SEVERAL PRETENSES.**

An indictment is not subject to demurrer, because several matters are alleged as false pretenses, some of which are such pretenses within the statutes, and others are not; but the averments of pretenses not within the statute will be treated as surplusage, unless they are descriptive averments.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 490-494.]

**6. CRIMINAL LAW** **↔442—**  
**EVIDENCE — PRELIMINARY PROOF—SIGNATURE BY MARK.**

Under Code 1907, §§ 4004-4006, authorizing proof of the execution of a written instrument by the maker without producing or accounting for the absence of the subscribing witness, a mortgagor, who could not read or write, can testify to the execution of the mortgage, if as a witness she was able to identify her mark.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1027.]

**7. MORTGAGES** **↔58—**  
**EXECUTION — SIGNATURE BY MARK—EFFECT OF ACKNOWLEDGMENT.**

Under Code 1907, § 3357, providing that acknowledgment operates as a compliance with the requirement of the preceding section for witnesses, a mortgage signed by mark, regularly acknowledged and recorded, is valid, without the attestation of a subscribing witness.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 153, 154.]

**8. ACKNOWLEDGMENT** **↔56—**  
**COLLATERAL ATTACK—INTEREST OF NOTARY.**

A mortgage is not subject to collateral attack, in a prosecution for obtaining the signature thereto by false pretense, on the ground that the notary who took the acknowledgment was personally interested in the mortgage.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 301, 302, 315.]

**9. FALSE PRETENSES** **↔38—**  
**VARIANCE—SEVERAL PRETENSES.**

Where an indictment for obtaining money under false pretenses alleges several separate pretenses, proof of any one of them is sufficient to support a conviction.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 50-53.]

**10. FALSE PRETENSES** **↔49(4)—**  
**EVIDENCE—STATEMENT.**

In a prosecution for obtaining a signature to a mortgage by false pretenses, evidence held to warrant the jury in finding that defendant sufficiently stated that he was a lawyer, not that that was the conclusion the prosecuting witness drew from other statements, so as to justify a conviction.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62.]

**11. CRIMINAL LAW** **↔553—**  
**APPEAL—REVIEW—CREDIBILITY OF WITNESS.**

The credibility of a witness, testifying in a criminal prosecution, is a question for the jury, not for the appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1252.]

**12. CRIMINAL LAW** **↔844(1)—**  
**APPEAL—EXCEPTIONS TO CHARGE—CHARGE PARTIALLY CORRECT.**

An exception to a portion of the charge in a criminal prosecution is of no avail, as showing reversible error, unless every proposition stated in that portion is erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2025.]

**13. CRIMINAL LAW** **↔844(1)—**  
**APPEAL—EXCEPTION TO CHARGE—GROUND OF EXCEPTION.**

An exception to that part of the charge beginning with certain words, to the effect that it was not necessary to establish each false pretense charged, is not an exception to a small portion of the part referred to, beginning with the middle of the paragraph and ending in the middle of a sentence, which was claimed on appeal to be erroneous, as assuming that one of the several false pretenses alleged to have been made was a misrepresentation as to a fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2025.]

**14. CRIMINAL LAW** **↔820—**  
**CHARGE—GRAMMATICAL CONSTRUCTION.**

The test of severe grammatical criticism is not the proper rule of construction to apply to the general charge of the court in a criminal prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1988.]

**15. CRIMINAL LAW** **↔820—**  
**CHARGE—CONSTRUCTION—ORDINARY MEANING.**

Hypercriticism should not be indulged in, in construing the charge of the court in a criminal prosecution, where the charge was expressed in plain language that is susceptible of ordinary understanding.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1988.]

**16. CRIMINAL LAW** **↔844(2)—**  
**EXCEPTIONS—CHARGE—GROUND OF OBJECTION.**

Where accused particularized the ground of his exception to a portion of the court's charge, the appellate court is not authorized to go beyond the stated ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2025.]

**17. CRIMINAL LAW** **↔767—**  
**CHARGE—INVADING PROVINCE OF JURY—CONSTRUCTION AS A WHOLE.**

Where the court in its charge several times stated that the misrepresentations relied on to constitute the false pretenses must have been of a material fact, a sentence in another part of the charge to the effect that it was not necessary to prove all the misrepresentations to sustain a conviction, but that if it was shown that defendant made any of them, enumerating them, he might be convicted, was not erroneous, as invading the province of the jury, because it did not again include a requirement that the representation be one of fact, since it

is impossible to state all the law in one sentence of the charge, and the charge must therefore be construed as a whole.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1795.]

Brown, J., dissenting in part.

Appeal from Criminal Court, Jefferson County; William E. Fort, Judge.

Jacob L. Addington was convicted of securing the signature to a mortgage by false pretenses, and he appeals. Affirmed, and petition for rehearing denied.

The second count of the indictment sufficiently appears, but in the indictment the mortgage alleged to have been obtained under false pretenses is set out in full. The oral charge of the court and the exceptions thereto are as follows:

Now, gentlemen, you have listened to this case from the beginning to the end, and have heard the evidence on both sides, and have listened patiently to the arguments of counsel for the state and for the defendant. You recognize that you are not here for the purpose of doing a favor to either side, neither to the state nor the defendant. You are not here for the purpose of doing anything in this cause, except to establish what is the truth, from the evidence in this case, and under the law which the court will give you in its charge. Twelve men have been selected, as jurors, because of their impartiality, their everyday experience in affairs of life and intelligence, in order that they may determine the issues in this case justly, intelligently, and without fear or favor. You, gentlemen, being those selected, become officers sworn to establish the truth as you see the truth to be, from the evidence in the case. Now you, gentlemen, are the sole judges and the exclusive judges of the evidence, and you are entitled to apply to the evidence in the case as you have heard it from the witness stand, your everyday common sense and experience, your intelligence and your judgment, what you have gathered from dealing with men and affairs, in the ordinary affairs of life. You likewise may consider, not only the spoken words of the witnesses, but may look behind those spoken words for any interest which the witness may have in the case, and any bias or prejudice, or anything which might sway the witness aside from the path of truth. The motive, then, of each witness in the case, may be looked to by you in determining what weight you will give to the testimony of each of the witnesses in the case. You have the right, of course, to reject any portion of any witness' testimony which you believe to be untrue; the general rule of law being to accept the true and reject the false, because, remember, gentlemen, that all through the case truth is what you are trying to arrive at, from all the testimony, from all of the witnesses in the case, so that in this court justice may be founded upon truth. You have the right to observe the manner of each witness while testifying on the stand, his facial expression, in order to determine from that, and from the evidence or testimony, and from his own words, what the truth is in the case. Now the presiding judge, gentlemen, is required to give the jury a statement, as clearly as possible, of the law of the case. The presiding judge is the judge of the law. He is here to interpret that law to you, so that you may understandingly apply the law to the evidence. I will give you, gentlemen, as briefly as I can, and as clearly, my understanding and interpretation of the law of Alabama as applied to the charge made against the defendant by the indictment in this case, and as all other phases thereof covering

the rights of the defendant and the charge made against him.

The first count of this indictment, gentlemen, I charge you, you cannot convict upon, because of its failure to set forth an instrument which on its face would be capable of forgery. There is a defect in the instrument as set out; that is, in the acknowledgment. The instrument does not appear in that count to be acknowledged, as it is in the second count of the indictment; the second count of the indictment, therefore, will be the only count or charge made before you against the defendant at bar. Now that count, gentlemen, does not charge forgery, but it charges an offense under section 6921 of the Code, under the general heading of fraud. That section reads as follows: "Any person who, by any false pretense or token, and with intent to injure or defraud, obtains from another his signature to any written instrument, the false making of which is forgery, must, on conviction, be punished as if he had forged the instrument." It is under the general statutes known as obtaining money or other goods by false pretenses, but charges not the obtaining of money or goods, but the obtaining of the signature of another to any written instrument, the false making of which is forgery. Now you will observe, gentlemen, from the very reading of the Code, that there are certain essential elements—that is, certain essential things—that must exist before the offense can be made out. The indictment charges an offense under that section, and it is necessary to prove beyond reasonable doubt, in the first place, that there was a false pretense made by the accused to the party alleged to have been injured—a false pretense; that is, a statement of facts, either an existing fact or a past fact, which is false or untrue. That is the first essential element of the offense which we have to consider. Was there a false statement made by the accused, as charged in the second count of the indictment? In other words, if the accused, as stated in the second count falsely pretends to Rachel Woodruff, "with the intent to injure or defraud, that he, the said Jacob L. Addington was a lawyer"? Now that is one of the charges of false pretense. Is that a fact or not? Did he falsely pretend that he was a lawyer or not, as charged, to Rachel Woodruff? In the first place, you have to determine, did he make that statement, as charged, that he was a lawyer? If so, was it false or true? Now you have heard the evidence on that subject, both that on behalf of the state and on behalf of the defendant, and it is for you to say, as judges of the evidence, what the truth is, where you find the evidence in conflict. If you can reconcile such conflict, so as to make the witnesses speak the truth, it will be your duty to do so, in fairness to the witnesses; but if you find any two witnesses are in irreconcilable conflict, then of course it is for you, and you alone, to decide what the truth is, rejecting what you believe to be untrue, and accepting what you believe to be true.

The second element of this offense charged in the second count of the indictment is that there must have been an *intent* on the part of the defendant to injure or defraud, either to injure the party to whom the false statement was alleged to have been made or defraud her. Now you, gentlemen, have heard the evidence in this case, and from that evidence as introduced you must determine whether or not there was an intent, on the part of the party accused of the alleged false statement, to injure or defraud. Now how does a jury arrive at a conclusion as to what a man's intent was? The only way here you can decide what a man's intent was, intent being what was in the heart of a man, is from all the circumstances, all the surrounding circumstances, from the evidence in the case, and then weigh those circumstances, if sufficient, and draw your reasonable conclusion whether or not there was an intent to defraud;

whether or not it is true, applying to it your own judgment, your own experience, and your common sense. Now it is not necessary that all the alleged false pretenses should be proven as charged. In other words, it would be sufficient to sustain the false pretense alleged in this second count of the indictment if you believed, beyond a reasonable doubt, that the defendant, with the intent to injure or defraud, made any one of the alleged false statements set out therein.

For example, if it was proven beyond a reasonable doubt that he, with the intent to injure or defraud—that the defendant said he was a lawyer, that would be sufficient, without proving furthermore that he made the representation that “he could plead the case of James M. Addison, charged with vagrancy in court.” You would not have to prove all that was alleged, but any one statement set forth, provided it was a material statement, and provided that the party to whom same was made relied upon it, and was induced to sign the alleged instrument by relying on such statement. If the state proves, beyond a reasonable doubt, that any one of these separate alleged false statements, either that he said he was a lawyer, or that he could plead the case of James M. Addison, charged with vagrancy, in court, or that he, Jacob L. Addington, was an attorney at the Birmingham bar and was authorized to defend cases in Birmingham, Ala.; in other words, if the evidence proved any one of those three alleged false statements, it would be sufficient to make out a charge of false pretense, provided you believed beyond a reasonable doubt that the defendant had at the time an intent to injure or defraud, and furthermore that Mrs. Rachel Woodruff signed the instrument described on account of that false statement, and was—and that that was the controlling inducement or controlling cause that moved her to sign it, and provided, furthermore, that that occurred in this county, and within three years next preceding the finding of the indictment. Of course, it must have occurred within that period in order to be actionable, because, if it did not happen within three years before the indictment was found, it would be barred by the statute of limitations, and it must have been in this county. So those are facts you have to find from the evidence in this case, after considering all the evidence on each side.

That the third essential element of obtaining a signature by false pretense is that the signature was obtained by means of such false pretense; and that is for you to say, gentlemen, after you have heard the evidence and the law, just what you think to be true, with reference to each of the allegations of the indictment. Of course, you have to believe beyond a reasonable doubt that there was such an instrument signed, as is set forth in the second count of the indictment, that Mrs. Rachel Woodruff signed that, and under the charge of the court that it was such an instrument as would be capable of forgery. Now the court charges you that instrument set out in this second count of the indictment is a mortgage, and being acknowledged, and signed and acknowledged and witnessed, that this is such an instrument as would be capable of forgery. Let me read you, in order that you may not misunderstand the technical features of the law, from the case of *Woodbury v. State of Alabama*, an Alabama decision, which is a leading authority on this question. It referred, of course, to obtaining goods or money under false pretenses, but the same principle applies to that, as it would to obtaining the signature by false pretenses. “A false pretense, to be indictable, must be calculated to deceive and defraud. As of an actionable misrepresentation, it must be of a material fact, on which the party to whom it is made has a right to rely; not the mere expression of an opinion, and not of facts open to his present observation, and

in reference to which, if he observed, he could obtain correct knowledge. Whether the prosecutor could have avoided imposition from the false pretense, if he had exercised ordinary discretion and prudence to detect its falsity, is not a material inquiry. As a general rule, if the pretense is not of itself absurd or irrational, or if he had not, at the very time it was made and acted on, the means at hand of detecting its falsehood, if he was really imposed on, his want of prudence is not a defense. \* \* \* The false pretense must not only be, however, of a material fact, but it must have been, not the sole, exclusive, or decisive cause, but a controlling inducement with the prosecutor for the transfer of his money or property. Other considerations may mingle with the false pretense, having an influence upon the mind and conduct of the prosecutor; yet if, in the absence of a false pretense, he would not have parted with his property, the offense is complete. \* \* \* But if without the false pretense he would have parted with his property—if that is not an operative, moving cause for the transfer—if he did not rely and act upon it, there may be falsehood, but there is not crime.” *Woodbury v. State*, 69 Ala. 245, 44 Am. Rep. 515.

Now, gentlemen, the law in reference to the question of presumption of innocence and reasonable doubt is this: That whenever a man is charged with any crime or other offense against the law, whether it is a felony or misdemeanor, he is presumed innocent until his guilt is established by the evidence, beyond a reasonable doubt. That presumption of innocence goes with him until the evidence establishes his guilt beyond a reasonable doubt. When the evidence does establish his guilt beyond a reasonable doubt, then the presumption of innocence ceases. But until that time that presumption goes with him as a matter of evidence to which he is entitled, as a matter of evidence and of policy. Now, you being men of intelligence and judgment, accustomed to exercise reason in the ordinary affairs of life, when you have heard this testimony and considered it all on both sides, fairly and impartially, seeking the truth, if you have left in your minds an actual substantial doubt that the defendant is guilty as charged, then you should give him the benefit of that doubt and acquit him. On the contrary, if you are convinced of his guilt from the evidence in the case, so that you have no such doubt left in your mind that he is guilty as charged, then you should convict him, provided the offense occurred in this county, and within the next three years preceding the finding of the indictment. The law says you must be satisfied in a criminal case to a moral certainty. A moral certainty does not mean, of course, an absolute certainty, or a mathematical certainty. If the law laid down that standard, it would be impossible to arrive at the truth with that standard, because you have to rely on human testimony, with all of its imperfections and frailties, and there could not be absolute truth with absolute certainty, and the law says not then with absolute certainty, but to a moral certainty. That is such a certainty of guilt from the evidence that you have no reasonable doubt of his guilt left in your mind. Now, if you are convinced of the defendant's guilt in this case to that degree of certainty where you have no reasonable doubt left in your mind after considering all of the evidence, then you are convinced to a moral certainty; otherwise not.

The showings that have been offered in evidence, gentlemen, mean that where one side has absent witnesses, and presents to the opposing side a statement on oath as to what that witness or those witnesses would testify, if present, the other side is required to admit that, if those witnesses were present and testifying, they would testify as set out in that showing. Of course, the party admitting the showing does not

admit—that is, is not required to admit—that the statements set out in the showings are true; in other words, that the statements made by the witnesses would be true, if made by them, but are required to admit that that witness or witnesses—those witnesses who are thus absent—would, if present, testify as set forth in the showing; and as to what weight shall be given to any statement given by a witness, as set forth in a showing, is a question for you to decide, weighing the statement in the light of other evidence, and in the light of your experience and judgment, giving to each portion of it such weight as you think it ought to receive, you being the judges of the evidence, and the showing being evidence in the case, and entitled to your consideration as such.

A verdict, gentlemen, means a true saying of 12 impartial men, who have agreed upon the truth as they see it, from the evidence. It takes 12 men to convict in any criminal case, and it takes 12 men to acquit—an agreement of 12 men. Therefore, in order for a verdict of acquittal, an agreement of 12 men is necessary, and it takes for a conviction an agreement of 12 men. Now the law requires you to take this evidence, and go over it, and discuss it, and, if you can do so, then reach a verdict which expresses the opinion of each individual juror, the truth of the case. If you cannot, well, of course, then there cannot be any verdict of any kind rendered. If you should find the defendant guilty as charged in the second count of the indictment, the form of the verdict, should be, "We, the jury, find the defendant guilty as charged in the second count of the indictment." The court fixes the punishment in cases of the offense charged against the defendant, in case you find him guilty. If you find the defendant not guilty, the form of your verdict should be, "We, the jury, find the defendant not guilty."

To remove any doubt on that proposition the counsel objects, or rather excepts, to my statement that the state is required to admit a showing. That statement means this: It is required to admit that, or have the case continued, one thing or the other. They are required to admit, in order to go to trial, the showing of the other side as to absent witnesses, or a continuance shall be permitted—results. It is for the court to decide whether a continuance shall be permitted, provided the court has acted upon a proper evidence before it and in the light of its judgment.

Defendant's Counsel: We desire to except to that part of the charge beginning with the words "It is not necessary," to the effect it is not essential to establish each representation by the evidence, and that the establishment of any one would be sufficient. Your honor understands my point?

The Court: Yes; I will say in that regard—I think I covered that in the charge, but I will say that the statement that the court made to that effect, to the effect that it is only necessary to establish one of the representations; that is, coupled with the statement that each of those statements must have been a material statement, and one upon which the party relied, and which induced the party to act.

Defendant's Counsel: We except on that point.

The Court: Yes; I understand that is your point, but we do not agree on the law on that proposition.

The Court: I give you, gentlemen, a number of charges in writing requested by defendant's counsel in this case; it being the law that wherever either side requests of the trial judge special charges in writing covering any phase of the law in the case, if those charges state the law correctly with reference to the matters to which they refer, then the presiding judge must give them, and read them to the jury as a

part of the law of the case. They are to be considered in connection with the general or oral charge, which I have already delivered, as a part of the law in the case, good law in reference to the matters to which they refer.

That part of the oral charge of the court, excepted to as above stated, was as follows:

Now, it is not necessary that all the alleged false pretenses should be proven as charged. In other words, it would be sufficient to sustain \* \* \* this second count of the indictment if you believed, beyond a reasonable doubt, that the defendant, with intent to injure or defraud, made any one of the alleged false statements set out therein.

For example, if it was proven beyond a reasonable doubt that he, with the intent to injure or defraud—that the defendant said he was a lawyer, that would be sufficient, without proving furthermore that he made the representation that "he could plead the case of James M. Addison, charged with vagrancy in court." You would not have to prove all that was alleged, but any one statement set forth, provided it was a material statement, and provided the party to whom it was made relied upon it, and was induced to sign the alleged instrument relying upon such statement. If the state proves, beyond a reasonable doubt, that any one of these separate alleged false statements, either that he said he was a lawyer, or that he could plead the case of James M. Addison, charged with vagrancy, in court, or that he, Jacob L. Addington, was an attorney at the Birmingham bar, and was authorized to defend cases in Birmingham, Ala.; in other words, if the evidence proved any one of those three alleged false statements, it would be sufficient to make out a charge of false pretenses, provided you believed beyond a reasonable doubt that the defendant had at the time an intent to injure or defraud, and furthermore that Mrs. Rachel Woodruff signed the instrument described on account of that false statement, and was—and that that was the controlling inducement or controlling motive that caused her to sign it, and provided, furthermore, that that occurred in this county, and within three years preceding the finding of the indictment.

Gibson & Davis, Gaston & Drennen, and H. K. White, all of Birmingham, for appellant. W. L. Martin, Atty. Gen., Harwell G. Davis, Asst. Atty. Gen., and Hugo L. Black, Sol., of Birmingham, for the State.

BROWN, J. The defendant was convicted on the second count of the indictment. The first question presented is as to the sufficiency of this count to authorize a judgment on the verdict of the jury. The contention of the appellant is that, although the indictment follows the form prescribed by the statute, inasmuch as this form does not contain an averment as to the materiality of the false pretenses, but leaves this to the pleader, enough of the transaction must be stated to show that the false statement or representation was material to the transaction in hand and to identify the occasion.

[1, 2] That the false pretense, to come within the statute, must be of a material fact, calculated to deceive, and on which the party to whom it is made has the right to rely, does not admit of question. *Woodbury v. State*, 69 Ala. 242, 44 Am. Rep. 515; 11 R. C. L. 831, § 9. And in the absence of

a statute dispensing with the necessity of stating the false pretenses relied on, the indictment must allege them in such terms as enable the court to determine whether or not the act is within the statute, and with such certainty as to show that it constitutes an indictable offense. 11 R. C. L. 858, § 41; Barton v. People, 25 Am. St. Rep. 384, note. Otherwise stated, the general rule is that an indictment must aver every fact necessary to an affirmation of guilt, and the rule is not satisfied as long as any fact essential to guilt is left to implication or inference. Jenkins v. State, 97 Ala. 66, 12 South. 110; Emmonds v. State, 87 Ala. 12, 6 South. 54; Adams v. State, 13 Ala. App. 330, 69 South. 357.

[3, 4] The form of the indictment here is that "Jacob L. Addington did falsely pretend to Rachel Woodruff, with intent to injure or defraud, that he, the said Jacob L. Addington, was a lawyer; that he could plead the case of James M. Addison, charged with vagrancy in court; that he, the said Jacob L. Addington, was a practicing attorney at the Birmingham bar, and was authorized to defend cases in the courts of Jefferson county, Ala.; and by means of such false pretense obtained from the said Rachel Woodruff her signature to a certain written instrument in substance as follows," etc. We hold that the averment, "*and by means of such false pretense obtained*," etc., is tantamount to an averment that the alleged false statement was made as of fact, was material to the transaction in hand, and that the party alleged to have been defrauded had a right to rely thereon, that she relied thereon, and was deceived thereby (Franklin v. State, 52 Ala. 414; Hicks v. State, 86 Ala. 30, 5 South. 425; Todd v. State, 13 Ala. App. 301, 69 South. 325); that an indictment following the form prescribed by the statute (Code 1907, § 7161, form 59) is sufficient, and the demurrer thereto was properly overruled (Toliver v. State, 142 Ala. 3, 38 South. 801; Jones v. State, 136 Ala. 118, 34 South. 236; Noles v. State, 24 Ala. 672; Headley v. State, 106 Ala. 109, 17 South. 714; Pearce v. State, 115 Ala. 115, 22 South. 502; Bobbitt v. State, 87 Ala. 91, 6 South. 378).

[5] The indictment is not subject to demurrer because several matters are alleged as false pretenses, some of which constitute false pretenses within the statute, and others do not. The averments as to those not within the statute will be treated as surplusage, unless they are descriptive averments. 11 R. C. L. 858, § 41; Barton v. People, 25 Am. St. Rep. 385, note; State v. Vorback, 66 Mo. 168; State v. Janson, 80 Mo. 97.

[6] The statute authorizes proof of the execution of a written instrument by the maker thereof, without producing or accounting for the absence of the subscribing witness (Code 1907, §§ 4004-4006; Hayes v. Banks, Adm'r, etc., 132 Ala. 354, 31 South. 464; Sledge et al. v. Singley et al., 139 Ala. 346,

37 South. 96); and although the maker of the mortgage in this case could not read or write, if as a witness she was able to identify her mark, which, when properly attested, was an efficacious signature to the mortgage, her testimony was competent to prove the execution of the mortgage. Lyons v. Holmes, 11 S. C. 429, 32 Am. Rep. 483.

[7, 8] The mortgage appears on its face to have been regularly acknowledged and recorded, and under the provisions of section 3357 of the Code the attestation of a subscribing witness who could write was not requisite to an efficacious and valid execution of the paper. Loyd v. Oates, 143 Ala. 231, 38 South. 1022, 111 Am. St. Rep. 39; Well Bros. v. Pope, 53 Ala. 585. The mortgage was not subject to collateral attack on the ground that the notary who took the acknowledgment was personally interested in the mortgage. Monroe v. Arthur, 126 Ala. 362, 28 South. 476, 85 Am. St. Rep. 36; Vizard v. Robinson, 181 Ala. 353, 61 South. 959. The objection to the mortgage and the motion to exclude were properly overruled.

[9] It seems to be well settled, where an indictment for obtaining money under false pretences alleges several separate pretences, proof of any one of the pretences alleged is sufficient to support a conviction. 11 R. C. L. 863, § 46; Bishop's New Criminal Procedure, § 171; Gardner v. State, 4 Ala. App. 131, 58 South. 1001; Beasley v. State, 59 Ala. 20; Commonwealth v. Morrill, et al., 8 Cush. (Mass.) 571; State v. Vorback, 66 Mo. 168; People v. Blanchard, 90 N. Y. 314; State v. Dunlap, 24 Me. 77; People v. Wakely, 62 Mich. 297, 28 N. W. 871. The motion to exclude the evidence on the ground of variance between the averments and proof was, therefore, properly overruled.

The court, after reading to the jury section 6921 of the Code as a part of the oral charge, further charged the jury:

"The indictment charges an offense under that section and it is necessary to prove beyond a reasonable doubt, in the first place, that there was a false pretense made by the accused to the party alleged to have been injured—a false pretense: that is, a *statement of facts*, either an existing fact or past fact, which is false or untrue. That is the first essential element of the offense which we have to consider. Was there a false statement made by the accused as charged in the second count of the indictment? In other words, if the accused, as stated in the second count, falsely pretends to Rachel Woodruff, 'with the intent to injure or defraud, that he, the said Jacob L. Addington, was a lawyer?' Now that is one of the charges of false pretense. Is that a fact or not? Did he falsely pretend that he was a lawyer or not, as charged, to Rachel Woodruff? In the first place, you have to determine, did he make that statement, \* \* \* that he was a lawyer? If so, was it false or true? Now, you have heard the evidence on that subject, both that on behalf of the state and on behalf of the defendant, and it is for you to say, as judges of the evidence, what the truth is, where you find the evidence in conflict. If you can reconcile such conflict so as to make the witnesses speak the truth, it will be your duty to do so, in fairness to the witnesses; but if you find any two witnesses are



in irreconcilable conflict, then, of course, it is for you and you alone to decide what the truth is, rejecting what you believe to be untrue, and accepting what you believe to be true. The second element of this offense charged in the second count of the indictment is that there must have been an intent on the part of the defendant to injure or defraud, either to injure the party to whom the false statement was alleged to have been made, or defraud her. Now you, gentlemen, have heard the evidence in this case, and from that evidence as introduced you must determine whether or not there was an intent, on the part of the accused of the alleged false statement, to injure or defraud. Now how does a jury arrive at a conclusion as to what a man's intent was? The only way here you can decide what a man's intent was, intent being what was in the heart of a man, is from all the circumstances, all the surrounding circumstances, from the evidence in the case, and then weigh those circumstances, if sufficient, and draw your reasonable conclusion whether or not there was intent to defraud; whether or not it is true, applying to it your own judgment, your own experience, and your own common sense. Now it is not necessary that all the alleged false pretenses should be proven as charged. In other words, it would be sufficient to sustain the false pretense alleged in this second count of the indictment if you believed, beyond a reasonable doubt, that the defendant, with the intent to injure or defraud, made any one of the alleged false statements set out therein. For example, if it was proven beyond a reasonable doubt that he with the intent to injure or defraud—that the defendant said he was a lawyer, that would be sufficient, without proving furthermore that he made the representation that 'he could plead the case of James M. Addison, charged with vagrancy in court.' You would not have to prove all that was alleged, but any one statement set forth, provided it was a material statement, and provided that the party to whom same was made relied upon it, and was induced to sign the alleged instrument by relying on such statement. *If the state proves, beyond a reasonable doubt, that any one of these separate alleged false statements, either that he said he was a lawyer, or that he could plead the case of James M. Addison, charged with vagrancy, in court, or that he, Jacob L. Addington, was an attorney at the Birmingham bar and was authorized to defend cases in Birmingham, Ala.; in other words, if the evidence proved any one of those three alleged false statements, it would be sufficient to make out a charge of false pretense, provided you believed beyond a reasonable doubt that the defendant had at the time an intent to injure or defraud, and furthermore that Mrs. Rachel Woodruff signed the instrument described on account of that false statement, and was—and that that was the controlling inducement or controlling cause that moved her to sign it, and provided, furthermore, that that occurred in this county, and within three years next preceding the finding of the indictment."*

At the conclusion of the oral charge, the defendant reserved an exception to the portion of the oral charge above italicized, and the court then said to the jury:

"Yes; I will say in that regard—I think I covered that in the charge, but I will say that the statement that the court made to that effect, to the effect that it is only necessary to establish one of the representations; that is, coupled with the statement that each of those statements must have been a material statement, and one upon which the party relied, and which induced the party to act."

The defendant also reserved an exception to this last statement of the court. It is the opinion of the writer that the portion of the

oral charge to which exception was first reserved is erroneous, in that it is clearly a charge on the effect of the evidence, in violation of section 5362 of the Code 1907; and constitutes reversible error. *L. & N. R. R. Co. v. Godwin*, 191 Ala. 498, 67 South. 675. This portion of the charge is subject to the further vice that it assumes that the alleged statement, *"that he could plead the case of James M. Addison, charged with vagrancy, in court,"* was made as of fact, while under some phases of the evidence, if such or similar statement was made, it was open to the jury to find that it was a mere jest, or that it was a promise to do something in the future. If this position is correct, it is manifest that what the court said in response to this exception in no way cured these vices. The sum and substance of the correction was that the statement must be a "material statement." This might all be true, and yet the statement not be one of fact. Neither is this error rendered innocuous by what had been previously said, in stating the elements of the offense to the effect that the pretense, to be within the statute, must be *"a statement of fact."* After charging this as the law, the court follows it with the specific instruction that, if the jury believed beyond a reasonable doubt that the defendant said *"that he could plead the case of James M. Addison in court,"* the case was made out, provided this was a material statement, and was made in the county within three years before the finding of the indictment. The only inquiry submitted to the jury with respect to this phase of the case presented in the indictment was: Did the defendant make the statement *"that he could plead the case of James M. Addison, charged with vagrancy, in court?"* Was this a material statement? Did he have an intent to injure or defraud? Did Mrs. Woodruff sign the mortgage on account of that statement? Was that the controlling inducement that moved her to sign it? Did this occur in the county within three years before the finding of the indictment?—clearly assuming that, if such statement was made, it was made *as of fact*.

"Whether a material representation was falsely made, *as of a fact*; whether it was made with intent to defraud; whether in consequence of such representation, and relying on it, the owner was induced to part with the alleged thing of value—are all inquiries for the jury, under proper instructions, on the solution of which the conviction or acquittal of the accused depends." *Beasley v. State*, supra.

"The instructions given by the court affirmatively, *ex mero motu*, should present the particular case, in all the phases and aspects in which the jury ought to consider it, not giving any undue prominence to, or leaving in obscurity, any phase or aspect there is evidence tending to support; and if such instructions in effect discard or ignore, and thereby induce the jury to discard or ignore, any real, material element of the offense imputed to the accused, they ought not to be supported." *Woodbury v. State*, 69 Ala. 242, 44 Am. Rep. 515.

"It would be difficult, if not impracticable, to lay down any general rule which could govern



every case which is within the statute. Many questions of fact must be settled by a jury, such as the character of the pretense used, the credit given to it, the occasion, and the evil purpose sought to be accomplished by the false device, which matters necessarily involve the motives actuating the minds of both parties." *State v. Vanderbilt*, 27 N. J. Law (3 Dutch.) 836.

In *People v. Blanchard*, 90 N. Y. 320, it was said:

"The representations relied on were proved almost literally as they stand in the indictment, and in such case it appears to be the rule that the sense in which they were used, the meaning they were intended to bear, and what was designed to be and what was understood from them, is a question for the jury"—citing *Regina v. Archer*, 6 Cox's Cr. Cas. 518.

A mere idle assertion, or the expression of a purpose or the ability to do something in the future, or a promise to perform services at a future time, not intended or accepted as a statement of a material fact, is not within the statute. *Colly v. State*, 55 Ala. 85; *Woodbury v. State*, supra; *People v. Jordan*, 66 Cal. 10, 4 Pac. 773, 56 Am. Rep. 73; 11 R. O. L. 832, § 10. The substance of the testimony given by Mrs. Woodruff as to the alleged statement made by the defendant, when considered as a whole, was, to use her language:

"He said he had a son 11 years old, and he [his son] could plead law about as good as he [the defendant] could. He told me and Mrs. Knight that, a lady friend of mine, one of my neighbors." Record, p. 17.

When the alleged pretense above italicized is separated from the others alleged in the indictment, and in view of the uncertainty of the meaning intended to be conveyed by the statement shown by the testimony of the witness, it cannot be said that the evidence showed without room for adverse inference that the statement was made as of fact; and the charge, in assuming that it was invaded the province of the jury.

There was some evidence tending to show that the mortgage in question was given by the witness Woodruff to secure an indebtedness to McNeal for services to be rendered by McNeal in behalf of Addison in a divorce proceeding and securing the custody of his (Addison's) children. If this was true, and the mortgage was given for the purpose of securing a bona fide indebtedness due from Woodruff to McNeal, the elements of injury essential to the fraud would be absent. *Commonwealth v. Harkins*, 128 Mass. 79; *Bishop's New Crim. Law*, § 438. The charge set out in the ninth assignment of error, drawn no doubt with this principle in view, as worded, if given, would have been an invasion of the province of the jury, and was well refused. The other charges refused to defendant were properly refused, for reasons patent on their face.

Considering the testimony in this record in its entirety, the writer is driven to the conclusion that the testimony of the witness Mrs. Woodruff, to the effect that the defendant said he was a lawyer, is but the state-

ment of her conclusion, drawn from the transaction leading up to the signing of the mortgage, and that, in fact, all that he really said in respect to such professional character was, to use her language:

"He said he had a son 11 years old, and he could plead law about as good as he could. He told me and Mrs. Knight that, a lady friend of mine, one of my neighbors."

While the conduct of the defendant may have been such as to warrant Mrs. Woodruff in drawing this conclusion, this statement, standing alone, certainly does not warrant the finding of a verdict by a jury in this solemn judicial proceeding that the defendant represented to Mrs. Woodruff, with intent to defraud, the fact that he was a lawyer, nor does it warrant the finding that any one of the other alleged false pretenses were made by the defendant, and therefore that a new trial should be awarded.

However, Judges Pelham and Evans do not concur in the views above expressed as to the court's oral charge being erroneous; nor what is said as to the defendant being entitled to a new trial, holding that the oral charge, when considered as a whole, is a clear statement of the law and free from error, that the evidence is sufficient to sustain the verdict, and the motion for a new trial was properly overruled.

The result is that the judgment of the criminal court is affirmed.

Affirmed.

PELHAM, P. J. (In which EVANS, J., concurs). [10] The evidence set out in the bill of exceptions is ample to show the commission of the offense charged against the defendant and of his guilty participation. I deem it necessary to call attention to the state of the record in this case on the two questions on which Judge BROWN, in writing a minority opinion, reaches his conclusion that reversible error is shown. The record shows that the state's witness, Mrs. Woodruff, in plain, unequivocal language testified that the defendant represented himself to be a lawyer; and even conceding that it was "her conclusion drawn from the transaction leading up to the signing of the mortgage" (dissenting opinion of BROWN, J.), it is shown to have been based on her personal knowledge, derived from the very transaction between the defendant and herself in which it is alleged that he did so falsely pretend to her. His pretense need not necessarily have been the statement to her of the bald, naked fact in so many words. If his conduct and course of dealing with her, and the circumstances, were such as support this conclusion and leave no room for adverse inference, this would be sufficient. Moreover, it is shown by the bill of exceptions (transcript, p. 15) that, after the witness Mrs. Woodruff had testified that the defendant had represented himself to her as being a lawyer, the court propounded to her this ques-

tion: "You said a little while ago he [defendant] stated to you he was a lawyer. Did he say anything along that line?"—to which the witness answered, "Yes;" whereupon the court asked the following question, "What was it?" to which the witness made reply, "Well, he just said he was a lawyer, and he would help me out." No objection was made to the admission of this testimony on the ground that it was a conclusion, or on any other ground—it is part of the evidence introduced in the case without objection. On at least two other occasions during the course of this witness' testimony she stated (without any objection being interposed or motion made to exclude the evidence) that the defendant told her he was a lawyer and would look after her case for her. Under this positive state of the evidence, it is not for this court to pass upon the truthfulness of this statement of the witness and say whether the defendant "*really*" did or did not make this representation. It was testified to without objection by a witness on the trial of the case, under the sanctity of an oath, and no attempt was made to impeach her, and it does not lie within the province of this court of review to reject it, and impeach the credibility of the witness, by holding that the defendant did not "*really*" state to the witness what she positively testified he did state to her.

[11] The credibility of a witness' statement is a question for the jury trying the case at nisi prius (*Davis v. State*, 152 Ala. 25, 44 South. 561), and the jury and trial court, who had the witness before them in person, with those advantages of observing conduct, demeanor, etc., not possessed by us, evidently accepted the statement as true, for the jury, principally on the testimony of this witness, returned a verdict of guilty against the defendant, which the court refused to disturb on a motion for new trial. The other constituent elements of the offense charged were all proven, and the question of the defendant's guilt became a question for the jury in determining the weight to be given the evidence, of which the jury are the sole judges. *Smith v. State*, 165 Ala. 50, 51 South. 610. The verdict of the jury can neither be said to be without support in the finding of guilt, nor plainly and palpably against the weight of the evidence. The evidence introduced on the trial in behalf of the state was amply sufficient, if believed by the jury, not only to support, but to justify as a reasonable and fair finding, the verdict of guilt returned by the jury.

The other point upon which it is sought to show error committed by the trial court justifying a reversal in the minority opinion of Judge BROWN relates to an exception to a portion of the oral charge. It is stated in that opinion:

"At the conclusion of the oral charge, the defendant reserved an exception to the portion of the oral charge above italicized."

It is not borne out by the record that the defendant reserved an exception to that particular portion of the oral charge italicized in the minority opinion; and in order that the discussion herein of the oral charge and exceptions reserved thereto may be understood, the reporter will set out in full the oral charge of the court and exceptions noted as the same appears in the transcript (pages 47 to 55, inclusive).

[12] In the first place, it will be observed that the exception at the conclusion of the oral charge is general, and had reference to, and fairly included in the portion excepted to, the entire last paragraph of the charge, commencing, "For example," and not merely that portion only singled out and italicized in the minority opinion. It cannot be doubted that portions of the charge contained in this paragraph correctly state propositions of the law applicable to the case. In fact, for that matter, I may remark here that the charge as a whole pretty thoroughly and exhaustively correctly states the principles of law bearing on the case as presented to the jury. It is well settled by a long and uninterrupted line of decisions by the Supreme Court and this court that unless every proposition stated in that portion of the charge excepted to is unsound and erroneous, it will avail the defendant nothing as showing reversible error; and that a general exception is unavailing unless every proposition stated in the portion of the charge excepted to is erroneous. *Bonner v. State*, 107 Ala. 97, 106, 18 South. 226.

[13] By reference to the report of the case, wherein the charge and exceptions to it are set out by the reporter, it will be seen that the particular portion of the charge to which an exception is in fact noted is specifically stated in the objection made by the defendant as beginning with the words: "It is not necessary." If we examine the charge as set out, and take the exception to refer to that part of the charge commencing with the sentence, "Now it is not necessary," etc., and ending with the words, "within three years next preceding the finding of the indictment," it will be found that many of the different principles of law included in this portion of the charge are correctly and well stated. In fact, the excerpt does not present the statement of an erroneous proposition of law, when construed in connection with the charge in its entirety. It is this entire portion of the oral charge that is set out in brief of defendant's counsel as being the portion of the general charge to which exception is reserved, and not that part selected by Judge BROWN from the middle of one of the paragraphs setting out the charge and italicized for criticism. This entire section of the charge commencing, "Now it is not necessary," and ending with the words "within three years next preceding the finding of the indictment," is also part of the charge that

is set out in the bill of exceptions in *hæc verba* in this record as the part of the charge to which an exception was reserved by the defendant, and not that part italicized in the minority opinion, commencing in the middle of a paragraph and ending in the middle of a sentence, and to which no exception was taken as limited to that particular portion of the charge. But if we take the exception as only going to that portion of the charge announcing the principle to which specific objection was made, "to the effect that it is not essential to establish each representation [false representations averred] by the evidence" (see report of case), the court's charge on that point, that it is not necessary that all the alleged false pretenses should be proved as charged, but if it is proved beyond a reasonable doubt that the defendant made any one of the alleged false statements set out in the charge, it is sufficient, this is a correct statement of a principle of law (*Gardner v. State*, 4 Ala. App. 131, 58 South. 1001, and authorities there cited); and a reading of the charge and exceptions to it will clearly demonstrate that it was to the pronouncement of this principle of law that the defendant objected and undertook to reserve an exception. Under the ruling in *B. R., L. & P. Co. v. Friedman*, 187 Ala. 562, 570, 65 South. 939, such an exception is abortive and unavailing.

The criticisms of the general charge indulged in are not made the subject of attack by the defendant, nor, as we have seen, was there any objection made or exception reserved, limited to that particular part of the charge italicized and criticized in the opinion of Judge BROWN. No other construction can be placed on the objections made and exceptions reserved by the defendant to the charge than that general objections were made to designated portions of the oral charge of the court which do not admit of any question as embracing within the part objected to correct propositions of law on the subjects to which they relate, and, possibly, a specific objection to that part of the charge wherein the court correctly propounded the law to the effect that proof of any one of the pretenses alleged was sufficient. No objection was made, or even remotely hinted at, that the charge transgressed the rule in charging on the effect of the evidence, or failed to charge that the false representation must be a material statement of a matter of fact, or violated the rule of law as to the assumption of facts; yet it is on these grounds alone that the charge is attacked in Judge BROWN'S minority opinion and held erroneous, even to requiring a reversal of the case. The charge is not subject to any of the supposed vices made the basis of attack, nor are the questions for the first time detected and raised against it as a ground for attack in Judge BROWN'S opinion presented on the record. However, it may be well, un-

der these conditions, to answer and show the fallacy of the objections discovered against the soundness of the general charge and given as reasons in the minority opinion why the case should be reversed.

[14] The charge, read as a whole, or in any of its related parts, cannot with any degree of fairness be said to be an invasion of the province of the jury, as being on the effect of any part of the evidence. This is true, even applying to it the test of severe grammatical criticism, which is not the proper rule of construction to apply to the general charge of the court. *B. R., L. & P. Co. v. Murphy*, 2 Ala. App. 588, 601, 56 South. 817. Even though part of the portion of the charge excepted to was faulty in this particular, in violating section 5362 of the Code, the other parts of that portion objected to were clearly not subject to such an objection, and the objection, therefore, would not be well taken. *Maxwell v. State*, 3 Ala. App. 169, 171, 57 South. 505.

[15] It only requires a fair reading of the charge to refute the strained construction of language that must be indulged in to even imagine that the charge read as a whole, in connection with the part referred to in this particular, trespasses upon the rule forbidding an assumption of facts. Hypercriticism should not be indulged in in construing charges of the court (*S. & N. R. R. Co. v. Jones*, 56 Ala. 507; *McGuire v. State*, 2 Ala. App. 218, 223, 57 South. 57); nor fanciful theories based on the vagaries of the imagination advanced in the construction of the court's charge, which is usually—as it is here, and as it should be—expressed in plain language that is susceptible of the ordinary understanding.

[16] It is quite clear that the charge is not erroneous in the particular pointed out by the defendant in the objection made to it—i. e., the pronouncement of the rule of law that it was not necessary that all of the false pretenses alleged must be proven; and as the defendant saw fit to particularize the ground of this exception, the court is not authorized, as in the minority opinion, to go beyond this stated ground of exception and inject objections of its own, and then proceed to pass upon them, that did not enter into the trial or consideration of the case. *A. G. Rhodes & Son Co. v. Charleston*, 41 South. 746.<sup>1</sup> "The reason underlying the principle—the theory upon which specific exceptions are required—is that, if error has in fact been committed, the exception reserved will point out the error to the presiding judge so that he may at once correct it." Opinion of the court by Justice (afterwards Chief Justice) McClellan in *Bonner v. State*, 107 Ala. 97, 106, 18 South. 228. Those particular so-called errors of the oral charge discussed in the minority opinion were not

<sup>1</sup> Reported in full in the *Southern Reporter*; reported as a memorandum decision without opinion in 148 Ala. 671.

pointed out or called to the attention of the trial court in any manner whatsoever; nor were they, or any of them, made the basis of objection interposed to the charge of the court; nor are they discussed, or even so much as referred to, by counsel for defendant in a carefully prepared brief of 32 closely typewritten pages filed in behalf of the appellant.

[17] The court, in its oral charge, more than once stated that, to constitute the offense charged, the misrepresentation must have been of a material fact, upon which the party relied, or had a right to rely, and read to the jury a full statement of the law on that proposition as announced by the Supreme Court in *Woodbury v. State*, 69 Ala. 242, 44 Am. Rep. 515. The court cannot embody in every sentence or paragraph of its charge the entire law of the case in all of its related parts and different phases, and criticism such as made of the court's oral charge in the minority opinion (even if grounded on objections and exceptions shown by the record) would be greatly strained and wholly unauthorized by any fair or legally recognized rule of construction. Such hypercriticism of a part of the oral charge, standing alone, is not the proper method by which to test it and measure the legal correctness or accuracy of the charge. *Sheffield v. Harris*, 183 Ala. 357, 369, 61 South. 88. It has been long and well settled by an uninterrupted line of authorities that the oral charge of the court must be construed as a whole, and that a judgment will not be reversed because a separate part of the charge, standing alone and unexplained, is erroneous, if the charge, construed as a whole, contains a correct statement of the law of the case. *Decatur Co. v. Mehaffey*, 128 Ala. 242, 29 South. 646; *L. & N. R. Co. v. Bogue*, 177 Ala. 349, 58 South. 392. If a phrase, or any part of a charge, contains an elliptical form of expression, or is ambiguous or likely to mislead, it is both the privilege and duty of counsel to call the court's attention to it, so that it might be corrected. The rule is well stated in the language of Justice McClellan in the opinion of the court in *McNeill v. State*, 102 Ala. 121, 126, 15 South. 352, 354 (48 Am. St. Rep. 17) quoting from another opinion of the Supreme Court previously written by him (*M. & E. R. R. Co. v. Stewart*, 91 Ala. 421, 427, 8 South. 708, 712):

"The general charge of a trial court, given *ex mero motu* with reference to any point, is to be considered as an entirety, and in connection with the evidence; and it should be read and construed with regard to the connection between its several sentences and propositions, each declaration being shaded and interpreted in the light of the context; and if any part, so considered, limited, or expanded, asserts the law correctly, it will not furnish ground for reversal, however faulty the clause might be, if its meaning were not controlled by prior or subsequent passages." *Montgomery & Eufaula R. R. Co. v. Stewart*, 91 Ala. 421, 427 [8 South. 708]; *Williams v. State*, 83 Ala. 68 [3 South. 743];

*O'Donnell v. Rodiger*, 76 Ala. 222 [52 Am. Rep. 322]; *L. & N. R. Co. v. Orr*, 94 Ala. 602 [10 South. 167]."

In a much later case, Justice Mayfield *apossitely* says in the opinion of the court on the same subject in *Roberson v. State*, 183 Ala. 43, 59, 62 South. 837, 843:

"Some parts of the oral charge as to which exceptions were reserved, if considered as standing alone, unaided by that which preceded and that which followed, would be error, to reverse, under the rule as we have above declared it; but, taken in connection with that which preceded, and that which followed, and in connection with the written charges, as we must take them, it affirmatively appears that no injury could have resulted. The errors, if such they should be called, consisted of incomplete statements as to the burden and the sufficiency of proof, as to the question of self-defense. Such statements were not positively erroneous, but were incomplete, in that certain qualifications of the rule were not stated; but the proper qualifications were stated in other parts of the oral charge and in requested written charges, and this fact prevented reversible error."

When read in connection with the evidence in the case, as is the correct rule (*M. L. & R. Co. v. Hughes*, 190 Ala. 216, 223, 67 South. 278), the oral charge has not the slightest tendency to erroneously state the principles of law applicable to the evidence before the court, or even be misleading in its tendency in any particular made the ground of objection. Viewed from any and every possible angle, there is no room for a holding that the record presents any question showing error in the court's general charge.

I find no reversible error presented in the record, and an affirmance of the judgment of conviction, in my opinion, should be ordered. Judge EVANS concurs in this conclusion, and in the views herein expressed, and an affirmance of the judgment appealed from is ordered.

Affirmed.

BROWN, J., dissenting in part.

#### On Application for Rehearing.

PER CURIAM. This case has received careful consideration on the application for rehearing by Judge PELHAM and Judge EVANS, who concurred in the majority opinion of the court written by PELHAM, P. J., on the original submission, and they think the questions dealt with are correctly treated and disposed of in that opinion. We adhere to that opinion, and can see no good reason or beneficial purpose to be served by promulgating a lengthy opinion on this application, containing a rediscussion of the questions we deem properly disposed of on sound reasoning and good authority in the original opinion. The cases cited in the majority opinion of the court will be found, upon investigation, in every instance to support the holdings they are cited in connection with. There is nothing in any of the numerous array of cases cited in Judge BROWN'S additional opinion of some length, which he seems to think necessary to promulgate on this appli-

cation, to elucidate his minority views, that is in the way of what is said, or the conclusions reached, by the majority of the court in the original opinion.

We have again, with painstaking care, reviewed the facts in the case, and are of the opinion, as heretofore expressed, that there is ample evidence to sustain the jury's verdict, and that the trial court cannot be said to have committed reversible error in overruling the defendant's motion for a new trial, under the familiar rule of law applicable to review here of the trial court's rulings in denying motions for new trials, based on the ground that the verdict is contrary to or not supported by the evidence. The witness Mrs. Woodruff seems to have been a rather illiterate, elderly woman, unable to give a very intelligent version of the transaction; but her testimony, taken as a whole, does not seem to us to be open to any other fair and reasonable construction than that the defendant made false representations to her about his being a lawyer, that induced her to execute a mortgage to the defendant for the purpose of securing an attorney's fee to him to obtain his services as a lawyer to represent her son. If she was not misled and deceived by the defendant assuring her that this was the purpose for which the mortgage was given, why was it executed at his instance to him? It was not disputed that the mortgage was executed by this old lady to secure an attorney's fee for the services of a lawyer to assist her son out of his troubles. *The evidence shows without contradiction that the defendant procured the mortgage from her and that it was executed to him.* Mrs. Woodruff testified positively that the defendant stated to her that he was a lawyer and would represent her son as such. Her testimony as a whole and the attending circumstances bear out the reasonableness and truth of this statement. One or two isolated or detached sentences in her testimony may be seized upon and stressed to detract from the effect of her testimony and the corroborating circumstances; but clearly this was a question of fact, properly submitted to the jury, and was resolved by the jury against the defendant. The trial court, possessing the advantage of having the witnesses before it, entertained the opinion that the jury was justified, under the evidence adduced upon the trial, in its conclusion, and a careful consideration of the evidence set out in the record leads us to the same conclusion, and we would feel unwarranted in overturning the verdict of the jury and holding the trial court in error in its ruling and reverse the judgment.

The application for a rehearing is denied.

BROWN, J. (dissenting). The criticism by the majority opinion that the vice in the oral charge of the court pointed out by the opinion of the writer heretofore promulgated was not noticed in appellant's brief and was

raised by the writer for the first time is unwarranted. The statute makes it the duty of this court to search the record for errors apparent thereon; and there is no rule of court or statute requiring the appellant in a criminal case to point out the errors, either by assignment of error or brief. Code 1907, § 6264; *Campbell v. State*, 182 Ala. 22, 62 South. 57; *Gaines v. State*, 148 Ala. 16, 41 South. 865. And as observed by the Supreme Court in *Campbell's Case*, supra:

"While the right to appeal is purely a creature of our statutes, the Legislature, by adopting the above provisions of our Code, clearly indicates the legislative purpose that such right shall not, in any criminal case, become a mockery, but that the right shall be substantial, and that this court shall see to it that a defendant who has been convicted in a criminal case, and who has reserved a question of law for the consideration of this court, and who prays an appeal, shall be accorded the privilege of having the legal questions presented by his record properly passed upon."

The authorities cited in the majority opinion to the proposition that appellant's exception was abortive and was not sufficient to raise the question commented on in the opinion of the writer do not sustain the pronouncement there made, as the following excerpts from those cases will show. Quoting from the opinion in *Bonner v. State*, 107 Ala. 106, 18 South. 228:

"The general charge of the court was given in writing. It covers the case pretty thoroughly and exhaustively, stating, of course, many distinct principles of law bearing on the case as presented to the jury, and expounding them concisely and correctly. The defendant excepted generally to the giving of this charge; the recital being, 'The defendant excepted to the giving of the above charge,' and this is all."

In this case the bill of exceptions recites:

"That part of the oral charge excepted to being as follows: 'Now it is not necessary that all the alleged false pretenses should be proven as charged. In other words, it would be sufficient to sustain \* \* \* this second count of the indictment if you believed, beyond a reasonable doubt, that the defendant, with intent to injure or defraud, made any one of the alleged false statements set out therein. For example, if it was proven beyond a reasonable doubt that he, with the intent to injure or defraud—that the defendant said he was a lawyer, that would be sufficient, without proving furthermore that he made the representation that he could plead the case of James M. Addison, charged with vagrancy, in court. You would not have to prove all that was alleged, but any one statement set forth, provided it was a material statement, and provided the party to whom it was made relied upon it, and was induced to sign the alleged instrument relying upon such statement. If the statement proves, beyond a reasonable doubt, that any one of these separate alleged false statements, either that he said he was a lawyer, or that he could plead the case of James M. Addison, charged with vagrancy, in court, or that he, Jacob L. Addington, was an attorney at the Birmingham bar, and was authorized to defend cases in Birmingham, Ala.; in other words, if the evidence proved any one of those three alleged false statements, it would be sufficient to make out a charge of false pretenses, provided you believed beyond a reasonable doubt that the defendant had at the time an intent to injure or defraud, and furthermore that Mrs. Rachel Woodruff signed the instrument described on account of that false statement, and was—and

that that was the controlling inducement or controlling motive that caused her to sign it, and provided, furthermore, that that occurred in this county, and within three years preceding the finding of the indictment."

In *B. R., L. & P. Co. v. Friedman*, 187 Ala. 570, 65 South. 941, it was said:

"The exception attempted to be taken to the oral charge of the court in respect of the statement that the jury's province was to decide the issues of fact was abortive, for that it was descriptive only—not the reservation of an exception to a particular, exactly designated statement of the judge. There is no practice allowing an exception by description of a subject treated by the court in an oral charge to the jury."

The exception in this case is to "an exactly designated statement of the judge," dealing solely and exclusively with the quantum of proof necessary to sustain the averments of the indictment descriptive of the offense, and the conclusion of the majority that the exception is general and does not reserve on the record the question discussed in the minority opinion is supertechnical, not borne out by the record, nor sustained by authority.

Under the practice prevailing in this state, it is not incumbent on the exceptor to state the grounds or give the reasons prompting the exception, or to enter into any controversy with the court as to the correctness of the principles announced in the charge. All that is required is that a specific portion of the charge be pointed out, in order that the trial court may change or modify this portion if it is deemed objectionable in any respect. And if the exception is so reserved, and the portion of the charge is a charge on the effect of the evidence, invasive of the province of the jury, or assumes any fact essential to the defendant's guilt, or is otherwise objectionable, it is the duty of this court, on appeal, to review the question thus presented. *Moore & Co. v. Robinson*, 62 Ala. 538; *Mayer v. Thompson-Hutchison Bldg. Co.*, 116 Ala. 638, 22 South. 859; *Gaynor v. L. & N. R. R. Co.*, 136 Ala. 259, 33 South. 808; *McIntosh v. State*, 140 Ala. 137, 37 South. 223; *Winter v. State*, 133 Ala. 176, 32 South. 125; *Collins v. State*, 138 Ala. 57, 34 South. 993; *Ragsdale v. State*, 134 Ala. 24, 32 South. 674; *L. & N. R. R. Co. v. Godwin*, 191 Ala. 498, 67 South. 675. The portion of the oral charge pointed out by the exception as set out in the record here, as we have said, deals solely with the quantum of proof necessary to sustain the averments of the indictment descriptive of the offense. It will be noticed that these averments were not in the alternative, and in addition to the criticism noted in the opinion of the writer heretofore promulgated, this portion of the charge is clearly subject to the vice that it assumes that three separate and distinct false pretensions are alleged, one at least of which is not within the statute, to wit, "that he could plead the case of *James M. Addison*, charged with vagrancy, in court," unless, as a matter of fact, it

amounted to an affirmation by the defendant that he possessed the present ability and qualifications as an attorney at law to appear and plead *Addison's* case. This question, under all the authorities, was one for the jury, because, conceding that such assertion was made, it was open to a construction wholly consistent with the defendant's innocence—i. e., that it was an idle jest, or a promise—or it might have carried the meaning that defendant would shortly qualify himself and in time to act in the capacity as attorney for *Addison*, and would then plead his case.

"As against defendants, these statutes, like all other criminal ones, must be construed strictly, and nothing not within their words be held to be within their meaning. On the other hand, in favor of defendants, the construction is liberal. So that the word 'pretense,' instead of being understood in the popular sense, has obtained a legal and technical one." 2 *Bishop's New Criminal Law*, § 415.

"It is not a false pretense to state, whether in the form of a promise or in any other form, what one deems the future will bring forth; a pretense must relate either to the past or the present." 2 *Bishop's Criminal Law*, § 420.

And it is held that the assertion or statement of a physician that he will or can cure a person of a certain disease, although false, is not within the statute. *Rex v. Bradford*. 1 *Ld. Raym.* 366; 2 *Bishop's New Criminal Law*, § 419.

While much might be said in opposition to the doctrine heretofore announced in this case, on the authority of *Gardner v. State*, 4 Ala. App. 131, 58 South. 1001, holding, where the indictment avers several separate and distinct pretenses, proof of any one of the several pretenses will support a conviction, and especially its application to an indictment where the several pretenses are not stated in the alternative and the averments are descriptive of the offense (*Felix v. State*, 18 Ala. 720; *Eskridge v. State*, 25 Ala. 30; *Thomas v. State*, 111 Ala. 51, 20 South. 617; *Townsend v. State*, 137 Ala. 91, 34 South. 382; *Lindsey v. State*, 48 Ala. 169; *McGehee v. State*, 58 Ala. 360; *Miles v. State*, 94 Ala. 106, 11 South. 403; *State v. O'Donald*, 1 *McCord* [S. O.] 532, 10 Am. Dec. 691; *Cowan v. State*, 41 Tex. Cr. R. 617, 56 S. W. 751), however that may be, the statement of the doctrine as made in this case and in *Gardner's* Case is subject to the qualification that the pretense alleged and proved must be within the purview of the statute. *Bishop* states the rule thus:

"There need be only one false pretense. Though several are set out in an indictment, yet if any one is proved—being such as truly amounts in law to a false pretense—the indictment is sustained." 2 *Bishop's Criminal Law*, § 418; 2 *Bishop's New Proc.* § 171.

The statement of the rule by the Supreme Court in no way conflicts with the uniform holding that all matters descriptive of the offense must be proven, but is that proof of "the falsity of every pretense made is not al-

ways necessary to a conviction," and gives as the reason:

"If it were, every malefactor could escape conviction by blending some truth with his false pretense." *Beasley v. State*, 59 Ala. 20; *Woods v. State*, 133 Ala. 168, 31 South. 984.

It was the province of the jury to pass upon the evidence, and draw the inference, if in their judgment the evidence warranted it, that the statement imputed to the defendant "that he could plead the case of James Addison, charged with vagrancy, in court," was the affirmation of the defendant's then present ability and qualification to appear in court as Addison's attorney and plead his case. *Beasley v. State*, 59 Ala. 20; *Woodbury v. State*, 69 Ala. 242, 44 Am. Rep. 515; *Smith v. State*, 165 Ala. 50, 51 South. 610; *Colly v. State*, 55 Ala. 85; *State v. Vanderbilt*, 27 N. Y. J. Law, 336; *People v. Blanchard*, 90 N. Y. 320. The court, in its oral charge, denied this right to the jury, and in so doing invaded their province, and impinged a constitutional right of the defendant. Const. 1901, § 11; *Martin v. State*, 62 Ala. 240.

While it is the jury's province to pass upon the credibility and weight of the evidence, and determine in the first instance whether the evidence justifies a verdict of guilty, it is the right and duty of this court, in reviewing the order of the court denying a new trial, to pass upon the weight of the evidence, and, if needs be, the credibility of the evidence as disclosed by the record. This rule is not new, but has existed for more than 20 years in civil appeals, and by the act approved September 22, 1915, amended section 2846 of the Code is made applicable to criminal appeals. Acts 1915, p. 722.

In *Cobb v. Malone*, 92 Ala. 630, 9 South. 738, where the rule was first announced in this state in civil cases, it was said:

"The decision of the trial court, refusing to grant a new trial on the ground of the insufficiency of the evidence, or that the verdict is contrary to the evidence, will not be reversed, unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust. And decisions granting new trials will not be reversed, unless the evidence plainly and palpably supports the verdict. Of course, these rules are not inflexible; but subject to exceptions and qualifications, dependent upon peculiar circumstances."

This court exercised the power in *Patterson v. Mulligan*, 12 Ala. App. 324, 66 South. 914, and, after reviewing and passing on the weight of the evidence, reversed the trial court, and granted the appellant a new trial. The power should be more liberally exercised in criminal appeals, for, as said by the Supreme Court:

"In no case of conviction, in which the evidence is palpably inconsistent [consistent] with the reasonable supposition of the innocence of the accused, can the primary court refuse to grant a new trial." *Martin v. State*, supra.

In order to constitute the offense denounced by our statute, there must be a false statement relating to some existing or past

fact, calculated to deceive, or the use of a false symbol or token calculated to deceive, and which misled and caused the party defrauded to part with a thing of value. Code 1907, §§ 6920, 6921; *Wilkerson v. State*, 140 Ala. 155, 36 South. 1004; *Pearce v. State*, 115 Ala. 115, 22 South. 502; *Colly v. State*, 55 Ala. 85; *Woodbury v. State*, 69 Ala. 242, 44 Am. Rep. 515; *Young v. State*, 155 Ala. 145, 46 South. 580; *Cowan v. State*, 41 Tex. Cr. R. 617, 56 S. W. 751; *Commonwealth v. Drew*, 19 Pick. (Mass.) 179. Mere "conduct and course of dealing," unaccompanied by the employment of a false representation of fact by word or the employment of a false symbol or token, although sufficient to warrant a conclusion reached by the party parting with the thing of value, is not sufficient to bring the case within the statute. Such construction of the statute would be a strict construction against the accused, which is contrary to the policy of the law (2 Bishop's Criminal Law, § 415), and would subject him to criminal liability on an erroneous conclusion of the other party to the transaction. Cases are numerous where false tokens—material evidences of the existence of a fact—were employed to assist in accomplishing the fraudulent purpose, and a conviction sustained. Such was the leading case of *Rex v. Barnard*, 7 C. & P. 784, where the accused, by appearing in the garb of an Oxford University student, was enabled to fraudulently obtain goods on credit. However, in that case the report shows that the accused "stated that he belonged to Magdalene College"; and likewise in the following cases the accused employed a symbol or token to aid his unlawful purpose: *Regina v. Bull*, 13 Cox, Cr. Law Cas. 608; *State v. Bourne*, 86 Minn. 432, 90 N. W. 1108; *Taylor v. Commonwealth*, 94 Ky. 281, 22 S. W. 217; *State v. Hammelsay*, 52 Or. 156, 96 Pac. 865, 17 L. R. A. (N. S.) 244, 132 Am. St. Rep. 686; *State v. Foxton*, 166 Iowa, 181, 147 N. W. 347, 52 L. R. A. (N. S.) 919, Ann. Cas. 1916E, 727; *Commonwealth v. Mulrey*, 170 Mass. 103, 49 N. E. 91; *Brown v. State*, 37 Tex. Cr. R. 104, 38 S. W. 1008, 66 Am. St. Rep. 794; *Commonwealth v. Beckett*, 119 Ky. 817, 84 S. W. 758, 68 L. R. A. 638, 115 Am. St. Rep. 285. In *State v. Goble*, 60 Iowa, 447, 15 N. W. 272, the opinion states that:

"The evidence shows that defendant represented by his words and action that he was Backer, and did not apply for payment as the agent or servant of Backer."

The cases noted above cited in 19 Cyc. 402, to sustain the proposition, "A false pretense or representation may be made by act as well as by word;" but an examination of these authorities demonstrates that this is not a clear statement of the rule, and it is only when some symbol or token is used in connection with misleading conduct, such as "passing of a worthless check or draft, or a check which accused has no reason to suppose will be honored" (see 19 Cyc. 402), that a false statement in words is not essential.



In *Glackan v. Commonwealth*, 3 Metc. (Ky.) 232, under a statute substantially the same as ours, it was held, as our Supreme Court has held, that:

"It is essential to a conviction for obtaining money or property under false pretenses to allege and prove that the pretense whereby the money or property was obtained was the statement of some pretended past occurrence or existing fact, made for the purpose of inducing the party injured to part with his property."

But after an amendment of the statute so as to read, "If any person, by false pretense, statement, or token, with intent," etc., it was held that conduct alone might be a pretense. *Commonwealth v. Murphy*, 96 Ky. 28, 27 S. W. 859.

It is broadly stated in the majority opinion that:

"The evidence set out in the bill of exceptions is ample to show the commission of the offense charged against the defendant and of his guilty participation."

Inasmuch as I do not concur in this conclusion, I deem it proper to state the reasons for not concurring, and this makes it necessary to set out some of the evidence.

The evidence shows without dispute that one Addison, the son of the prosecutrix, was confined in the county jail on a charge of vagrancy, sworn out by Addison's wife; that defendant, having gone to the jail on business, was called by Addison, who requested defendant to aid him in making bail; that the prosecutrix, Mrs. Woodruff, was present at this time. After Addison, by aid of the defendant, secured bail, the defendant, Addison, and the prosecutrix went to the office of one McNeal, an attorney for whom defendant was working, and discussed Addison's trouble with McNeal, agreeing on the amount of the fee to be charged for prosecuting a prospective proceeding for divorce and custody of children to be instituted by Addison against his wife. At this time the question of the prosecutrix giving a mortgage to secure a fee was mentioned, but nothing further was done. Three days thereafter the prosecutrix, accompanied by her friend, John Gravit, came back to McNeal's office, and the prosecutrix then signed the mortgage. The evidence shows that the defendant was not present at this time, and, so far as is shown, he had not been in contact or conversation with the prosecutrix for three days. The testimony of the prosecutrix on its face is self-contradictory, and mainly consists of the statement of conclusions in response to leading questions. The testimony of this witness and others touching the alleged false pretenses is as follows:

Mrs. Woodruff: "Q. Did Mr. Addington say whether or not he was a lawyer? (Defendant objected to leading the witness.) A. Yes, sir; he said he was a lawyer. Q. What else did he say about that? A. Well, he told me that he would get the children and a divorce for my son and property for \$150. I mean my son's children and a divorce for my son from his wife. \* \* \*

Witness further testified, in answer to questions, that she was in Mr. McNeal's of-

fice, where Addington stayed, at the time she made her mark to the paper; that McNeal's office and Addington's office were all together. She was then asked the question: "Did Mr. McNeal sign his name to the paper in your presence?" The witness answered:

"Yes, sir; he did, because there wasn't anyone else there to do the writing but him. Q. Well, what was said along about that time, Mrs. Woodruff? A. Well, Mr. Addington there wanted—he said that he would get the children and the property and the divorce for my son for \$150, and for me to give a mortgage on my home. Well, I didn't want to do it, understand, and I was of some time of consenting to do it, but last he turned around and said: 'I'll put your son back in jail if you don't, or have him put back.' Q. Did you sign it then? A. Yes, sir; I signed it then. I felt then that I would rather do anything than see my son go back in jail. \* \* \* Q. Did he tell you whether or not he would defend your son? (Defendant objects to the question.)

"The Court: Do you remember all that he said to you at all before you signed that instrument? If you remember, state all that he said to you before you signed that instrument. A. Well, he said that he would get the divorce and children and property, if I would give him a mortgage on my place for \$150. Well, then, that was right after my son got out of jail; my son was worried, and he hurried on to his work after he got out of jail, but—

"The Court: What else—did he say anything else to you besides what you have just stated? A. No, only that he didn't want me—would not take my home away from me.

"The Court: You said a little while ago he stated to you he was a lawyer. Did he say anything along that line? A. Yes.

"The Court: What was it? A. Well, he just said he was a lawyer, and he would help me out.

"The Court: You mean the defendant said—A. Yes; and then he told several around the neighborhood where I live— (Defendant objects to the testimony.)

"The Court: Sustained. Not what he told others, but what he told *you* at that time. What else did he say about representing you, or being your lawyer? What did he say, just his own words, as you recollect it? A. Well, he didn't tell me that he would have anything to do with my case, for I did not know that I would have any case, but he told my son that he would plead his case.

"The Court: Did he tell your son apart from you or in your presence? A. He didn't tell him in my presence. (Defendant moves to exclude the answer.)

"The Court: Well, that would be hearsay testimony. That statement there as to what was said by defendant to her son, gentlemen, is not to be considered by you as legitimate evidence. It is what was said to her, in order to induce her to make her signature. To Witness: You have related substantially all that he said to you before? A. Yes. He was in the office of Mr. McNeal when he told me that he would—that he was a lawyer, and that he would get the divorce and get the children for my son, and after that was when I signed the mortgage. It was after he told me that—I didn't sign the mortgage until he turned around and said that he would put my son back in jail if I didn't sign it, and that was after he told me he was a lawyer, and that he would represent me and get the children and get the divorce. \* \* \* Jimmie is my boy; he was in jail; I wanted to get him out; I didn't care what I had to do to get him out, and I will tell you that I would be willing to do anything in this world to get him out, and when I first saw Mr. Addington, Jimmie knew him, and knew who he was.



Jimmie knew all about him—I reckon he did. \* \* \* When I signed the paper, of course, they had already told me what they were going to charge me to get Jimmie out, and get the divorce, and get the children. \* \* \* I went down to Jimmie's trial, but Mr. McNeal did not go with me, but he was there."

In answer to specific questions preceding each statement, witness answered:

"I made no objections to him representing Jimmie, and I wanted him to represent Jimmie; he was already out of jail, so that he could get out of his trouble together. I didn't know who my son would get for his lawyer. I was just down there, but I didn't know who he was going to get. I did not hire Mr. McNeal, or Mr. Addington, as my lawyer. I hired neither of them. It was up to Jimmie to hire them. I wanted to get Jimmie out, and let him do the hiring; but whatever lawyer he got was all right with me. I left that to him. I didn't know nothing about it. They did get the boy out like they told me he would get out—he got out on bond, and he hasn't been back in jail since. I signed the bond that he got out on, and so did my niece.

"Q. (by the Court). You may let me ask you one question, so that I can get it clear in my mind. When you first testified, you spoke of the defendant, Mr. Addington, saying that he was a lawyer. Did he tell you he was a lawyer, or your son? A. Well, he told me. Mr. and Mrs. Knight was in his office, and we were all sitting there talking. Q. Was that before you signed this (referring to the mortgage)? A. Yes. Q. He told you what? A. He said he had a son 11 years old, and he could plead law about as good as he could. He told me and Mrs. Knight that, a lady friend of mine, one of my neighbors. Q. He had a son about 11 years old, that could plead law about as good as he could? A. That is what he said. Then he told several around there. \* \* \* He told me that. Q. That is all you remember he told you about being a lawyer—that he had a son 11 years old that could plead law about as good as he could? A. Yes, sir; I didn't know nothing about him or his son either." (Bottom of page 46 of the transcript.)

Cross-examination: "Mr. John Gravit was in the office of McNeal at the time I signed the mortgage. Mr. McNeal was in his office, and we were in the one that went into his. Mr. John Gravit came to the office of Mr. McNeal with me. Mr. John Gravit was a friend and neighbor of mine, and he and Mrs. Knight all came to the office, and both were with me when I signed the mortgage. Mr. Addington was not there at that time. I don't think he was there."

The witness John Gravit testified:

"After Addison was released, three days after this, I went to the office of Mr. McNeal with Mrs. Woodruff, for her to make arrangements with Mr. McNeal to defend her boy. Mr. Addington was not present. While there, she made a mortgage to Mr. Addington."

The witness W. O. Martin testified:

"Mr. Addington did not tell her he was a lawyer, and as a matter of fact did not have anything to say to her. He talked with Mr. Addison, who seemed to know him."

The witness J. H. McNeal testified:

"Mr. Addington made no representation to her that he was a lawyer. She said she knew he was not a lawyer, but just worked for a lawyer. I defended her son in the police court, and he was convicted, and an appeal was taken.

\* \* \* There was no representation made to her by Mr. Addington. She stated in my presence that she knew Mr. Addington was not a lawyer, but, as he would take care of my fee, she would make the mortgage out to him, because she could not read or write, and rather deal with the one that she knew than with me. Mr. John Gravit, a neighbor of hers, came into the office with her, and he fully understood why the mortgage was made out and executed by her."

The witness O. C. Martin testified:

\* \* \* Mr. Addington did not tell him that he was a lawyer, and, as a matter of fact, did not have anything to say to him, as him and Mr. Addison appeared to know each other."

Defendant testified on this subject:

\* \* \* I think she asked me why I did not make a lawyer, and I told her that I had a little boy that could beat me in the law."

Witness further testified:

"She knew I was not a lawyer, and she wanted to know why I did not make a lawyer. That is my recollection of the conversation that was had about the little boy. I don't remember whether she asked me whether I was a lawyer or not. I don't remember telling her that I was a lawyer. I don't remember whether she asked me that question. It is my recollection that that conversation came up—that she asked me to do something down at the jail—I would like to explain how that came about."

In answer to the question, "Did you or not tell her you were a lawyer?" witness answered:

"I tried to tell you. If she asked me whether I was a lawyer or not, I told her I was not. Later on, she said something about—what I was trying to tell you about—why I did not make a lawyer. It is probable, and I think, that I did at some time tell her that I was not a lawyer."

This evidence clearly shows that the only representation or statement made by the defendant to the prosecutrix touching his qualifications or ability as a lawyer was "that he had a son 11 years old at home that could plead law as good as he [defendant] could"; and it is utterly preposterous to say that this sustains the averments of the indictment that the defendant represented that he was a lawyer. It shows just the contrary. Furthermore, the course and manner of examination of this witness, and the frequent recurrence by the trial judge to the question as to what defendant had stated to the witness, show that to his mind the testimony of this witness was unsatisfactory. The evidence further shows that the controlling inducement to the signing of the mortgage was not the statement by the defendant, but the duress embodied in the threat to have the son of the prosecutrix put in jail; said threat being made in the absence of the defendant and possibly by McNeal.

For the reasons stated above, the writer is of the opinion that the rehearing should be granted, and the defendant awarded a new trial.

(16 Ala. App. 26)

**MORAGNE v. STATE** (6 Div. 95.)(Court of Appeals of Alabama. March 23, 1917.  
Rehearing Denied April 10, 1917.)**1. CRIMINAL LAW**  $\Leftrightarrow$  288—**SPECIAL PLEA—DEFENSES AVAILABLE UNDER GENERAL PLEA.**

Special pleas that defendant was engaged in interstate commerce, and therefore not amenable to the state statutes, state a defense available under the plea of not guilty, and it was not error to strike them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 657, 658, 662, 664, 665.]

**2. COMMERCE**  $\Leftrightarrow$  61(1)—**REGULATION—TRANSPORTATION OVER HIGHWAYS—POLICE POWER.**

The Legislature can prohibit the use of public streets or public roads for the transportation of intoxicating liquors or other commodities dangerous to the public, or the use of which violates the state's public policy, unless such regulation unduly burdens interstate commerce, since the use of public streets and public roads within the state is subject to the police power.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 81, 89.]

**3. COMMERCE**  $\Leftrightarrow$  61(1)—**INTERSTATE COMMERCE—INTOXICATING LIQUORS—TRANSPORTATION.**

Acts 1915, p. 39, § 1, prohibiting the transportation into the state of intoxicating liquors intended to be received, possessed, sold, or used in violation of law, page 44, § 12, making it unlawful to possess intoxicating liquor in excess of certain quantities, and page 27, § 24, making it unlawful to transport such prohibited liquors for another along any public street or highway, are not invalid when applied to interstate transportation of intoxicating liquors over the highways of the state, in view of the Webb-Kenyon Act, prohibiting the interstate transportation of intoxicating liquors into a state for use in violation of the state laws.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 81, 89.]

**4. CRIMINAL LAW**  $\Leftrightarrow$  720(1), 726—**TRIAL—ARGUMENT OF COUNSEL.**

The solicitor has a right to comment on defendant's testimony that the one for whom it was transporting the liquor agreed to take care of him, and to answer statements made by defendant's counsel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671, 1681.]

**5. INDICTMENT AND INFORMATION**  $\Leftrightarrow$  130—**JOINDER OF OFFENSES—CHARGES UNDER SEPARATE STATUTES.**

Under Acts 1909, p. 91, § 30, providing that indictments may set out several charges in separate counts, and that accused may be convicted and punished upon each count as upon separate indictments, and Acts 1915, p. 31, § 30, providing that indictments for violating that statute, or any other statute for the suppression of intemperance, may set out several charges in separate counts, and the accused may be convicted and punished upon each one as upon separate indictments, one accused of unlawfully transporting intoxicating liquor may be tried and convicted on a complaint containing different counts framed under different statutes.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 419-423.]

Appeal from Criminal Court, Jefferson County; H. P. Heflin, Judge.

Frank Moragne, alias Frank Moriner, was convicted of unlawfully transporting intoxi-

cating liquors over the public highways of the state, and he appeals. Affirmed.

John W. Altman, of Birmingham, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

**BROWN, P. J.** The facts material to a disposition of the question presented on this appeal are without dispute, and when treated in the light most favorable to the defendant are as follows: By arrangement made with one Morris, of Pensacola, Fla., in Birmingham, Ala., in November or December, 1915, the appellant agreed and undertook to transport spirituous, vinous, or malt liquors for said Morris from the state of Georgia, through Alabama, to Pensacola, in the state of Florida, in an automobile over the public highways of this state; and in pursuance of this undertaking the defendant received for this purpose from the agent of the Southern Railroad at Cave Springs, Ga., a shipment of liquors consisting of about 74 gallons of whiskey, which had been shipped from Chattanooga, Tenn., consigned to Morris; that these liquors were loaded into his automobile and carried by him over the public roads to a point one mile past Clay, in Jefferson county, Ala., where the defendant was arrested by a deputy sheriff of Jefferson county, Ala., and at the time of his arrest defendant had said liquor in his possession for the purpose of carrying it through the state, over the state's public highways, to the state of Florida, and claimed to have a through bill of lading for said liquor. It was also shown that Morris had ordered the liquor in due course of business from a wholesale dealer in Chattanooga, Tenn.; that the shipment was made up and in the regular and ordinary way started on its way over the Southern Railway, billed to Cave Springs, Ga., and from there via automobile to Pensacola, Fla. The defendant testified:

"I think the bill of lading I had from the railroad agent up there shows that the weight of the goods I was carrying was something like 960 pounds, not over 1,000 pounds."

At the time of the agreement between the defendant and Morris, as well as the transaction in hand, there was in force in this state the following statute:

"Section 1. That it shall be unlawful for any railroad company, express company, or other common carrier, or any officer, agent or employé or any of them, or any other person to ship or to transport into, or to deliver in this state in any manner, or by any means whatsoever, any spirituous, vinous, malted, fermented or other intoxicating liquors of any kind from any other state, territory or district of the United States, or place noncontiguous to, but subject to the jurisdiction of the United States, or from any foreign country, to any person, firm or corporation within the territory of this state, when the said spirituous, vinous, malted, fermented or other intoxicating liquors, or any of them, are intended by any person interested therein to be received

ed, possessed, sold, or in any manner used, either in the original package, or otherwise, in violation of any law of this state now in force, or in violation of any law that may be hereafter enacted in this state, or take effect therein."

"Sec. 12. That it shall be unlawful for any person, firm or corporation (1) to receive or accept for delivery of, or to possess or to have in possession at any one time whether in one or more places, and whether in original packages or otherwise, more than one-half gallon of spirituous liquors, or more than two gallons of vinous liquors, or more than five gallons of malted liquors, when in kegs, or more than sixty pints in bottles, or more than one gallon of any other intoxicating or fermented liquors beyond those thus enumerated; or (2) to receive, accept delivery of, possess, or have in possession more than one gallon of spirituous liquors, or four gallons of vinous liquors, or more than ten gallons of malted liquor, including beer and ale, when in kegs, or one hundred and twenty pints in bottles, or more than two gallons of any other fermented or intoxicating liquors beyond those thus enumerated, within any four consecutive weeks, whether in one or more places, but this section shall not apply to the possession of wine or cordial made from grapes or other fruit grown and raised by the person making the same for his own domestic use, when such person keeps such wine or cordial for his own domestic use on his own premises; but this section shall apply upon its enactment into law to such receipt, or acceptance of deliveries, or possession of such liquors respectively, occurring at any place or locality or within any territory in this state, where and within which it shall then be unlawful to sell, keep for sale, or otherwise dispose of said liquors, and it shall become applicable in respect to such receipt or acceptance of deliveries or possession of such liquors occurring at other places or localities, and within other territory in this state when and as soon as it shall become unlawful to sell, keep for sale, or otherwise dispose of such liquors at such places or localities or within such territory; this section shall not affect or modify any existing law or any law enacted at this session of the Legislature in so far as it regulates the sale or keeping for sale of alcohol, or wine for a defined purpose, by wholesale or retail druggists."

Acts 1915, pp. 39 and 44, §§ 1 and 12.

"Sec. 24. It shall be unlawful for any person, firm, corporation or association, whether a common carrier or not, to accept from another for shipment, transportation or delivery, or to ship, transport or deliver for another said prohibited liquors or beverages or any of them, when received at one point, place or locality in this state, to be shipped or transported to or delivered to another person, firm or corporation at another point, place or locality in this state, or to convey or transport over or along any public street or highway any of such prohibited liquors for another, and any person violating any provision of this section shall be guilty of a misdemeanor, but the provisions of this section shall not apply to those transporting and delivering to druggists and physicians such alcohol as they are permitted by the laws of the state to sell or dispose of in accordance with the statutory regulations upon that subject."

Acts 1915, p. 27, § 24.

[1] The appellant's only contention is that he was engaged in transporting the liquor in his possession at the time of his arrest as an act of interstate commerce, and therefore he is not amenable to these statutes. This is, in short, a denial that he has violated these statutes, and the defense, if available at all, may be offered under the plea of not guilty;

and the special pleas offered were stricken without error.

The above-quoted statutes prohibiting the possession of more than a specified quantity of liquor, or the transportation of such liquor for another, have been sustained by the repeated rulings of the Supreme Court, as well as by our own rulings, as a legitimate exercise of the police power of the state. *O'Rear v. State*, 72 South. 505; *Howard v. State*, 73 South. 559; *Southern Express Co. v. Whittle*, 194 Ala. 406, 69 South. 652, L. R. A. 1916C, 278.

[2] The use of the public streets and public roads within the state is subject to the police power of the state. *Wiggins v. Skeggs*, 171 Ala. 492, 54 South. 756; *Perry v. N. O., etc., R. R. Co.*, 55 Ala. 414, 28 Am. Rep. 740; *Southern Ry. Co. v. Ables*, 153 Ala. 523, 45 South. 234. And it cannot be doubted that it is within the competency of the Legislature to prohibit the use of public streets or public roads in the state for the transportation of commodities that are dangerous to the public, or the possession and use of which violates the state's public policy, unless such regulation unduly burdens or interferes with interstate commerce.

[3] Under the statute quoted above it is a misdemeanor for any person to have in his possession at any one time more than one-half gallon of spirituous liquors. It is likewise a misdemeanor for any common carrier or other person—

"to ship or to transport into \* \* \* this state, in any manner or by any means whatsoever, any spirituous, vinous, malted, fermented or other intoxicating liquors of any kind from any other state, \* \* \* when the said spirituous, vinous, malted \* \* \* liquors or any of them, are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package, or otherwise, in violation of any law of this state." Acts 1915, p. 39, § 1.

And likewise a misdemeanor (page 27, § 24) for any person "to convey or transport over or along any public street or highway any of such prohibited liquors for another," whether the act of transporting commenced in this state or out of it, or whether the transportation was intended to end in this state or in another state.

The crucial point, therefore, is: Can the defendant justify on the theory that he was engaged in interstate commerce and therefore not amenable to these statutes; and, if so amenable, are they void, as being a burden on interstate commerce? This question is given a negative answer by what is known as the Webb-Kenyon Law (Act March 1, 1913, c. 90, 37 Stat. 699), and the construction and operation given it by the Supreme Court of the United States in the very recent case of *James Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. —. The title and text of the act are as follows:

"An act divesting intoxicating liquors of their interstate character in certain cases.

"[*Shipment of Liquors into a State, etc., in Violation of Any Law Thereof, Prohibited.*] That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

Fed. Stat. Anno. Supp. 1914, p. 208.

The liquors in question having been received by the defendant for the express purpose of bringing them into this state, to be possessed by him and transported over the public highway, they were not commodities of interstate commerce, and the defendant violated the statutes of the state, and is amenable thereto. The oral charge of the court was in accord with these views, and was free from error, and the charges refused to the defendant for like reasons were properly refused.

[4] There was no error in the rulings of the court as to the argument of the solicitor. The defendant's testimony tended to show that it was a part of his agreement with Morris that Morris "would take care of him," and the solicitor had a right to comment on this evidence. The other argument complained of was in answer to statements made by defendant's counsel in argument to the jury.

[5] The complaint upon which the defendant was tried contained seven different counts framed under different statutes, and the cause was, without objection, submitted to the jury on all the counts, and the jury returned a verdict finding the defendant guilty as charged in counts 2, 5, and 6, assessing a fine of \$500 under each of said counts, and judgment followed, adjudging the defendant guilty under each of said counts. This proceeding, in so far as appears from the record proper, is in accordance with the statute. Acts 1915, p. 31, § 30; Acts 1909, p. 91, § 30; *Shivers v. State*, 7 Ala. App. 110, 61 South. 487.

Whether the evidence in the case justified the defendant's conviction on more than one count is a question not presented on the record. *Woodson v. State*, 170 Ala. 87, 54 South. 191; *Trent v. State*, 73 South. 834; *Addington v. State*, 74 South. 846; *Barefield v. State*, 72 South. 293.

No error appearing upon the record, the judgment must be affirmed.

Affirmed.

(16 Ala. App. 51)

# JORDAN v. STATE. (4 Div. 482.)

(Court of Appeals of Alabama. April 8, 1917.)

## 1. PERJURY §32(3, 4)—EVIDENCE.

In a prosecution for perjury, the record of the indictment and the judgment of the law and equity court in a murder case in which the perjury was alleged to have occurred were properly admitted in evidence, the indictment to show that the court had jurisdiction, and the judgment to show the trial.

[Ed. Note.—For other cases, see *Perjury*, Cent. Dig. §§ 110, 111.]

## 2. CRIMINAL LAW §695(4)—OBJECTIONS TO EVIDENCE—SCOPE.

In a prosecution for perjury, where the objection to the admission in evidence of the record of the indictment in the case in which the perjury was alleged to have been committed was general, no grounds being stated, the question of the identity of the record was not presented.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1636.]

## 3. JUDGMENT §279—MINUTE ENTRY—STATUTE—"FINAL RECORD."

Under Code 1907, § 5733, providing that the orders, judgments, and decrees entered upon the minutes are parts of the record, and need not be copied into the final record, the minute entry, showing a judgment, constitutes the final record of the judgment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 546-551.

For other definitions, see *Words and Phrases*, *Final Record*.]

## 4. CRIMINAL LAW §673(2) — TRIAL — EVIDENCE—LIMITATION TO PARTICULAR PURPOSE—NECESSITY.

In a prosecution for perjury by having sworn falsely in a murder case, the judgment in such case being admitted in evidence only to show the trial of the case, and not as a circumstance tending to show that defendant swore falsely, the court should limit the use of such evidence to that purpose.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1874.]

## 5. CRIMINAL LAW §673(2)—LIMITATION OF EVIDENCE.

If the issues on a trial for perjury involve the same issues litigated on the trial in which the perjury is alleged to have been committed, any evidence admissible in the first trial is competent on the trial for perjury; but, where the indictment for perjury relates to a subordinate evidential matter, the issue should be limited to such matter, and the *res gestæ* of the fact involved in the issue.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1874.]

## 6. WITNESSES §379(8)—IMPEACHMENT.

In a prosecution for perjury alleged to have been committed on a murder trial, where a witness testified that defendant was not present at the killing, that deceased did not reach back to his hip pocket and draw a pistol and present it at the party charged with murder, contrary to the testimony on the murder trial of defendant charged with perjury, and that four or five shots were fired, it was the right of defendant charged with perjury to impeach the witness by showing he testified on the murder trial that only three shots were fired, the *res gestæ* of the fact under investigation.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1252, 1253, 1256.]

**7. WITNESSES — 330(1) — CROSS-EXAMINATION—RELEVANT MATTER.**

In such prosecution for perjury, the court erred in sustaining the solicitor's objection to a question to another witness on cross-examination, eliciting evidence as to whether or not he ran away from the place of the difficulty when the shooting began, the fact having some tendency to affect the probative force of his testimony; for, while the scope of cross-examination as to irrelevant matters to test the accuracy and credibility of testimony is a matter within the discretion of the trial court, such discretion does not extend to relevant facts, and to deny defendant the right to cross-examine as to such facts is reversible error.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1106.]

**8. PERJURY — 32(5)—EVIDENCE.**

In a prosecution for perjury alleged to have been committed on a murder trial, book entries made by a witness, and the fact that defendant drew a full day's pay for the day of the killing, were admissible as having a tendency to show defendant was not present on the occasion of the shooting, which he testified that he witnessed.

[Ed. Note.—For other cases, see *Perjury*, Cent. Dig. § 115.]

Appeal from Circuit Court, Covington County; A. B. Foster, Judge.

Pink Jordan was convicted of perjury, and he appeals. Reversed and remanded.

The perjury is alleged to have occurred in the trial of *State v. Mitchell Wells*, for killing one B. Sager, and the perjury alleged is that witness falsely swore on that trial; that B. Sager drew a nickel-plated weapon, a pistol, and pointed it at Wells just prior to the shooting of Sager by Wells. The other facts sufficiently appear.

Baldwin & Murphy, of Andalusia, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

**BROWN, P. J.** [1] The record of the indictment and judgment of the law and equity court in the case of *State v. Mitchell Wells* was properly admitted in evidence, the indictment for the purpose of showing that that court had jurisdiction to try Mitchell Wells, and the judgment for the purpose of showing the trial. *Williams v. State*, 68 Ala. 551; *Smith v. State*, 103 Ala. 69, 15 South. 866.

[2] The bill of exceptions states that the record of the indictment was offered in evidence, and the objection to the admission of this evidence was a general objection, no grounds being stated; and the question of the identity of the record is not presented. *Stevenson v. Moody*, 85 Ala. 33, 4 South. 595.

[3] The minute entry showing the judgment constitutes the final record of the judgment. Code 1907, § 5733.

[4] As this case must be reversed on another ground, we think it proper to suggest that the court should so limit the effect of the evidence afforded by the judgment to the

purpose of showing the trial of the case of *State v. Mitchell Wells*, and that it should not be considered as a circumstance tending to show that the defendant swore falsely on that trial. *Estill v. State*, 38 Tex. Cr. R. 255, 42 S. W. 305.

[5] If the issues on the trial for perjury involve the same issues that were litigated in the trial in which the perjury is alleged to have been committed, any evidence that was admissible in the first trial would be competent on the trial for perjury. *Reg. v. Harris*, 9 Cox C. C. 503; 30 Cyc. 1443, sub. 2. Where, however, the indictment for perjury relates to a subordinate evidential matter, the issue should be limited to this matter and the *res gestæ* of the fact involved in the issue. *Chitwood v. U. S.*, 101 C. C. A. 342, 178 Fed. 442.

The defendant is charged with having falsely sworn that Sager "reached with his right hand to his hip pocket and pulled therefrom a nickel-plated gun and presented it at the said Mitchell Wells just before the said Mitchell Wells fired the shot that killed" Sager. The state's witness Clements testified on the trial of this case, that the defendant was not present on the occasion of the killing of Sager by Wells, that witness saw the difficulty, and that Sager did not reach back to his hip pocket and draw from it a pistol and present it at Wells; that four or five shots were fired, but the evidence does not show which of these shots took effect.

[6] It was the defendant's right to impeach the witness by showing he testified on the trial of Wells that only three shots were fired on the occasion. This was of the *res gestæ* of the fact under investigation, the drawing of a pistol by Sager.

[7] The court also erred in sustaining the solicitor's objection to the question to the witness Collins on cross-examination, eliciting evidence as to whether or not the witness ran away from the place of the difficulty when the shooting began. If the witness was frightened or excited by the occurrence to such extent that he ran away from the place of the difficulty, this had some tendency to affect the probative force of his testimony. While the scope of the cross-examination of witnesses as to irrelevant matters for the purpose of testing the accuracy and credibility of testimony is a matter within the discretion of the trial court, such discretion does not extend to relevant facts, and to deny the defendant the right to cross-examine as to such facts is reversible error. *Snell v. Roach*, 150 Ala. 469, 43 South. 189.

[8] The book entries made by the witness Collins and the fact that defendant drew a full day's pay for the day of the alleged difficulty had a tendency to show that defendant was not present on the occasion of the shooting, and the ruling of the court as to these phases of the evidence was free from

error. *Shirley v. South. Ry. Co.*, 73 South. 430.

We find no other error in the record.  
Reversed and remanded.

(73 Fla. 700)

CARNEY v. STRINGFELLOW et al.

(Supreme Court of Florida. March 24, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇨867(2) — WRIT OF ERROR—STATUTE—QUESTIONS.

On writ of error taken under the statute to an order granting a new trial in a civil action at law, the only questions to be considered are those involved in the order granting a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3477, 3478, 3480, 3486.]

2. APPEAL AND ERROR ⇨1015(1)—GRANTING NEW TRIAL—REVERSAL.

A stronger showing is required to reverse an order allowing a new trial than to reverse one denying it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3863.]

3. APPEAL AND ERROR ⇨854(6)—GRANTING NEW TRIAL—AFFIRMANCE.

Where the trial court grants a new trial containing several grounds without stating any ground upon which the ruling was based, the order will be affirmed if any ground of the motion is sufficient to authorize the granting of the new trial. And it must be assumed that the court based the order on the grounds that warrant it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3423, 3424.]

4. APPEAL AND ERROR ⇨1015(2)—DISCRETION OF TRIAL COURT — GRANTING NEW TRIAL.

Where a new trial is granted, and there is such a conflict in the evidence that this court cannot say the trial judge abused his discretion in granting such new trial, his ruling will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3863.]

5. APPEAL AND ERROR ⇨1015(2)—GRANTING NEW TRIAL—REVIEW.

Where the evidence on a material issue in a cause is conflicting, and it does not so preponderate in favor of the verdict as to show an abuse of discretion or the violation of any provision or settled principle of law in granting a new trial, the action of the trial court will not be disturbed on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3863.]

6. APPEAL AND ERROR ⇨977(3)—DISCRETION OF TRIAL COURT—GRANTING NEW TRIAL.

There are so many matters occurring in the course and progress of a judicial trial that, in the opinion of the judge who tried the case, may affect the merits and justice of the cause to the substantial injury of one of the parties, that of necessity a large discretion should be accorded to the trial court in granting a new trial, to the end that the administration of justice may be facilitated; and the appellate court will not reverse an order granting a new trial, unless it clearly appears that a judicial discretion has been abused in its exercise, resulting in injustice or that the law has been violated.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3862.]

7. NEW TRIAL ⇨13—TRIAL ⇨143—DIRECTED VERDICT—OPINION OF TRIAL COURT.

A trial court should not direct a verdict for one party where there is evidence that would legally support a verdict for the opposite party, for the reason that the parties are entitled to a jury trial of the issue of fact presented. But a party against whom a verdict is rendered is also entitled to the benefit of the judgment of the trial court on the justice as well as on the legality of the verdict rendered.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 19; Trial, Cent. Dig. §§ 342, 343.]

8. NEW TRIAL ⇨72 — GROUNDS — VERDICT AGAINST EVIDENCE.

Although a motion for a directed verdict for one party may be denied, yet in the same case if the trial court is of opinion that the verdict does not accord with the manifest weight of the evidence and the substantial justice of the cause, a new trial should be granted if duly made.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146-148.]

9. NEW TRIAL ⇨85 — DIRECTED VERDICT—VERDICT AGAINST EVIDENCE.

While the legal sufficiency of the evidence to support the verdict for one party will make a directed verdict for the other party improper, yet the mere legal sufficiency of the evidence to support a verdict rendered will not preclude the trial court from granting a new trial, where the verdict does not do substantial justice in the cause or is against the manifest weight and probative effect of the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 130.]

10. NEW TRIAL ⇨6—DISCRETION OF COURT.

Trial courts have much more latitude of discretion in granting new trials on the evidence than have the appellate court; and the trial courts should exercise this discretion so as to facilitate the administration of justice.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 9, 10.]

11. JURY ⇨37 — RIGHT TO JURY TRIAL—GRANT OF NEW TRIAL.

The right of parties to have the trial court review the verdict with reference to the evidence is consistent with the right to a jury trial. If a new trial is granted, it merely gives the right to present the issues in the case to another jury for determination. This is a means afforded by law for the correction of any injustice that may be done by a verdict found, without the delay and expense of appellate proceedings.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 220.]

12. APPEAL AND ERROR ⇨977(3)—DISCRETION OF TRIAL COURT—GRANTING NEW TRIAL—WRIT OF ERROR.

The statute authorizes a writ of error to an order granting a new trial; and by this means if the trial court abuses its discretion in granting a new trial when in law the evidence requires the verdict to be as found, such abuse may be corrected by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3862.]

13. APPEAL AND ERROR ⇨933(1)—GRANTING NEW TRIAL—REVIEW.

The action of the trial court in granting a new trial will not be reversed by the appellate court, unless some settled principle of law has been violated or a plain case of abuse of discretion is shown; the presumption in all cases being that the trial court properly granted a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3772.]

14. JURY  $\Leftrightarrow$  12(1)—VERDICT—REVIEW BY TRIAL COURT.

A party litigant in a common-law action has in general a right to a verdict of a jury, and also to a review of the verdict by the trial court.

[Ed. Note.—For other cases, see JURY, Cent. Dig. §§ 26, 27, 28, 34, 82, 99, 101, 103.]

15. NEW TRIAL  $\Leftrightarrow$  72—GROUNDS—VERDICT CONTRARY TO EVIDENCE.

Where a motion for new trial is duly made, the party making it is entitled to the benefit of the judicial opinion of the trial judge thereon. If upon a motion for new trial duly made the trial judge is of opinion that there is difficulty in reconciling the verdict with the justice of the case and the manifest weight of the evidence, a new trial should be granted.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146–148.]

Error to Circuit Court, Hernando County; W. S. Bullock, Judge.

Action by A. W. Carney against J. D. Stringfellow and M. G. Stringfellow, copartners. Judgment for plaintiff, and from the granting of a new trial, he brings error. Order affirmed.

Davant & Davant, of Brooksville, for plaintiff in error. W. S. Broome, of Gainesville, for defendants in error.

WHITFIELD, J. Carney brought an action for damages alleging malicious prosecution. There was judgment for the plaintiff. The court granted a new trial, and the plaintiff took writ of error under section 1695 of the General Statutes of 1906. The grounds of the motion for new trial include those that the verdict is contrary to the evidence, and the court did not indicate on which ground the motion was sustained.

[1] The only question to be considered on a writ of error taken under the statute to an order granting a new trial "to review said order" is whether the court erred in granting the new trial. Section 1695, Gen. Stats. 1906; Compiled Laws 1914; Jones v. Jacksonville Electric Co., 56 Fla. 452, 47 South. 1.

On writ of error taken under the statute to an order granting a new trial in a civil action at law the only questions to be considered are those involved in the order granting a new trial.

[2] A stronger showing is required to reverse an order allowing a new trial than to reverse one denying it.

[3] Where the trial court grants a new trial containing several grounds without stating any ground upon which the ruling was based, the order will be affirmed if any ground of the motion is sufficient to authorize the granting of the new trial. And it must be assumed that the court based the order on the grounds that warrant it.

[4] Where a new trial is granted, and there is such a conflict in the evidence that this court cannot say the trial judge abused his discretion in granting such new trial, his ruling will not be disturbed.

[5] Where the evidence on a material is-

sue in a cause is conflicting, and it does not so preponderate in favor of the verdict as to show an abuse of discretion or the violation of any provision or settled principle of law in granting a new trial, the action of the trial court will not be disturbed on writ of error.

[6] There are so many matters occurring in the course and progress of a judicial trial that, in the opinion of the judge who tried the case, may affect the merits and justice of the cause to the substantial injury of one of the parties, that of necessity a large discretion should be accorded to the trial court in granting a new trial, to the end that the administration of justice may be facilitated; and the appellate court will not reverse an order granting a new trial, unless it clearly appears that a judicial discretion has been abused in its exercise, resulting in injustice or that the law has been violated. *Ruff v. Georgia, S. & F. R. Co.*, 67 Fla. 224, 64 South. 782; *Georgia Southern & F. R. Co. v. Hamilton Lumber Co.*, 63 Fla. 150, 58 South. 838; *Mizell Live Stock Co. v. Pollard*, 71 Fla. 192, 71 South. 31; *Aberson v. Atlantic Coast Line R. Co.*, 68 Fla. 196, 67 South. 44; *Alles v. Diaz*, 62 Fla. 421, 57 South. 614; *Beverly v. Hardaway*, 66 Fla. 177, 63 South. 702; *Louisville & N. R. Co. v. Wade*, 49 Fla. 179, 38 South. 49; *Citizens' Bank & Trust Co. v. Spencer*, 46 Fla. 255, 35 South. 73; *Acosta v. Gingles*, 65 Fla. 507, 62 South. 582; *Hobbs v. Cheyney*, 62 Fla. 214, 56 South. 554; *Connor v. Elliott*, 59 Fla. 227, 52 South. 729.

While it is the proper function and province of the jury to compare and weigh complicated and contradictory evidence of facts, and to render their verdict thereon, it is at the same time true that in cases where there is conflict in the testimony, it is within the province and power of the court to set aside a verdict which does not reach a substantially just conclusion in cases where the conflicts are of such character and the circumstances of such nature as to give ground for the belief that the jury acted through prejudice, passion, mistake, or any other cause which should not properly control them. This power exists in the court. In exercising it the court does not encroach upon the province of the jury, for the reason that it does not conclusively settle facts in the form of a verdict, but only gives another jury the opportunity of so doing, and of correcting what appears to be a mistake. If this is not properly within the power of the court, then the result is that the first 12 men that happen to constitute a jury in a given case are by law the final arbiters of the facts in that case. There is no such principle of law.

This is a conservation and justly prized power of the court; like all powers it may be abused. It is much better, however, that exceptional cases of its improper exercise should be endured than that the security

which it affords should be withdrawn. The rule which should govern a court in the exercise of this power should be a fair view of the justice of the particular case, the character of the conflicting testimony, and the surrounding circumstances, rather than an extraordinary degree of respect for the maxim, "Ad questionem facti non respondent iudices; ad questionem legis non respondent iuratores"; and wherever it appears to the court that there is difficulty in reconciling the verdict with the justice of the case, and the manifest weight of evidence, there the court should not, from a too-great respect for this wise and venerable maxim, withhold its power. This is the rule which should govern the judge of the court presiding at the trial, who has the same opportunity as the jury to observe what occurs in the trial. In all cases of appeal the presumption is that he exercised this discretion properly, and the case is not presented to this court as it was to him, because this additional presumption is added to the verdict. Where he has declined to disturb the verdict of the jury, a very clear and strong case must be made out before this court would feel justified in reversing his action. It should be a very plain case to justify an appellate court in setting aside this concurrent conclusion of both court and jury, upon the ground that their action was contrary to the evidence or weight of evidence. *Schultz v. Pacific Ins. Co.*, 14 Fla. 73.

[7-13] A trial court should not direct a verdict for one party where there is evidence that would legally support a verdict for the opposite party, for the reason that the parties are entitled to a jury trial of the issue of fact presented. But a party against whom a verdict is rendered is also entitled to the benefit of the judgment of the trial court on the justice as well as on the legality of the verdict rendered. And although a motion for a directed verdict for one party may be denied, yet in the same case if the trial court is of opinion that the verdict does not accord with the manifest weight of the evidence and the substantial justice of the cause, a new trial should be granted if duly made. While the legal sufficiency of the evidence to support a verdict for one party will make a directed verdict for the other party improper, yet the mere legal sufficiency of the evidence to support a verdict rendered will not preclude the trial court from granting a new trial where the verdict does not do substantial justice in the cause or is against the manifest weight and probative effect of the evidence. *Florida East Coast R. Co. v. Hayes*, 66 Fla. 589, text 595, 64 South. 274; *Aberson v. Atlantic Coast Line R. Co.*, 68 Fla. 196, 67 South. 44. Trial courts have much more latitude of discretion in granting new trials on the evidence than have the appellate courts; and the trial courts should exercise this discretion so as to facilitate the administration of justice. The right of parties to have the trial court review the verdict

with reference to the evidence is consistent with the right to a jury trial. If a new trial is granted, it merely gives the right to present the issues in the case to another jury for determination. This is a means afforded by law for the correction of any injustice that may be done by a verdict found, without the delay and expense of appellate proceedings. As the trial judge sees the witnesses and hears them testify, and knows all the circumstances of the case as it is developed at the trial, which matters cannot be presented to the appellate court, he is in a better position to determine the justice of the verdict on the evidence than is the appellate court; and the proper exercise of the trial court's wide discretion in granting new trials on the evidence secures justice to the parties and prevents needless expense and delay. The statute authorizes a writ of error to an order granting a new trial; and by this means if the trial court abuses its discretion in granting a new trial when in law the evidence requires the verdict to be as found, such abuse may be corrected by the appellate court. *Feinberg v. Stearns*, 56 Fla. 279, 47 South. 797, 131 Am. St. Rep. 119; *Bishop v. Taylor*, 41 Fla. 77, 25 South. 287; *Philadelphia Underwriters' Ins. Co. of North America v. Bigelow*, 48 Fla. 105, 37 South. 210. Where some settled principle of law is violated by the trial court in granting a new trial, the appellate court may correct the error. *Winn v. Coggins*, 53 Fla. 327, 42 South. 897; *Nathan v. Thomas*, 63 Fla. 237, 58 South. 247, Ann. Cas. 1914A, 387; *Georgia Southern & F. R. Co. v. Hamilton Lumber Co.*, 63 Fla. 150, 58 South. 838. But the action of the trial court in granting a new trial will not be reversed by the appellate court, unless some settled principle of law has been violated or a plain case of abuse of discretion is shown; the presumption in all cases being that the trial court properly granted a new trial. *Acosta v. Gingles*, 65 Fla. 507, 62 South. 582; *Allen v. Lewis*, 43 Fla. 301, 31 South. 286.

[14] A party litigant in a common-law action has in general a right to a verdict of a jury, and also to a review of the verdict by the trial court.

[15] Where a motion for new trial is duly made, the party making it is entitled to the benefit of the judicial opinion of the trial judge thereon. If upon a motion for new trial duly made the trial judge is of opinion that there is difficulty in reconciling the verdict with the justice of the case and the manifest weight of the evidence, a new trial should be granted. *Seaboard Air-Line Ry. v. Anderson*, 73 Fla. —, 73 South. 837; *Tampa Waterworks Co. v. Mugge*, 60 Fla. 263, 53 South. 943; *Armstrong v. State*, 30 Fla. 170, 11 South. 618, 17 L. R. A. 484; *McDonald v. State*, 56 Fla. 74, 47 South. 485; *Ruff v. Georgia, S. & F. R. Co.*, 67 Fla. 224, 64 South. 782; *Dominguez v. Citizens' Bank & Trust Co.*, 62 Fla. 148, 56 South. 682; *Zackary v.*



Georgia, F. & A. R. Co., 62 Fla. 419, 56 South. 686; Dunnellon Phosphate Co. v. Crystal River Lumber Co., 63 Fla. 131, 58 South. 786.

In this case the evidence as to the liability of the defendants is conflicting in essential particulars, and the evidence does not in law require a verdict for the plaintiff. It cannot be said that in granting the motion for new trial the court violated any settled principle of law or abused a judicial discretion. *Farrell v. Solary*, 43 Fla. 124, 31 South. 283; *Reddick v. Joseph*, 35 Fla. 65, 16 South. 781. The order is affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and ELLIS, JJ., concur

(73 Fla. 716)

PALATINE INS. CO. v. WHITFIELD.  
(Supreme Court of Florida. March 24, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §938(1)—PRESUMPTION—PRESENTATION OF ASSIGNMENT OF ERRORS.

Where the record shows that at the time of filing the bill of exceptions the plaintiff in error filed his complete assignment of errors, and both appear in the transcript of the record, it must be assumed, in the absence of an affirmative showing to the contrary, that an assignment of errors was presented to the judge with the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3795, 3798.]

2. APPEAL AND ERROR §938(1)—PRESUMPTION—PRESENTATION OF ASSIGNMENT OF ERRORS.

As the court should refuse to settle a bill of exceptions when no assignment of errors is presented therewith, it must be assumed, in the absence of an affirmative showing to the contrary, that an assignment of errors was presented to the judge with the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3795, 3798.]

3. APPEAL AND ERROR §938(1)—PRESUMPTION—PRESENTATION OF ASSIGNMENT OF ERRORS.

The mere fact that the bill of exceptions, duly authenticated, contains no assignment of errors, is not conclusive that the same was not presented to the judge, even though special rule No. 1 of this court (37 South. x) directs that the assignment of errors presented with the bill of exceptions shall be made a part thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3795, 3798.]

4. INSURANCE §335(4)—FIRE INSURANCE—IRON SAFE CLAUSE—BREACH.

It is not a violation of the iron safe clause of a fire insurance policy for the insured not to keep his books and last inventory in a fireproof safe, if he can produce them when demanded.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 853.]

5. INSURANCE §335(3)—FIRE INSURANCE—IRON SAFE CLAUSE—BREACH.

The provision in a fire insurance policy requiring the insured to "keep a complete set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit," is satisfied, if the insured can produce them when demanded.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 853.]

6. INSURANCE §310(1)—FIRE INSURANCE—FORFEITURE—NOTICE TO INSURED.

Where an insurance company intends to insist on a forfeiture clause of its policy, it should so inform the insured as soon as practicable after it ascertains the facts upon which it bases its claim for forfeiture.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 761, 780.]

7. INSURANCE §310(1)—FIRE INSURANCE—AVOIDANCE.

The declaration in an insurance policy that a violation of its provisions will cause it to become null and void does not make it so, but the policy is voidable only.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 761, 780.]

8. INSURANCE §372, 373(1)—FIRE INSURANCE—FORFEITURE CLAUSE—WAIVER.

A forfeiture clause in an insurance policy may be waived by the insurance company, and such waiver may be established by the acts and statements of its representatives.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 941, 947.]

9. INSURANCE §146(3)—AVOIDANCE OF POLICY—CONSTRUCTION.

The provisions of an insurance policy limiting or avoiding liability are construed strictly against the insurer, and liberally in favor of the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 295.]

(Additional Syllabus by Editorial Staff.)

10. TRIAL §296(13)—INSTRUCTIONS—CURE OF ERROR.

In an action upon a fire insurance policy, erroneous instructions that defendant had the burden of proving its pleas were not reversible error, where the court afterwards corrected the charge by stating that the burden was on plaintiff to prove his replications.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 718.]

11. TRIAL §252(14)—INSTRUCTION—ISSUES.

In an action upon a policy of fire insurance, a requested charge as to insured's failure to produce his inventory, etc., was properly refused, where it did not fully and correctly state the facts in connection with the transaction and was not applicable thereto.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 604.]

12. TRIAL §252(14)—INSTRUCTION—EVIDENCE TO SUSTAIN.

In such action, a requested charge as to the waiver of a provision of the policy requiring the production of an inventory was properly refused, where the testimony did not sustain the inferences and conclusions of fact recited in the charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 604.]

Error to Circuit Court, Jackson County; Cephas L. Wilson, Judge.

Action by J. M. Whitfield against the Palatine Insurance Company. Verdict and judgment for plaintiff, motion for new trial denied, and defendant brings error. Affirmed.

On May 17, 1915, defendant in error brought suit in the circuit court of Jackson county against the Palatine Insurance Company.

The declaration is in the statutory form on a fire insurance policy.

The defendant filed eight pleas.

The first plea charges a breach of what is known as the "iron safe clause," in that plaintiff did not take inventories as provided for in the policy.

The second plea charges violation of "iron safe clause," in that plaintiff did not keep books, and did not produce the books for inspection of defendant, as required by the policy.

The third plea charges that plaintiff took out additional insurance without securing the agreement of the defendant and having same indorsed on the policy.

The fourth plea charges that plaintiff used gasoline on the premises where the property was insured, and no agreement of the defendant for him to do so was indorsed on the policy.

The fifth plea is to the same effect, except that it charges that plaintiff generated illuminating gas or vapor adjacent to the building described in the policy, and no agreement of the defendant for him to do so was indorsed in the policy.

The seventh plea charges that plaintiff did not give notice and furnish proofs of his loss within 60 days from the date of the fire.

The eighth plea is a traverse of the damages alleged.

The plaintiff filed replications to all but the eighth plea.

The replication to the first and second pleas in substance sets up that the defendant sent an adjuster to Malone to investigate the origin and extent of the fire, to whom plaintiff produced evidentiary data, invoices, and books of account that were kept by the plaintiff in the usual course of business, which were accepted and used by the company's adjuster without objection, and thereafter before the institution of this suit offered plaintiff \$488 for his loss on merchandise, and \$312 for loss on furniture and fixtures, and did not deny the company's liability, nor object that the provisions of the policy had not been complied with, and thereby waived the defense sought to be made by these pleas.

The replication to the third plea in substance sets up that the same agent who issued and delivered the policy sued on procured the additional insurance mentioned in this plea, with knowledge at the time that the policy sued on was then in force, and delivered to him the policy for such additional insurance, and consented to same and waived endorsement of same on the policy; that after the fire the company sent an adjuster to Malone to investigate the origin of the fire, the nature and extent of plaintiff's loss, and the defendant company's liability therefor, and thereafter offered to pay plaintiff \$488 in settlement of plaintiff's loss on his stock of merchandise, and did not deny its liability under the policy, and that the defense sought to be set up by this plea was thereby waived.

The replication to the fourth, fifth, and sixth pleas in substance sets up that the property insured was situated in the plaintiff's

drug store and was lighted by artificial gas generated in a tank outside the building, that the lighting apparatus was standard in design and installation, of a type approved by the National Board of Fire Underwriters, and permitted without extra charge by all fire companies writing business in the town of Malone, Fla., including the defendant, and that its use was known, or should have been known, by the defendant at the time of delivering the policy and accepting the premium therefor; that no gasoline was used, allowed, or generated in the store in which the insured articles were kept, or adjacent thereto, except the gasoline so used and allowed.

The replication to the seventh plea sets up that within 60 days after the fire the insurance company's adjuster came to Malone, and after investigation, and with full knowledge of the facts alleged in this plea, offered to pay the plaintiff \$800 in settlement of the liability, and did not then or at any time prior to the institution of the suit make any objection to paying the loss on the grounds set forth in this plea.

The defendant filed rejoinder to plaintiff's replication to the defendant's first, second, third, and seventh pleas, and also filed demurrer thereto, upon the grounds that they are vague, indefinite, uncertain, and insufficient; that the facts set up in the replication to the first and second pleas are insufficient to constitute a waiver; that an offer of compromise is insufficient as a waiver of the iron safe clause; that the facts set up in replication to third plea are not sufficient to constitute a waiver; that the replication fails to allege that the agent received knowledge of the additional insurance while acting as agent of defendant, or within the scope of his authority as such agent; and that the replication sets up two distinct matters by way of reply. The demurrer to the replication was overruled. The defendant for rejoinder sets up that, before the insurance company's adjuster made any investigation of the loss, the plaintiff entered into an agreement in writing with the insurance company that any action or investigation on the part of the adjuster relating to the claim of plaintiff for loss or damage should not be a waiver of any of the conditions or requirements of the insurance policy.

To this rejoinder the plaintiff demurred, on the grounds, that it is vague, indefinite, uncertain, and insufficient; that it is not alleged that there was any consideration for the nonwaiver agreement; that it is not alleged that the nonwaiver agreement was entered into without notice on the part of defendant of the existence of the facts constituting a forfeiture of the policy; that the nonwaiver agreement is simply declaratory of the nonwaiver stipulation contained in the policy, and does not constitute a bar to the waiver created by defendant's adjuster proceeding to investigate the loss, and requiring plaintiff to submit proofs as to plaintiff's loss, and de-

defendant's liability. The demurrer to the rejoinder being sustained, and the defendant having joined issue on the plaintiff's replication to the defendant's pleas, the case proceeded to trial, and resulted in a verdict and judgment for the plaintiff for \$2,000, with interest, and \$25 and 10 per cent. for attorney's fees. A motion for a new trial having been denied by the trial judge, writ of error was sued out to this court.

There are nine assignments of error, as follows:

"(1) The court erred in overruling defendant's demurrer to plaintiff's replication.

"(2) The court erred in sustaining plaintiff's demurrer to defendant's rejoinder.

"(3) The court erred in admitting in evidence the two pages of the inventory, amounting to \$78.92 and \$98.25, being various articles of jewelry.

"(4) The court erred in overruling defendant's motion to strike out the item of microscope, \$100, from plaintiff's inventory in evidence.

"(5) The court erred in admitting in evidence the letter dated April 10, 1915, signed by J. T. Dargan, Jr., addressed to Whitfield & Thomas, and in overruling defendant's objection to said letter.

"(6) The court erred in overruling defendant's motion for new trial.

"(7) The court erred in overruling and refusing to give the second special instruction requested by the defendant.

"(8) The court erred in refusing to give the seventh special instruction requested by the defendant.

"(9) The court erred in refusing to give the ninth special instruction requested by defendant."

Paul Carter, of Marianna, for plaintiff in error. John H. Carter, of Marianna, for defendant in error.

BROWNE, C. J. (after stating the facts as above). [1-3] We are met at the outset with a proposition which is presented for the first time in the brief of the defendant in error. It is contended that this court cannot consider any assignment which depends upon the bill of exceptions for support, for the reason that no assignment of errors is made a part of the bill of exceptions, nor does the bill purport to be predicated upon any assignment of errors, and special rule 1 of the court (37 South. x) is invoked in support of the contention that the bill of exceptions is a nullity.

It appears from the record that at the time of filing the bill of exceptions the plaintiff in error filed his complete assignment of errors, and both appear in the transcript of the record, although the record does not say that at the time the plaintiff in error presented his bill of exceptions to the circuit judge he also presented to him his assignment of errors.

In *Thomas Bros. Co. v. Price & Watson*, 56 Fla. 694, 48 South. 17, the question here raised in the brief was squarely presented by a motion to strike the bill of exceptions and to dismiss the writ of error, and this court said:

"In this case it does not affirmatively appear from the transcript that no assignment of errors was in fact presented to the judge with

the bill of exceptions; and as the court should refuse to settle the bill of exceptions when no assignment of errors is presented therewith, it must be assumed, in the absence of an affirmative showing to the contrary, that an assignment of errors was presented to the judge with the bill of exceptions, at least where, as in this case, no exception was taken to the settlement of the bill of exceptions on the ground that no assignment of errors had been presented as required by the rule.

"The mere fact that the bill of exceptions duly authenticated, contains no assignment of errors, is not conclusive that none was presented to the judge, even though the rule directs that the assignment of errors presented with the bill of exceptions shall be made a part thereof.

"The rule does not require that the transcript shall show the service of a copy of the assignment of errors on the defendant in error, and the directions to the clerk in this case do not demand it.

"The ground of the motion that no copy of the assignment of errors was served on the defendants in error is not self-supporting, and no evidence to sustain it is presented here. There is nothing to show that the bill of exceptions was not made up in pursuance of an assignment of errors presented to the judge."

This seems to dispose of the contention of the defendant in error on this point.

[4, 5] The first assignment of error relates to the overruling of the defendant's demurrer to the plaintiff's replication to the first and second pleas, which set up a breach of the iron safe clause. Allegations in the replication are admitted by the demurrer to be true, and even without the allegation of the offer of the adjuster to pay \$800 in settlement of the claim, the other allegations state a sufficient compliance with the iron safe clause of the policy to put the parties to their proofs. The replication states that on the request of the "adjuster" plaintiff "personally produced evidentiary data, invoices, and books of account that were kept by plaintiff in the usual course of business, from which the amounts and value of said stock of merchandise at the time of the fire could be reasonably ascertained." The agreement in the policy which is known as the "iron safe clause" requires that the insured "will take a complete inventory of stock on hand at least once in each calendar year," and "will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit," and "will keep such books and inventory \* \* \* securely locked in a fireproof safe at night, and at all times when the building mentioned in the policy is not open for business, or, failing in this, the insured will keep such books and inventories in some place not exposed to fire which would destroy the aforesaid building." It is immaterial whether he kept the inventories and books in a fireproof safe or not, if he could produce them when demanded, and the replication avers that upon request of the insurance company's adjuster the insured personally produced evidentiary data, invoices, and books of account that were kept by him in the usual course of business, from which the amount and value

of said stock of merchandise at the time of the fire could be reasonably ascertained. It seems to us that this is all the insurance company had a right to require, and there is no error in this ruling of the lower court. In construing a similar clause in an insurance policy, the Supreme Court of the United States said:

"Turning now to the words of the policies in suit, what is the better and more reasonable interpretation of those provisions so far as they relate to the issues in this case? The covenant and agreement 'to keep a set of books, showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business,' should not be interpreted to mean such books as would be kept by an expert book-keeper or accountant in a large business house in a great city. That provision is satisfied if the books kept were such as would fairly show, to a man of ordinary intelligence, 'all purchases and sales, both for cash and credit.' There is no reason to suppose that the books of the plaintiff did not meet such a requirement.

"That of which the company most complains is that the insured did not produce the last inventory of their business, and remove the books and inventory from the fireproof safe in which they had been placed the night of the fire. It will be observed that the insured had the right to keep the books and inventory either in a fireproof safe or in some secure place not exposed to a fire that would destroy the house in which their business was conducted. But was it intended by the parties that the policy should become void unless the fireproof safe was one that was absolutely sufficient against every fire that might occur? We think not. If the safe was such as was commonly used, and such as, in the judgment of prudent men in the locality of the property insured, was sufficient, that was enough within the fair meaning of the words of the policy. It cannot be supposed that more was intended. If the company contemplated the use of a safe perfect in all respects and capable of withstanding any fire however extensive and fierce, it should have used words expressing that thought."

Liverpool & London & Globe Ins. Co. v. Kearney, 180 U. S. 132, 21 Sup. Ct. 323, 45 L. Ed. 460.

The second assignment is based on the court sustaining the demurrer to the defendant's rejoinder, which sets up a nonwaiver agreement as an avoidance of the replication dealing with the acts of the adjuster.

It seems that an adjuster of the Palatine Insurance Company went to the scene of the fire shortly after it occurred for the purpose of investigating and adjusting the loss; that before he began his work he had information about the gas-generating machines; he obtained and made memorandum of the address of the manufacturers, and proceeded with the adjustment without making any objection about its use by the plaintiff. He took the plaintiff's books of account, was furnished with duplicate invoices of goods bought since the last inventory, spent part of two days in making the investigation, and before leaving he stated, in reply to question about plaintiff getting his money, that they were so crowded with business and had had so many fires it would take full time. He did not tell the plaintiff that his policy had been for-

feited. He made a very thorough investigation, and was afforded every facility by the insured to ascertain the facts, and at no time during the part of two days that he was in Malone investigating and adjusting the loss did he disclaim liability under the policy.

[6] On April 30, 1915, Mr. J. T. Dargan, Jr., on behalf of the Palatine Insurance Company and other companies which he represented, wrote to the plaintiff that he had just received definite instructions from the various companies interested in the loss, and offered to pay 40 per cent. of the respective policies in full settlement of his claim. They did not then deny liability, but merely stated that the offer was made in a spirit of compromise, "without either admitting or denying liability under the policy." This all goes to show that at no time before the institution of this suit did the insurance company treat the policy as void, and it ought not to be heard to make that contention now. If an insurance company intends to stand on a forfeiture clause of its policy, it should so inform the insured as soon as practicable after it ascertains the facts upon which it bases its claim of forfeiture. In this case, after more than two months had elapsed, and after a full investigation and adjustment of the loss, and the insurance company had been acquainted with the result of its adjuster's investigation, they were not only silent about any claim of forfeiture, but sought to lull the insured to sleep by writing him that they neither admitted nor denied liability under the policy.

[7, 8] It seems to be settled in this state that, notwithstanding the strong language used in an insurance policy to the effect that a violation of certain clauses therein will cause it to "become null and void," the policy is not void, but voidable, and that a forfeiture clause may be waived by the insurance company; and such waiver may be established by the acts and statements of the representatives of the insurance company. *Tillis v. Liverpool & L. & G. Ins. Co.*, 46 Fla. 268, 35 South. 171, 110 Am. St. Rep. 89; *Eagle Fire Ins. Co. v. Lewallen*, 56 Fla. 246, 47 South. 947; *Caledonian Ins. Co. v. Smith*, 65 Fla. 429, 62 South. 595, 47 L. R. A. (N. S.) 619.

It appears from the testimony that, after having knowledge of the facts which might have constituted a forfeiture, the company proceeded to adjust the loss, and after its completion, and after consultation with the company, its representative offered to pay the insured \$688 for his loss on the stock of merchandise and \$312 for his loss on store furniture and fixtures. Both of these items were embraced in the policy sued on. The amount on the former was \$1,220, and on the latter \$780. It is true that in the written offer of settlement they state that the same is made "in a spirit of compromise", but the

fact that they make an offer to pay 40 per cent. of the amount of the policies, after a full investigation and adjudication of the loss, amounts to a waiver of any right to a forfeiture, and shows that the compromise they propose is in relation to what they think may be due, and not in compromise of any of the matters out of which a forfeiture could be claimed. As was said in *Tillis v. Liverpool & L. & G. Ins. Co.*, supra:

"If these acts do not constitute an express waiver, they could only have been done by virtue of the obligation of a valid policy, and therefore the company knowing of the forfeiture, by such acts waived it, and are bound by such waiver."

A nonwaiver agreement may itself be waived. *Pennsylvania Fire Ins. Co. v. Draper*, 187 Ala. 103, 65 South. 923; *Tillis v. Liverpool & L. & G. Ins. Co.*, 46 Fla. 268, 35 South. 171, 110 Am. St. Rep. 89; *Eagle Fire Co. v. Lewallen*, 56 Fla. 246, 47 South. 947; *Pennsylvania Fire Ins. Co. v. Hughes*, 108 Fed. 497, 47 C. C. A. 459. In the latter case the court, in discussing a nonwaiver agreement, said:

"Like the forfeiture provisions of the policy, above referred to, if not more strictly, the language of this agreement should be construed strongly against the company, and liberally in favor of the insured."

The third and fourth assignments raise the question whether jewelry and a microscope, of the aggregate value of \$277.17, were covered by the policy. The clause in the policy reads:

"\$1,220 on stock of merchandise consisting chiefly of drugs and such other merchandise, not more hazardous, usual to trade."

[9] It is not necessary for us to decide whether or not these articles are such as are usual to a general drug store, because there is no provision in the policy limiting the nature of merchandise to such articles as are usual to the drug or any other trade. The words "and such other merchandise, not more hazardous, usual to trade," are printed, and there is a blank space before the word "trade," in which, if the insurance company had desired to limit their liability for loss to drugs strictly, or to any other class of goods, they could have inserted the words of limitation. They did not do this, and under the policy the plaintiff could carry any article of merchandise usual "to trade." The plaintiff in error cannot complain that this construction is too technical, because in asking to have these articles excluded from those for the loss of which he would be liable he is asking this court to be technical and construe the contract strictly against the insured, so as not to cover liability for loss of anything not peculiarly appertaining to the drug trade. In effect, he asks us first to construe the contract liberally in his favor, and infer that the "drug trade" was meant, and, having done this, then to construe it strictly in his favor and exclude liability for anything not unquestionably included in that term. Such a construction would re-

verse the well-settled rules of this and other states that "the provisions of a policy limiting or avoiding liability are strictly construed against the insurer, and liberally in favor of the insured." *L'Engle v. Scottish Union & National Fire Ins. Co.*, 48 Fla. 82, 37 South. 462, 67 L. R. A. 581, 111 Am. St. Rep. 70, 5 Ann. Cas. 748; *Caledonian Ins. Co. v. Smith*, 65 Fla. 429, 62 South. 595, 47 L. R. A. (N. S.) 619; *Queen Ins. Co. v. Young*, 86 Ala. 424, 5 South. 116, 11 Am. St. Rep. 51; *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 20 South. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17. As there is no question that jewelry and a microscope are articles usual to trade, and the policy containing no words of limitation as to the kind of trade, we find no error in the ruling of the court in admitting evidence in relation to the loss of these articles.

The fifth assignment relates to the admission in evidence of a letter, dated April 10th, signed by J. T. Dargan, Jr., addressed to Whitfield & Thomas, upon the grounds that the proposition contained in the letter was merely an offer of compromise. We have already covered that contention. The introduction of the letter, however, was objected to upon the further grounds that it "related to a policy other than the policy in suit." This letter was from J. T. Dargan, Jr., who signed it as adjuster. It is dated from "Southern Adjustment Bureau, Jacksonville, Florida, Office, April 10, 1915." The testimony shows that Mr. Dargan was one of the parties who went to Malone shortly after the fire and spent part of two days investigating and adjusting the loss. It is true he says in this letter that the facts and circumstances of the claim have been duly submitted to the "British America Assurance Company," and no mention is made of the Palatine Insurance Company, the defendant below; but there was introduced in evidence another letter with same heading, and from the same party, dated April 30, 1915, with the caption "Re Claim Stock Drugs, Store Furniture and Fixtures and Soda Fount, Malone, Florida, Fire February 23, 1915, Connecticut Policy No. 1006, New York Underwriters' Policy No. 20400 and Palatine Policy No. 50067," which says that:

"The Connecticut Fire Insurance Company, the New York Underwriters' Agency, and the Palatine Insurance Company are willing, in a spirit of compromise though neither admitting nor denying liability under their several policies above mentioned, and more particularly reserving all rights and defenses which they may have thereunder, to pay in final settlement 40 per cent. of the amounts of their respective policies. This, you will note, permits the payment under stock item of \$688, under furniture and fixture item of \$312, and under item covering soda fount of \$400."

This letter is in almost the same phraseology as the one of April 10th, and contains the same offer, and is on the same subject. No objection was made to the introduction of this letter, and as there was nothing in the letter of April 10th that was not fully

covered in the letter of April 30th, no harm could come from the introduction of the former, and if error was committed by the lower court in permitting its introduction, it was harmless error, and no ground for reversal.

[10] The sixth assignment relates to the denial of the defendant's motion for a new trial. The third to the eighth grounds of the motion relate to the charges of the court, and present a very serious question, and if the charges had not been subsequently corrected would have been reversible error. The circuit judge was very specific in giving these charges. He read the first, second, and third pleas in full, but before doing so he charged that:

"The burden of proof is upon the defendant to prove these pleas after the plaintiff has proven the contract of the insurance and the loss under it; then defendant must prove by a preponderance of the evidence these pleas which undertake to set up a forfeiture of the contract."

After reading the first, second, third, and fourth pleas, the circuit judge charged in each instance that the burden of proof was on the defendant to prove his pleas by a preponderance of the evidence. He then charged that there were then other pleas, similar to the fourth, which there was no necessity to read, but to each of them he charged that the burden was on the defendant to prove them by a preponderance of the evidence. He read the seventh plea to the jury, and charged them that the burden of proving the plea by a preponderance of the evidence rests upon the defendant. Before completing his charge the judge corrected the error of these charges in the following language:

"Gentlemen of the jury, the court desires to correct a part of the charge first given you by charging you that the burden of proof in this case is upon the plaintiff to prove his replications to the pleas of the defendant, and not upon the defendant to first prove its pleas, because the pleas are practically confessed by plaintiff's replications, and if the plaintiff has proved his replications, or any of them, by a preponderance of the evidence, then he has successfully avoided the force and effect of such pleas to which he has filed and proven his replications, and you would find for the plaintiff upon such plea or pleas."

This court realizes that harm may be done a litigant by a trial judge in erroneous charges emphatically and specifically given, the effect of which may not be entirely remedied by a correction in a few words at the end of the charge; but we think there was no such error in this instance as to warrant a reversal upon that ground alone.

[11] The tenth ground in the motion for a new trial is the refusal of the trial judge to give the following charge:

"I charge you that, if in this case the adjuster of the insurance company called upon the plaintiff for the inventory and the plaintiff, Mr. Whitfield, or Mrs. Whitfield, acting for him, stated that the inventory was lost or destroyed, and failed to produce same, and has never produced it for the inspection of the insurance company, and then the adjusters merely looked at the ledger entries of the plaintiff as to the

amount of goods on hand, and did not request of plaintiff duplicate bills as to the goods, or put him to other expense or trouble, there would be no waiver as to the goods, and you should find a verdict for the insurance company as to the insurance on goods amounting to \$1,220."

This charge did not fully and correctly state the facts in connection with this transaction, and was not applicable to them, and was properly refused.

[12] The twelfth ground of the motion for a new trial is the refusal of the trial judge to give the following charge:

"There would be no waiver of the provision requiring the production of the inventory, if the acts done by the defendant's adjusters, relied on as a waiver, were induced by the statements of the plaintiff that the inventory was burned or lost, and in fact it was not so burned."

The testimony in this case does not sustain the inferences and conclusions of fact recited in this charge. There is nothing to show that the acts done by the defendant's adjusters were induced by the statements of the plaintiff that the inventory was burned. Mr. Whitfield testified:

"I did not tell Mr. Von Hasselen that I didn't have an inventory at all. No, sir; I did not tell him that I had made an inventory, but that the inventory was burned and I couldn't produce an inventory. I told him we couldn't produce the original invoices. I did not show him the inventory on this book here that I am showing you. He wasn't asking for anything at that time; that was on the day when he took, I don't know what you call it; it was before the other fellow was there."

Mr. Von Hasselen, the defendant's adjuster, testified:

"I visited Malone, representing this insurance company, shortly after the fire. I saw Mr. Whitfield, the plaintiff here, when I was in Malone. I did not demand production of the inventory required by the policy. I asked him if he had it. He said he did not have it. I asked him about his books, whether or not he had kept his books according to the iron safe clause. He said he had; said he had a record of his purchases and his sales. He said he did not have the inventory."

#### "Cross-Examination.

"I believe I explained to him what I meant by inventory. There is only one meaning to an inventory. I asked him if he had his last inventory. He did not show me the amount of it on his ledger. He showed it to Dargan. Mr. Dargan is an adjuster for this company. He was there for the purpose of investigating this loss, the same as I was; we were working together. I do not remember the kind of book he showed Mr. Dargan, I did not see the book."

This is the entire testimony of Mr. Von Hasselen. The other adjuster, Mr. Dargan, was not called as a witness. There is no contention that the plaintiff did not take an inventory as provided for in the policy. Mrs. Whitfield and Mr. Whitfield testified fully as to the taking of the inventory, which was begun about the 12th of January, 1915, and ended on the 28th of that month. The fire occurred February 23, 1915. The inventory was produced in court and exhibited in evidence. We find no error in refusing this charge.

The grounds in the motion for a new trial

that the verdict was contrary to law and contrary to the evidence are disposed of in the discussion of the other questions raised by the assignments of error.

We find no reversible error in the record, and the judgment of the lower court is affirmed.

TAYLOR, SHACKLEFORD, WHITFIELD,  
and ELLIS, JJ., concur.

(73 Fla. 601)

TAYLOR et al., Board of County Com'rs, v.  
STATE ex rel. MILLER et al.

(Supreme Court of Florida. March 8, 1917.  
Rehearing Denied April 17, 1917.)

(Syllabus by the Court.)

1. COUNTIES  $\S$  35(1) — COUNTY SITE ELECTIONS—CONSTRUCTION OF STATUTE.

Laws 1911, c. 6239,  $\S$  10, as amended by chapter 6480, Laws 1913 of Florida (Comp. Laws 1914,  $\S$  834d), is not applicable to any county that has constructed a new courthouse within the past 20 years, unless the courthouse is built of wood and the county site is not located on any line of railroad transportation.

[Ed. Note.—For other cases, see Counties, Cent. Dig.  $\S$  38-41.]

2. COUNTIES  $\S$  35(1) — COUNTY SITE ELECTIONS—CONSTRUCTION OF STATUTE.

As the county site of Pinellas county is located on a line of railroad transportation and the courthouse of the county was erected therein within the past 20 years, Laws 1911, c. 6239,  $\S$  10, as amended by chapter 6480, Laws 1913 of Florida, is not applicable to Pinellas county.

[Ed. Note.—For other cases, see Counties, Cent. Dig.  $\S$  38-41.]

Error to Circuit Court, Pinellas County;  
O. K. Reaves, Judge.

Mandamus by the State of Florida, on relation of M. P. Miller and others, against John S. Taylor and others, as the Board of County Commissioners of Pinellas County. Peremptory writ issued, and respondents bring error. Reversed.

J. S. Davis, of St. Petersburg, and Jas. F. Glen and Sparkman & Carter, all of Tampa, for plaintiffs in error. Lunsford & De Vane, of Tampa, for defendants in error.

WHITFIELD, J. At the instance of resident citizens and taxpayers who were relators, an alternative writ of mandamus was issued by the circuit judge commanding the county commissioners of Pinellas county to meet and receive a petition praying for a change of the county site of the county "and act upon the same, and call an election for the purpose of choosing and locating the permanent county site of said county, and that said election be called and held as required by law," or to show cause for not doing so. The respondents filed the following return:

"(1) That the permanent county site of Pinellas county was located, and intended both by the Legislature and by the voters of Pinellas county to be located, at Clearwater in pursuance of the

election held on the second Tuesday in November, A. D. 1911, under the provisions of section 21 of chapter 6247, Acts of 1911, creating Pinellas county, and the said chapter 6247 would not have been accepted by the voters of Pinellas county, or the said election carried, unless upon the consideration that Clearwater should be the permanent county site of said county, all of which was well known to the relators and to the citizens and voters of Pinellas county, and it was agreed by common consent of the citizens and voters of Pinellas county, including the relators, that Clearwater should be the permanent county site of the said county for the purpose of carrying the said election, and in order to carry such election, and without such agreement the said election could not have been carried.

"(2) These respondents deny that no permanent courthouse, jail, or other permanent county building has been erected in Pinellas county since the same was created, and aver that the present county site is located at Clearwater, and Clearwater is a city located on two lines of railroad transportation, to wit, the Atlantic Coast Line and the Tampa & Gulf Coast Railroad, and a new and substantial courthouse of wood, including the necessary county offices, was constructed at Clearwater, in the year 1912, at a cost of several thousand dollars, which ever since has been, and now is, the courthouse of said county; that in a former proceeding brought against the predecessors of these respondents it was determined and decided by the Supreme Court of Florida, in the case of State ex rel. v. S. S. Coachman et al., as County Commissioners of Pinellas County, 64 Fla. at page 478, 60 South. 344, that the provisions of chapter 6239, Laws of Florida, Acts of 1911, applied to Pinellas county, and under the provisions of said act these respondents are without power or authority to call an election to change the location of said county site prior to the year 1932, wherefore they declined and refused to entertain or consider the petition of the relators, or pass upon the sufficiency thereof to require them to call an election as therein prayed."

This return was sustained on demurrer and motion to quash. A demurrer to the following replication was overruled:

"(3) And for a third replication to the said return of the respondents herein, the relators say that the effect of chapter 6247 of the Laws of Florida, and of the election held thereunder on the second Tuesday in November, 1911, as alleged in said return, was to establish at Clearwater a temporary county site only, for Pinellas county, and that there has not been constructed in Pinellas county any permanent courthouse or any courthouse intended by the county commissioners of Pinellas county to be a permanent courthouse for said county; that the building or structure which was at the time of the filing of the petition for election, as alleged in the petition for an alternative writ herein, being used and occupied by the county commissioners and other officials of said county as temporary quarters for the transaction of the official business of said county of Pinellas, is a cheap, wooden building inadequate and insufficient for the use of the officials of said county in the transaction of the official business of said county which said building never was, at the time of the erection thereof nor since, considered or treated by the county commissioners of said county as a permanent courthouse for said county, and which said building was not, when constructed, upon land belonging to the said county of Pinellas, but that the said building was constructed as a subterfuge and with the fraudulent intent and purpose on the part of the county commissioners of said county, of avoiding an election for a change in the location of the county site, at which time of the erection of the said



structure a petition was pending before the board of county commissioners of said county of Pinellas praying for an election for a change of the location of the county site of said Pinellas county; that since the erection of the said structure now so occupied by the said county commissioners and other officials of said county as temporary quarters for the transaction of their official business an election has been called and held by the county commissioners of said county and a bond issue voted for the purpose of raising funds with which to purchase a county site for said county and the construction of a courthouse and jail, and that such bonds have been by the said board of county commissioners sold and funds raised which are now in the possession or at the command of the board of county commissioners of said county with which to construct, and which funds are by the said board of county commissioners held for the purpose of constructing a substantial courthouse and jail for said county, and it is the intention of the said board of county commissioners of said county to erect a new, adequate, and permanent courthouse for said county of Pinellas with such funds as soon as the question of the location of a permanent county site shall be legally determined."

The following rejoinder was filed:

"That it is untrue that there has not been constructed in Pinellas county any permanent courthouse or any courthouse intended by the county commissioners to be a permanent courthouse for said county, and that on the contrary a building or structure now in use as a courthouse was constructed in the year 1912 at a cost of several thousands of dollars with the intention and purpose of constituting a permanent courthouse for said county, and the said courthouse was then adequate and sufficient for the use of the officials of the said county in the transaction of the official business of the said county and has continued to be until the present time; that it is untrue that the said building when constructed was not upon land belonging to the said county of Pinellas, and it is not true that the said building was constructed as a subterfuge with the fraudulent intent and purpose on the part of the county commissioners of said county of avoiding an election for the change of the location of the county site, and these respondents aver that the said courthouse was constructed in perfect good faith; that it is true a petition had been filed for an election for the change of the location of the county site at the time of the construction of the said courthouse, but the said petition had not been signed by the requisite number of qualified electors who were taxpayers to require or authorize the county commissioners to call an election, and at the time of constructing the said courthouse it was well known to the county commissioners and to all of the citizens of Pinellas county, Fla., that the act of the Legislature creating Pinellas county had been passed under an agreement that Clearwater should be the permanent county site of said county, and it was further well known to the county commissioners and to all of the citizens of Pinellas county, Fla., that the election held in pursuance of the act aforesaid would not have carried but for the said agreement that Clearwater should be the county site of said county, and the county commissioners of said county constructed the said courthouse for the purpose of permanently locating the county site at Clearwater and preventing a breach of faith upon the part of citizens who are agitating the question of removal of the county site."

A demurrer to the rejoinder was sustained, and a peremptory writ of mandamus was issued, the command thereof following that contained in the alternative writ. The respondents took writ of error and contend

that the court erred in overruling the demurrer to the third replication, in sustaining the demurrer to the rejoinder, and in granting the peremptory writ of mandamus.

[1, 2] The proceedings herein are for the enforcement of steps taken to hold an election to change the county site of Pinellas county pursuant to the provisions of chapter 6239, Acts of 1911, section 10 of which chapter is amended by chapter 6480, Acts of 1913, to read as follows:

"That section ten (10) chapter 6239, Laws of Florida, be amended so as to read as follows: 'Section 10. The provisions of this act shall not apply to any county having constructed a new courthouse within the past twenty years, other than a county having constructed a courthouse of wood, in which the county site is situated in any town or city not located on any line of railroad transportation, and any person or persons, firm or corporation using money, goods or chattels to secure votes or influence for any place as the county site of any county in this state, shall, upon conviction thereof, be imprisoned in the state penitentiary not exceeding two years.'"

As the return avers that a courthouse was constructed in Clearwater in Pinellas county in 1912, and that Clearwater is the county site of Pinellas county and is a city located on two lines of railroad transportation, chapter 6239 is not applicable, since section 10 of such chapter as amended by section 1, chapter 6480, set out above, in effect enacts that the provisions of the act shall not apply to any county having constructed a new courthouse within the past 20 years, unless the courthouse is built of wood and the county site is not located on any line of railroad transportation.

In this case, "the county having constructed a new courthouse within the past 20 years," and "the county site is situated in" a town that is "located on a line of railroad transportation," the provisions of chapter 6239 as amended do not authorize the holding of the election contemplated.

Even if "the effect of chapter 6247 of the Laws of Florida, and of the election held thereunder on the second Tuesday in November, 1911, \* \* \* was to establish at Clearwater a temporary county site only," as alleged, yet as the pleadings show an election to change and establish the county site involved here is not authorized by chapter 6239 under which the election is sought, the peremptory writ of mandamus was erroneously ordered.

Though chapter 6239 was applicable to Pinellas county before the amendment of 1913 to section 10 of the act, that amendment excludes Pinellas county from the operation of the act, since as shown by the pleadings the courthouse in that county, though built of wood, was constructed within the past 20 years, and the county site is located on a line of railroad transportation.

Reversed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and ELLIS, JJ., concur.



(73 Fla. 817)

MCKINNON v. LEWIS et al.

(Supreme Court of Florida. April 2, 1917.)

*(Syllabus by the Court.)***DISCOVERY**  $\S$ 40—**INTERROGATORIES**—**TITLE**.

Under section 1969, General Statutes, either party to a suit in ejectment may avail himself of the proceedings by interrogatories provided by sections 1534 and 1535, to obtain a disclosure from the other party of the title and every link thereof upon which such other party sues or defends.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 52, 53.]

Error to Circuit Court, Jackson County; D. J. Jones, Judge.

Ejectment by Attaway McKinnon against Amos E. Lewis and others. Judgment for defendants, sustaining their exceptions to plaintiff's interrogatories and plaintiff brings error. Reversed.

See, also, 72 South. 370; 74 South. 606.

D. L. McKinnon, of Marianna, for plaintiff in error. Will H. Price, of Marianna, for defendants in error.

**PER OURIAM.** A former writ of error herein was dismissed, no final judgment being shown. McKinnon v. Lewis, 72 Fla. —, 72 South. 370. Subsequently a final judgment for the defendants was rendered, and the plaintiff took writ of error to such final judgment.

The action is in ejectment, and trial was had on a plea of not guilty.

Section 1969 of the General Statutes of 1906 provides that:

"Either party to a suit in ejectment may avail himself of the proceedings by interrogatories provided by sections 1971 and 1972, to obtain a disclosure from the other party of the title and every link thereof, upon which such other party sues or defends."

The sections "1971 and 1972" mentioned should be sections "1534 and 1535" of the General Statutes of 1906. Investment Co. v. Trueman, 63 Fla. 184, 57 South. 663.

Under this statute the plaintiff filed the following interrogatories:

"The defendant Amos E. Lewis is hereby required to file in this court within ten days, written answers, under oath, to the following interrogatories, to wit:

"First. State fully and in detail all the evidence you depend upon as your defense in this suit; state what kind of title you rely upon. If you claim under deed, attach a copy of each and every one with indorsements on same that you claim under to your answer.

"Second. State whether you deeded this land to J. R. Lewis and he deeded it to W. A. & E. C. Lewis. State who was in possession of this land in the year 1909; and, if you say W. H. Barton, state whom he was claiming under.

"Third. If in answer to your first interrogatory you say that you claim under deed, state with certainty and in detail, who took possession for you, when, and who was in the house at the time and prior and under whom did he claim title.

"Fourth. If you state that you claim title through deed from the Citizens' State Bank of

Marianna, Fla., state the date of consideration, if any, the date of the deed, the date when deed was delivered to you, and the date that you had same recorded, and did you not know that at the time that plaintiff had a deed to this land and same was recorded and that he was claiming under same."

To these interrogatories the defendant filed exceptions as follows:

"First. That said interrogatories, and each of them, are concerning matters that pertain entirely to the defense of this defendant and in no wise are material to the plaintiff in making out this cause of action, if any he has.

"Second. That said interrogatories, and each of them, are not of such nature or character as to which a bill for discovery would lie upon the chancery side of the docket.

"Third. That said interrogatories and each of them are not necessary in order to establish plaintiff's cause of action, but are merely inquiries to ascertain the defendant's ground of defense to the suit brought against him.

"Wherefore, this defendant prays the judgment of the court as to whether or not he shall be required to make other or further answer to said interrogatories, or any of them."

These exceptions were sustained. This ruling might have been proper under section 1534; but under section 1969, the plaintiff was entitled to propound the interrogatories. Reversed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITEFIELD, and ELLIS, JJ., concur.

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(73 Fla. 810)

NELSON v. HALL.

(Supreme Court of Florida. March 31, 1917.)

*(Syllabus by the Court.)***1. PLEADING**  $\S$ 872—**FAILURE TO DENY**—**EFFECT**.

Material allegations or averments contained in a pleading which are not denied by the opposite party are for the purposes of the trial considered to be not in issue.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1212-1216.]

**2. PLEADING**  $\S$ 371—**IMMATERIAL ISSUE**.

An immaterial issue may be tendered, and, if accepted, the parties may go to trial upon it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1211.]

**3. TRIAL**  $\S$ 139(1)—**TAKING CASE FROM JURY**—**EVIDENCE**.

A trial court should not withdraw a case from the jury by giving a peremptory instruction for either party unless there is no evidence before the court that could in law support a verdict contrary to the one directed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341.]

**4. TRIAL**  $\S$ 143—**DIRECTION OF VERDICT**.

Where the trial court directs a verdict for one party to a cause, and the evidence is conflicting upon the issue on which the cause was tried, and there is evidence to support a contrary verdict, such action of the court will be deemed to be reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343.]

**5. SALES**  $\S$ 176(5)—**ACTION FOR PRICE**—**ISSUE**—"FULL."

Where the issue upon which a cause was tried was whether certain machinery was in

"full" operation, the word "full" is construed to mean that the machinery was complete in its essential parts or capable of perfect operation.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 441.

For other definitions, see Words and Phrases, First and Second Series, Full.]

Error to Circuit Court, Dade County; H. Pierre Branning, Judge.

Suit by Edwin Nelson against R. E. Hall. Judgment for defendant, and plaintiff brings error. Reversed.

Hudson, Wolfe & Cason, of Miami, for plaintiff in error. John O. Gramling, of Miami, for defendant in error.

ELLIS, J. The plaintiff in error brought suit in the circuit court for Dade county against R. E. Hall upon three promissory notes, each dated March 20, 1908. There were five counts to the declaration. Three of them were based on the three promissory notes. The other two were common-law counts for materials furnished and money paid by the plaintiff to the defendant at his request. The declaration alleged that the three notes were made by the defendant, R. E. Hall, and payable to the International Harvester Company of America, by that company indorsed to the Miami Hardware Company, which indorsed them to the plaintiff, Edwin Nelson.

To this declaration the defendant interposed two pleas, which in substance averred that the notes were given for the purchase of an "engine, pump, and other machinery" to be set up and water supplied on the land of defendant on or before September, A. D. 1908. It was averred, in substance, that the defendant agreed to purchase from the International Harvester Company an irrigating plant consisting of engine, pump, and other machinery to be set up and water supplied on defendant's land, and that an "appliance would be furnished which would be attached to said machinery, so that the engineer in charge could turn all the pipes at one time, or with drum attached to engine the pipes would be turned automatically." The first plea averred that the machinery was not installed and water flowing as agreed, and that the defendant, relying upon the promises made by the agents of the International Harvester Company, planted a crop on the lands, and the crops failed on account of the unsatisfactory manner in which the machinery was set up and the lack of parts which was agreed to be furnished, and defendant lost his entire crop, and the machinery and irrigating plant was worthless to him because the promise of the agents of the company had not been complied with.

The second plea averred that among other promises the agents represented that the irrigating plant would be in first-class condition in every respect; and, although part of the machinery was placed on the land, the machinery was not installed and water

flowing as agreed; that the defendant, relying on the promises made, planted a crop which failed on account of the unsatisfactory manner in which the machinery was set up and the lack of parts which was agreed to be furnished, and the defendant lost his entire crop, and the machinery and plant was worthless to defendant because of the failure of the corporation to comply with its promises, and that the plaintiff was not a bona fide holder of the notes for a valuable consideration and without notice, and that when the notes were signed the agent of the International Harvester Company represented to defendant that the notes would not have to be paid until all the machinery was in perfect condition, and that the plaintiff and the International Harvester Company had failed and refused to put the same in perfect condition.

To these pleas the following replication was filed:

"Comes plaintiff, and for a third replication to defendant's first and second additional pleas says that the pump, engine, piping, and fittings for which the notes sued on were given in payment were delivered to defendant in the fall of 1907, and said machinery had been set up and was in full operation and use by defendant more than 4½ months before the notes sued on in this cause were executed and delivered by defendant to the International Harvester Company of America, and that at the time defendant executed said notes he had, or by the exercise of reasonable diligence could have had, full knowledge that the said machinery had been set up and water supplied on or before November 1, 1907, and had full knowledge that no appliances had been furnished to be attached to said machinery so that the engineer in charge could turn all the pipes at one time or with drum attached to the engine would be turned automatically and that with such knowledge defendant executed and delivered the several notes sued on in payment for said machinery and thereby waived any delay in the setting up of said machinery and thereby waived the alleged defects in said machinery and the absence of such turning device."

[1, 2] According to a well-established rule of pleading, allegations or averments that are material to the cause of action or defense which are not denied by the opposite party are for the purposes of the trial considered to be not in issue. The reason for the rule is that the parties may by their pleadings produce a single issue which is the object of the common-law system of pleading. If an immaterial issue is tendered it may be accepted and the parties go to trial upon it. See *Cotton States Belting & Supply Co. v. Florida R. Co.*, 69 Fla. 52, 67 South. 568; *New York Life Ins. Co. v. Mills*, 51 Fla. 256, 41 South. 603; *Evans v. Kloeppel*, decided at the June term, 1916, 73 South. 180.

The replication ignored the averments of the two pleas as to the consideration for which the notes were given, and that in the agreement for the purchase of the machinery it was provided that an appliance would be furnished which would be attached to the machinery so that the engineer could turn all the pipes at one time, or with drum at-

tached to engine the pipes could be turned automatically. It also ignored the averments as to the failure to comply with such agreement, and averred the fact to be that the machinery, pump, engine, pipes, and fittings had been set up and were in full operation and use by the defendant for more than four months before the notes sued on were executed and delivered, and that the defendant had thereby waived the alleged defects in the machinery. In other words, the defendant had by the execution and delivery of the notes several months after the machinery, pump, engine, pipes, and fittings had been set up by the seller and used by the defendant waived the objection that the seller had failed to comply in every particular with the agreement of sale, particularly the agreement to furnish the appliances to be attached to the machinery.

The defendant accepted the issue and the parties went to trial.

It is contended by plaintiff in error that there was evidence to support the issue of fact tendered by the replication, viz. that the notes were executed and delivered four months after the machinery, pump, engine, pipes, and fittings had been set up by the seller on the defendant's land, and was in full operation and use by defendant.

The court, however, instructed the jury to return a verdict for the defendant, which they did. A judgment was entered thereon, to which the writ of error was taken.

[3, 4] The trial court should not withdraw a case from the jury by giving a peremptory instruction for either party unless there is no evidence before the court that could in law support a verdict contrary to the one directed by the court. If there is evidence to support a different verdict, or the evidence is conflicting upon the issue on which the cause is tried, the court errs if he withdraws from the jury the consideration of such evidence, thereby usurping their province and substituting his judgment upon the facts for theirs. *McKinnon v. Johnson*, 57 Fla. 120, 48 South. 910; *Bass v. Ramos*, 58 Fla. 161, 50 South. 945; *Wood v. Gipson*, 63 Fla. 318, 58 South. 364.

The principle announced above was expressed in the following language in the cases cited:

"A charge directing a verdict for the defendant should never be given unless it is clear that there is no evidence whatever adduced that could in law support a verdict for the plaintiff. If the evidence is conflicting, or will admit of different reasonable inferences, or if there is some evidence tending to prove the issue presented by the plaintiff, it should be submitted to the jury as a question of fact, and not taken from them and passed upon by the judge as a question of law."

The parties are entitled to a jury trial, and where there is evidence received in behalf of one party to support the issue, and it is legally sufficient, he is deprived of his jury trial if the court directs a verdict for the

other party. Although after verdict rendered the court may set it aside and grant a new trial, and such order be sustained on writ of error, it does not follow that in such case a directed verdict for the party upon whose motion the new trial was granted would have been proper. See the discussion in *Carney v. Stringfellow et al.*, 74 South. 808, decided at the present term.

[5] It is admitted by defendant in error in the briefs of counsel that the single issue at which the parties arrived was:

"Had the 'plant' been in full operation for the time averred in the replication when the notes were executed and delivered by the defendant?"

The word "full" was used as an adjective, and carries the meaning of "complete," "entire," "perfect," in describing the noun "operation." See Webster's New International Dictionary. As applied to the machinery, or its operation, we think the word as used conveyed the meaning that the machinery was complete in all its essential parts, and that it was capable of perfect operation.

We think that the testimony of Edwin Nelson, who said that "the machinery and piping and everything was set up and water flowing about the 1st of November, 1907," that during that time the defendant made no complaint to Nelson about the "machinery or anything about it," again, "At the time the notes were executed by Mr. Hall he made no complaint whatever as to any defects in the piping or machinery or anything of that kind;" also the testimony of W. F. Miller, who said, "The material was all right; it was working satisfactory; if there were any defects in the machinery nobody knew anything of it; the engine was all right, the pump all right, the pipes carried the water without leakage and the nozzles threw all the water that was required of them;" "this plant was set up and in operation in the early part of November, 1907;" "I inspected the whole apparatus when it was put up; I was there when the water was turned on and many times after; I inspected every part of it to see it was complete and working all right;" also the testimony of L. M. Snell, who testified that the defendant had a place near that of the witness, and that in 1907 an irrigating plant was put up on the defendant's place; "the plant began to furnish water on the land and went in operation about the month of November, 1907; I was right there by it; you might say I examined it; I was right there by it daily, continuously; it did the work all right"—and the testimony of others, was quite sufficient, if believed by the jury, to support the issue as tendered by the replication and accepted by the defendant.

The peremptory instruction therefore was erroneous, and the judgment is reversed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and WHITFIELD, JJ., concur.

(73 Fla. 589)

**BIBB v. UNITED GROCERY CO.**

(Supreme Court of Florida. March 7, 1917.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR §1078(6) — ASSIGNMENTS OF ERROR—OVERRULING MOTION FOR NEW TRIAL.**

In treating an assignment of error based upon the overruling of the motion for a new trial, an appellate court will consider only such grounds of the motion as are argued before it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4261.]

**2. TRIAL §295(2), 296(1) — INSTRUCTIONS — CONSTRUCTION AS ENTIRETY.**

In determining the correctness of charges and instructions, they should be considered as a whole, and, if as a whole they are free from error, an assignment predicated on isolated paragraphs or portions, which, standing alone, might be misleading, must fail. In passing upon a single instruction or charge, it should be considered in connection with all the other instructions and charges bearing on the same subject, and if, when thus considered, the law appears to have been fairly presented to the jury, an assignment predicated upon the giving of such instruction must fail, unless under all the peculiar circumstances of the case the court should be of the opinion that such instruction or charge was calculated to confuse, mislead, or prejudice the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-707.]

**3. APPEAL AND ERROR §1031(6)—REVIEW—INSTRUCTIONS.**

In determining the correctness of charges and instructions, they should be considered as a whole; but, where a special charge or instruction in itself announces a patently erroneous proposition of law, it must affirmatively and clearly appear that the presumptive harm caused thereby has been entirely removed, or the judgment should be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038, 4045, 4046.]

**4. APPEAL AND ERROR §1064(4)—REVIEW—LANGUAGE OF INSTRUCTION.**

Even though some of the language used in portions of the general charge and instructions of which complaint is made was not so happily chosen as might have been, an appellate court cannot be expected to apply the principles of absolute precision and technical nicety in construing the same. It is sufficient to determine that no reversible error has been made to appear therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4224.]

**5. FACTORS §66—DEFENSES—SPECIAL INTEREST—QUESTION FOR JURY.**

In an action of replevin instituted by a wholesale grocery house against its factor to recover the possession of a certain stock of goods, store fixtures, and appliances, and under the evidence adduced the only interest which the defendant had therein, if any, was a special interest, and there was some conflict in the testimony as to such special interest, such point is properly submitted to the jury for determination by appropriate instructions from the court.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 96-103.]

**6. SUFFICIENCY OF EVIDENCE.**

Evidence examined and found sufficient to support the verdict.

Error to Circuit Court, Duval County; Daniel A. Simmons, Judge.

Action of replevin by the United Grocery Company, a corporation, against Daniel T. Bibb. Verdict and judgment for plaintiff, and defendant brings error. Affirmed.

W. M. Toomer and W. H. Surrency, both of Jacksonville, for plaintiff in error. Marks, Marks & Holt, of Jacksonville, for defendant in error.

**SHACKLEFORD, J.** The United Grocery Company, a corporation, instituted an action of replevin against Daniel T. Bibb to recover the possession of:

"All of that certain stock of groceries, goods, wares and merchandise, together with all store fixtures and appliances that were on the 30th day of March, A. D. 1914, located in that certain store situated on the southeast corner of Main and Ashley streets, in Jacksonville, Duval county, Florida, said store being numbered 527 Main street, of the value of, to wit, \$3,000.00."

No point is made on the pleadings, the declaration being in the usual form, and the defendant filing a plea of not guilty. The defendant gave no forthcoming bond, and a trial was had before a jury upon the issues made by the pleadings, which resulted in a verdict in favor of the plaintiff, upon which judgment was duly rendered and entered, which judgment the defendant has brought here for review.

[1] The only assignment of error is based upon the overruling of the motion for a new trial. In accordance with our established practice, we shall consider only such grounds thereof as have been argued before us, treating the other grounds as having been abandoned. *Smith v. State*, 65 Fla. 56, 61 South. 120.

The fifth, sixth, and eighth grounds of the motion are based upon the giving of certain instructions at the request of the plaintiff, numbered 8, 10, and 12, which instructions are as follows:

"(8) I further charge you that if you should find a verdict in favor of the defendant when you come to fix the value of the property, you are not to find the whole value of the merchandise and fixtures described in the declaration, because under the evidence in this case all of that property actually belonged to United Grocery Company. Therefore, in such event, you can only find the value of the defendant's special interest in that property, and not what the property itself was worth."

"(10) Before you can find a verdict in favor of the defendant, the evidence in this case must produce in your minds the belief that:

"First, on the 30th day of March, 1914, the defendant was entitled to continue in possession of the goods replevined, and

"Second, that the right to continue in possession arose directly out of some special property that the defendant had in the goods replevined, and

"Third, that this special property in the goods had a definite money value, and what the amount of that value was."

"(12) I further charge you, gentlemen, that, under the oath taken by you, the only issue in this case for you to determine is which of these parties was entitled to the possession of the merchandise and fixtures on the 30th day of March, 1914, and if you find for the plaintiff

to fix the value of said merchandise and fixtures, which under the evidence admittedly belonged to the plaintiff, and if you find for the defendant to fix the value of his special property in the said merchandise and fixtures, if any he had. In deciding this case, you have nothing to do with the question of whether the United Grocery Company owed Bibb any money, or whether Mr. Bibb owed the United Grocery Company any money; for such damages under the law cannot be recovered in an action of replevin. If, as a result of the business transactions between these parties, either one owed the other any sum of money by way of an accounting, shortage, or what not, the party to whom it is owed, whether it be the United Grocery Company or Mr. Bibb, may bring a separate suit to recover such sum of money, and judgment in this case will have no bearing whatever upon that right."

[2, 3] All of these grounds are argued together. We call attention to the fact that the trial court of its own motion gave a general charge to the jury and also a number of instructions at the request of the plaintiff. So far as is disclosed by the transcript, the defendant requested no instructions. We have repeatedly held that:

"In determining the correctness of charges and instructions, they should be considered as a whole, and if, as a whole, they are free from error, an assignment predicated on isolated paragraphs or portions, which, standing alone, might be misleading, must fail. In passing upon a single instruction or charge, it should be considered in connection with all the other instructions and charges bearing on the same subject, and if, when thus considered, the law appears to have been fairly presented to the jury, an assignment predicated upon the giving of such instruction must fail, unless under all the peculiar circumstances of the case the court is of the opinion that such instruction or charge was calculated to confuse, mislead, or prejudice the jury." *Pensacola Electric Co. v. Bissett*, 59 Fla. 360, 52 South. 367.

It is true that we also held in the same case, wherein we followed prior decisions of this court and to which ruling we have subsequently adhered, that:

"In determining the correctness of charges and instructions, they should be considered as a whole; but, where a special charge or instruction in itself announces a patently erroneous proposition of law, it must affirmatively and clearly appear that the presumptive harm caused thereby has been entirely removed, or the judgment should be reversed."

We also held in *Wood Lumber Co. v. Gipson*, 63 Fla. 316, 53 South. 364, that:

"In passing upon an assignment questioning the correctness of the ruling of the trial court in denying a motion for a new trial, which is based upon the sufficiency of the evidence to sustain the verdict, the question thereby presented to an appellate court is whether or not the jurors acting as reasonable men could have found such verdict from the evidence adduced. If this question can be answered in the affirmative, the action of the trial court upon such motion should not be disturbed."

[4, 5] In passing upon the three specified instructions of which complaint is made, it will be advisable to keep the above-enunciated principles in mind. In the absence of any contention to the contrary, we are warranted in assuming that the defendant had no fault to find with any portion of the gen-

eral charge of the court or with any of the other instructions given at the request of the plaintiff, and also that the defendant did not see any necessity for requesting any other or further instructions himself. Did any one of the three instructions complained of announce "a patently erroneous principle of law," and, if so, does it "affirmatively and clearly appear that the presumptive harm caused thereby has been entirely removed"?

We have carefully considered these three instructions in connection with the charge of the court and the other instructions given, in the light of the issues made by the pleadings and the evidence adduced at the trial, aided by the briefs of the respective counsel, and have been unable to find any error therein which would warrant a reversal of the judgment. The defendant correctly states in his brief that "the relation of the parties here was that of a wholesale grocery concern to its factor." What that relation was is disclosed by a written agreement or contract which had been made by the plaintiff and the defendant and which was introduced in evidence by the plaintiff, without objection by the defendant. There is no occasion to set this contract out in full, as it is somewhat lengthy. It is sufficient to state that, among other provisions, it contains the following:

"(1) The first party agrees to consign and deliver to the second party such merchandise of the kind dealt in and handled by the first party as may be reasonably necessary to the proper conduct of the store of the second party, upon the terms and conditions hereinafter set forth.

"(2) That the first party agrees to allow the second party a discount of 10 per cent. on all goods sold and paid for (except those purchased from third parties) by the second party, such discount to be payable at the end of each calendar month upon the aggregate of all cash sales of merchandise, except sales of goods and merchandise purchased for cash from third parties as hereinafter provided, made during the said month.

"(3) The first party agrees to allow the second party a drawing account of \$25.00 per week, provided that the total of the sums so drawn shall be charged against and deducted from the discount referred to herein in paragraph 2.

"(4) The first party agrees to accept as cash from the second party, paid and receipted invoices for such goods and merchandise as the second party shall buy for cash from third parties by and with the expressed consent and not otherwise.

"(5) The second party covenants and agrees to accept all goods and merchandise, whether received from the first party direct or whether purchased from third parties with the consent and approval of the first party, as goods and merchandise consigned by the first party to the second party, it being especially understood and agreed that at all times, the title to and right of property in all of the goods and merchandise in the store of the second party shall be in the first party, and that the second party shall at all times hold himself ready to account to the first party upon demand for the said goods and merchandise or for the invoice price thereof."

Under these provisions, at best, the only interest which the defendant had in the goods and fixtures was a special interest, and, as to whether or not the defendant had such special interest therein there was some conflict

in the testimony, therefore such point was properly submitted to the jury for determination. See 34 Cyc. 1536, 1568; Shinn on Replevin, §§ 629, 635, 652, 684; Cobbey on Replevin (2d Ed.) §§ 1072, 1136, 1148. Numerous authorities will be found cited in the notes appended in these authorities.

[8] The only remaining grounds of the motion which are argued, the twelfth and thirteenth, contend that the verdict rendered is contrary to the law and the evidence. To this contention we cannot agree. The evidence is amply sufficient to support the verdict, and it has not been made to appear to us wherein it is contrary to law.

The judgment will be affirmed.

BROWNE, C. J., and TAYLOR, WHITEFIELD, and ELLIS, JJ., concur.

(73 Fla. 658)

BIBB v. UNITED GROCERY CO. et al.  
(Supreme Court of Florida. March 14, 1917.)

(Syllabus by the Court.)

TRIAL  $\S$  139(1) — DIRECTED VERDICT — STATUTE.

Under the provisions of section 1496 of the General Statutes of 1906, as amended by chapter 6220 of the Laws of Florida of 1911 (Comp. Laws 1914, § 1496), a verdict is properly directed for the defendant, when it is apparent to the judge of the circuit court, after all the evidence shall have been submitted on behalf of the plaintiff in a civil case, that no evidence has been submitted upon which the jury could lawfully find a verdict for the plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341.]

Error to Circuit Court, Duval County; Daniel A. Simmons, Judge.

Action by Daniel T. Bibb against the United Grocery Company and others. Judgment for defendants on motion of each defendant for a directed verdict, and plaintiff brings error. Affirmed.

W. M. Toomer and W. H. Surrence, both of Jacksonville, for plaintiff in error. Marks, Marks & Holt, of Jacksonville, for defendants in error.

PER CURIAM. Daniel T. Bibb brought an action at law against the United Grocery Company, a corporation, and B. G. Lasseter, which both the plaintiff and the defendants concur in their briefs in stating "is an action on the case for a malicious abuse of process in the nature of a conspiracy to break up and destroy the plaintiff's business." No point is made on the pleadings, and we see no occasion to set them out. The case was tried before a jury, and at the close of the plaintiff's evidence each of the defendants filed a motion upon several grounds for a directed verdict, which motions were granted and the jury instructed to find a verdict in favor of the defendants, which the jury did, and judgment was entered accordingly.

The two errors assigned are based upon

the overruling of the motion for a new trial, the grounds of which are that the court erred in directing a verdict in favor of the defendant, and in the exclusion of a certain designated paper proffered by the plaintiff in evidence. An examination of all the plaintiff's evidence convinces us that the plaintiff had signally failed to prove his case; therefore no verdict could have been lawfully returned in his favor. This would have been true, even if the excluded paper had been admitted in evidence. Under the provisions of section 1496 of the General Statutes of 1906, as amended by chapter 6220 of the Laws of Florida (Acts of 1911, p. 191), the direction of the verdict by the trial judge was proper.

The judgment will be affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITEFIELD, and ELLIS, JJ., concur.

(73 Fla. 694)

HOWARD v. STATE.

(Supreme Court of Florida. March 24, 1917.)

(Syllabus by the Court.)

1. HOMICIDE  $\S$  142(7) — INDICTMENT — PROOF AND VARIANCE — INSTRUMENT.

There is no fatal variance between the allegation and the proof of the instrument with which a wound is inflicted, if the instrument used produces, or is capable of producing, the same kind of a wound as the instrument charged in the indictment.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 256.]

2. HOMICIDE  $\S$  142(7) — ASSAULT WITH INTENT TO MURDER — VARIANCE.

Under an information which charges an assault with intent to murder by shooting another with a deadly weapon, to wit, a shotgun loaded and charged with gunpowder and leaden balls, a conviction will be sustained on proof that the wound was inflicted with bird shot fired from a gun in the hands of the accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 256.]

3. HOMICIDE  $\S$  90 — ASSAULT WITH INTENT TO KILL — "DEADLY WEAPON."

A shotgun loaded with gunpowder and bird shot is a deadly weapon when an assault is made with it on a person within the range of the gun to kill or do great bodily harm to the person assaulted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 119.]

For other definitions, see Words and Phrases, First and Second Series, Deadly Weapon.]

Error to Circuit Court, Columbia County; M. F. Horne, Judge.

Nathan Howard was convicted of an aggravated assault, and he brings error. Affirmed.

A. J. Henry, of Lake City, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

BROWNE, C. J. The plaintiff in error, indicted in the circuit court of Columbia coun-

ty for an assault with intent to murder, was found guilty of an aggravated assault and sentenced to confinement at hard labor in the county jail for a period of six months. He seeks reversal by this court on writ of error.

The charging part of the indictment is as follows:

"That Nathan Howard, late of said county, on the 15th day of April, A. D. 1916, in the county and state aforesaid, with force and arms, and with a deadly weapon, to wit, a shotgun loaded and charged with gun powder and leaden balls, and which he the said Nathan Howard then and there had and held in his hands, in and upon one Mack Caesar, unlawfully, of and from a premeditated design to effect the death of the said Mack Caesar, did make an assault; and the said Nathan Howard did then and there unlawfully, of and from a premeditated design to effect the death of the said Mack Caesar, shoot off and discharge the leaden balls aforesaid out of the shotgun aforesaid at, toward, against, upon, and into the body of the said Mack Caesar."

The errors assigned for which plaintiff in error contends are based upon the refusal of the circuit judge to give to the jury this special instruction in law requested by him:

"The proof must show that the shotgun admittedly used in the encounter was loaded with powder and leaden balls, and, whatever you may believe of the guilt of the defendant in other respects, you cannot convict the defendant if you believe from the evidence that the gun was loaded with small shot instead of leaden balls."

The only evidence of how the gun was loaded was given by the defendant, who testified it was loaded with "bird shot." The plaintiff in error cites dictionary definitions to show the distinction between the terms "leaden balls" and "shot." Thus from the Standard Dictionary: Leaden balls: "Any spherical or conoid projectile larger than a small shot." Shot: "A spherule or pellet composed principally of lead, several of which are used for one loading of a firearm; used chiefly in shooting small game."

The Encyclopedic Dictionary, which he cites, defines shot, "small spherical pellets of lead used for shooting birds and other small game," and ball (leaden) as "a bullet; a globular piece of metal designed as a projectile to be expelled from a musket or rifle." The Standard Dictionary, however, gives as its first definition of ball, "a globular or spherical body of any dimensions," and in its synonyms for shot gives "ball, bomb, bomb-shell, bullet, canister, chainshot, grape, grape-shot, lead, missile, projectile, shell, shrapnel, slug." Soule's Dictionary of English Synonyms gives for ball, "missile (of fire-arms), bullet, shot, projectile," and for shot he gives "ball, bullet, missile, projectile." We therefore fail to find any authority in the lexicons for drawing such a distinction between the words "leaden balls," and "bird shot," as to make the use of the one in the indictment and of the other in the proof a fatal variance.

[1] If, however, such a distinction were made by the dictionaries, we would not be

limited by them, because it is a well-settled principle of the common law that:

"Where the instrument laid and the instrument proved are of the same nature and character, there is no variance." Wharton's Criminal Law (11th Ed.) § 652.

Continuing, this high authority says:

"Thus evidence of a dagger will support the averment of a knife."

And he lays down the doctrine that:

Where it is proven that the deceased was killed by an instrument "capable of producing the same kind of death as the instrument stated in the indictment, the variance will not be material." Id. § 652.

[2, 3] In the case of Drummer v. State, 45 Fla. 17, 33 South, 1008, third headnote, this court held that:

"Under an indictment which charges an assault with intent to murder by shooting with a pistol, a conviction may be had on proof that the shooting was done with a gun, the two weapons being the same in character and inflicting the same character of wound."

If there is no fatal variance where the instrument laid is a pistol, and the instrument proven is a gun, there can be none where the variance is merely in the size of the missile with which the gun or pistol is loaded. The fact that a gun loaded with large shot will kill at a greater distance than one loaded with bird shot does not preclude the latter from being a deadly weapon within the range of its killing capacity; neither will the fact that the wound inflicted was not a deadly one, support the contention of the plaintiff in error that a gun loaded with bird shot discharged at a person about six feet away, as in this case, is not a deadly weapon.

In the case of Regina v. Warman, 2 Car. & K. (61 E. O. L.) 195, the indictment charged the prisoner with killing his wife "with a certain instrument called a 'swingle', made of wood, iron, and leather." The evidence showed that her death had been effected by a blow on the head given with "a piece of wood." The court said:

"In a case of homicide it is sufficient if the mode of death is substantially proved as laid, and I think that here the death is sufficiently shown to have arisen from a stroke feloniously given by an instrument held by the prisoner."

In the case of Goodwyn v. State, 4 Smedes & M. (12 Miss.) 520, the indictment charged that the mortal wound was "given with a gun loaded with powder and one leaden bullet." The proof was that the gun was loaded with "duck shot." The defendant requested the trial judge to charge the jury:

That, "if they believed from the evidence that the deceased came to his death by means of the shot aforesaid, and not by one leaden bullet discharged from said shotgun as alleged in the bill of indictment, they must find a verdict for the accused."

This charge the court refused, but charged the jury:

"That the said proof was sufficient to sustain the said bill as alleged in the indictment."

In passing on the charges requested by the defendant, the Supreme Court of Mississippi said:

"The charge requested was clearly properly refused. The instrument by which the death is caused need not necessarily be strictly proved as laid in the indictment, and proof of its having been caused by any other instrument capable of producing death in a similar mode, satisfies the indictment in that respect."

In the Mississippi case the variance between the allegation and the proof was somewhat greater than in the instant case, in that in the former the allegation was that the gun was loaded with "one leaden ball," and in the case under consideration the allegation is "leaden balls." Shot, according to the American Standard, range in size from No. 12, the smallest, to No. 1, and then the size is designated by letters; B being the next largest in size to No. 1, and increasing until TTTT is reached, which are quite large. The gradation in size is very gradual, and it would be impracticable to accept the distinction sought to be made by plaintiff in error, and determine just when these pellets of varying sizes cease being shot and become leaden balls. The instrument with which the wound was inflicted in this case was "shot," and this term is sufficiently comprehensive to embrace all projectiles propelled by high explosives out of any instrument of death, from the smallest shot known as mustard seed, to the largest armor-piercing shot used in ordnance.

There was no material variance in the description of the instrument which inflicted the wound, as laid in the indictment and the instrument proved, and there was no error in the court refusing to give the charge complained of. As the evidence fully sustained the verdict, we find no reversible error.

The judgment is affirmed.

TAYLOR, SHACKLEFORD, WHITEFIELD,  
and ELLIS, JJ., concur.

(141 La. 144)

No. 21099.

BORDES v. BANK OF ST. BERNARD.

(Supreme Court of Louisiana. May 10, 1915.  
On the Merits, March 12, 1917. Re-  
hearing Denied April 16, 1917.)

(Syllabus by Editorial Staff.)

1. APPEAL AND ERROR  $\S$  795(2)—DISMISSAL OF APPEAL—GROUNDS—MOTION.

Allegations in a motion to dismiss the appeal that it was not taken and filed within the required delay, that the transcript was not complete, and that the certificate of the clerk is not such as the law requires because it showed that certain documents were not included in the transcript, are too vague and general to be considered, and the first ground named does not raise the objection that the appeal bond was filed more than 12 months after the date of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig.  $\S$  3143.]

2. APPEAL AND ERROR  $\S$  797(1)—DISMISSAL OF APPEAL—MOTION—TIME FOR MAKING—IRREGULARITIES.

A motion to dismiss an appeal because of delay in filing the bond and of omissions from the

transcript is based on mere irregularities, which cannot be considered, unless the court's attention was called thereto within 3 days from the filing of the transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig.  $\S$  3149, 3150.]

3. APPEAL AND ERROR  $\S$  322—PARTIES—APPELLEES—JUDGMENT FOR ONLY ONE DEFENDANT.

Where plaintiff brought suit against a bank in contract for refusal to honor his checks, and a suit in tort against one who has garnished the bank and thereby caused it to dishonor his checks, and both defendants filed exceptions to the petition, a judgment in favor of defendant bank and against plaintiff sustaining the exception of no cause of action filed by defendant and dismissing plaintiff's suit at his cost is a judgment only between plaintiff and the bank, so that the other defendant is not a necessary party to an appeal therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig.  $\S$  1795-1797.]

On the Merits.

4. GARNISHMENT  $\S$  230—EFFECT AS BETWEEN DEFENDANT AND GARNISHEE.

A bank is excused from performing its agreement to honor checks of a depositor to the amount of a note and mortgage delivered by him to the bank where the note and mortgage were garnished by another, even though the garnishment was void, since the bank would not have accepted the note subject to a void garnishment, and the depositor had therefore failed to perform his agreement.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig.  $\S$  435-444.]

5. GARNISHMENT  $\S$  230—EFFECT AS BETWEEN DEFENDANT AND GARNISHEE.

The fact that the garnishment was on a judgment for a sum less than the note and mortgage does not require the bank to honor the depositor's checks up to the amount of the excess of the note over the garnishment, since the note would have had to be sold to satisfy the judgment, and the bank was not bound to accept a joint tenure when it had bargained for a sole tenure, nor bound to bother itself with a litigation.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig.  $\S$  435-444.]

Appeal from Twenty-Ninth Judicial District Court, Parish of St. Bernard; R. Emmet Hingle, Judge.

Action by Joseph Bordes against the Bank of St. Bernard and another. From a judgment in favor of the defendant bank and against the plaintiff sustaining the exception of no cause of action filed by defendant, and dismissing plaintiff's suit, plaintiff appeals. Motion to dismiss the appeal denied and judgment affirmed.

Fernand F. Teissier and Oscar Schreiber, both of New Orleans, for appellant. Olivier S. Livaudais, of New Orleans, for appellee.

PROVOSTY, J. Motion is made to dismiss this appeal on the following grounds:

"(1) That said appeal was not taken and filed within the required delay as fixed by law.

"(2) That the transcript herein filed is not complete, and does not contain all the documents pertaining to same.

"(3) That all parties were not made and cited to this appeal.

"(4) That the certificate of the clerk is not



such as the law requires, as it shows certain documents as not being included in the transcript."

[1, 2] We learn from the brief that the first of these grounds of dismissal is based upon the fact that the bond of appeal was filed more than 12 months after the date of the judgment. As an allegation of that fact the language of the motion to dismiss is too vague and general. Vague and general allegations will not support a pleading in this court any more than in the trial court. The same generality and vagueness is found in the language of the second and fourth grounds. These three grounds are not stated with sufficient particularity to call for consideration. But we will add that even if well pleaded they could not avail, as they are based on mere irregularities which in order to serve for the dismissal of an appeal would have had to have been called to the attention of the court within 3 days from the filing of the transcript; and the motion to dismiss in this case was not filed within that time. *Corell v. Welsh*, 120 La. 558, 45 South. 438; *Barton v. Burbank*, 119 La. 227, 43 South. 1014.

[3] The facts in connection with the allegation of want of proper parties, constituting the third ground of dismissal, are as follows: The suit originally was against the Bank of St. Bernard alone, in damages for failure to honor the checks of plaintiff. The reason of the bank's refusal was that the collaterals which were to serve as security for the payments which were to be made for plaintiff were garnished by one Leon Bouziques. The bank filed an exception of no cause of action. Before this exception had been fixed for trial, plaintiff filed a supplemental petition, alleging that the garnishment had been illegal, and asking for judgment in solido against the bank and Bouziques. The suit against Bouziques was in tort; that against the bank was originally on contract, and continued to be so. No allegation was made in the supplemental petition connecting the bank in any way with the alleged tort. To this supplemental petition the bank filed the same exception as to the original petition: That it showed no cause of action. The exception to the original petition had not stated why a cause of action was not stated. That to the supplemental petition did so. It averred that no cause of action was shown for the reason that the bank was justified in refusing to make further payments after the collateral security had been garnished.

The reason assigned by Bouziques in his exception why the petition showed no cause of action against him was that the petition did not deny that the garnishment had issued upon a judgment.

The minutes read that "the exception" was fixed for trial; that "the exception" was argued and submitted; and that the court rendered the following judgment:

"It is ordered, adjudged and decreed that there be judgment herein in favor of defendant Bank of St. Bernard, and against plaintiff, Joseph Bordes, sustaining the exception of no cause of action herein filed by defendant, and dismissing plaintiff's suit at his costs."

One day short of 12 months thereafter plaintiff filed a petition for appeal, in which he alleged and prayed as follows:

"That a judgment in favor of the Bank of St. Bernard, one of the defendants herein, was rendered and signed on December 15, 1913; that said judgment is contrary to the law and the evidence; and that petitioner is aggrieved thereby and desires to appeal therefrom devolutive to the honorable Supreme Court of the state of Louisiana.

"Wherefore petitioner prays that an order of appeal devolutive from said judgment, returnable, \* \* \* and further prays that the Bank of St. Bernard be cited. \* \* \*"

The court made its order in conformity with this prayer; that is to say, granted the order of appeal and directed the Bank of St. Bernard to be cited.

The question presented is whether, under the foregoing circumstances, Bouziques was a necessary party to the appeal.

It will be noted that the minutes read that "the exception," in the singular, not the exceptions, in the plural, was fixed for trial and tried; and that the judgment is in favor of "the defendant, Bank of St. Bernard," with no mention of Bouziques.

According to this, Bouziques was no party to the judgment.

But it will be noted, on the other hand, that by the judgment the suit for plaintiff is dismissed with no reserve as to Bouziques; in other words, is dismissed as to both defendants, apparently.

The cause of action against the bank not having been the same as that against Bouziques, and the minutes and the judgment not showing positively that the cause of action as against Bouziques was passed on, we think that the situation must be taken to be that the judgment was only as between plaintiff and the bank, and that therefore Bouziques was not a party to it, and is not interested in its maintenance, and was properly left out of the appeal.

The motion to dismiss is therefore overruled.

#### On the Merits.

Plaintiff alleges that he and the defendant bank entered into an agreement in pursuance of which he placed in the hands of the bank a certain mortgage note, and the bank agreed to honor his checks up to the full amount of said note; and that a judgment having been obtained in another parish against him, and garnishment process having issued upon this judgment and been served upon the bank, the latter, by reason thereof, refused to honor his checks—to his damage, etc., for which he prays judgment.

An exception of no cause of action was sustained, on the ground that, in view of the said garnishment, the bank was no longer bound to honor the checks.

Against that position the plaintiff contends that garnishment cannot issue from one parish to another upon a judgment; and that therefore the said garnishment was null, and could be, and should have been, disregarded by the bank.

[4] Whatever merit there may be in the contention that the garnishment proceeding was null, we are of opinion that, such as the garnishment was, it had the effect of bringing a change in the situation such as justified the bank in no longer honoring the checks. When the agreement was entered into, this note was perfectly good, and plaintiff's title to it was unclouded. The defendant bank would not have accepted it, would not have made the agreement, if the situation had been otherwise; if, for instance, garnishment process had already been levied upon the note. It would have made no difference that counsel learned in the law might have advised that the garnishment proceeding was null, and that the courts would so hold; the bank would have required the note to be first cleared of the garnishment seizure before it would accept it as the equivalent of a cash deposit, and pay out its money on that hypothesis. Plaintiff's part of the agreement was therefore to furnish this note in this untrammelled and unclouded condition. The effect of the garnishment was practically to cause plaintiff to fail to carry out that part of the agreement; and the failure of plaintiff to carry out his part of the agreement was good reason for the bank's refusal to carry out its part.

[5] The note was for \$2,500, and the garnishment called for only \$500. The checks were for less than \$2,000. Plaintiff contends that, at any rate, the garnishment was no excuse for not carrying out the agreement up to the amount of this margin of \$2,000.

The answer is threefold: (1) That the note would have had to be sold to satisfy this \$500; (2) the bank was not bound to accept a joint tenure when it had bargained for a sole tenure; (3) it was not bound to bother itself with a litigation when nothing of that kind had entered into its bargain.

Judgment affirmed.

SOMMERVILLE, J., concurs.

(41 La. 150)

No. 22348.

STATE v. MCINTOSH.

(Supreme Court of Louisiana. March 12, 1917.  
Rehearing Denied April 16, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW §=1166½(6) — APPEAL — VOIR DIRE EXAMINATION OF JURORS.

Where, in the examination, on voir dire, of proposed jurors, defendant adopts a line of inquiry obviously intended to be directed to all the jurors, with a view of ascertaining their opinions upon a question, to arise in the case, which he considers important to his interest, and the

inquiry is suppressed by the ruling of the trial judge, defendant is entitled to a review of such ruling, on the appeal, even though he may not have exhausted his peremptory challenges in the impaneling of the jury, since, if the inquiry was competent, the error in the ruling was never cured or rendered harmless, as he must have been compelled to accept all the jurors by whom he was tried, without knowing the views of either of them upon the question about which he sought information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8115, 3118.]

2. JURY §=131(8) — VOIR DIRE EXAMINATION — SCOPE.

In the examination of proposed jurors on voir dire, defendant is not entitled to inquire concerning their opinions as to the credibility of witnesses upon whom he expects to rely; such an inquiry being unreasonable and calculated to confuse and obstruct the administration of criminal justice.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 568.]

3. CRIMINAL LAW §=1088(5) — AFFIDAVIT OF JURORS — CONSIDERATION.

Where an affidavit, by jurors in a criminal case, which tends to show misconduct on the part of the jury, appears in the transcript of appeal, in connection with a motion for new trial, but does not appear to have been offered on the hearing of the motion, filed, or considered by the trial judge, and is not referred to in his ruling on such motion or in the bill reserved thereto, it will not be considered by this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2789.]

4. CRIMINAL LAW §=889 — VERDICT — CORRECTION.

Unless a verdict has been received and recorded, it is competent for the court to order the jury to correct it, if it be illegal and unauthorized, and return a verdict which may be given effect.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2109, 2110, 2112.]

Appeal from Seventh Judicial District Court, Parish of Richland; John R. McIntosh, Judge.

John H. McIntosh was convicted of murder, and he appeals. Affirmed.

See, also, 136 La. 1000, 68 South. 104.

George Wesley Smith, of Rayville, for appellant. A. V. Oco, Atty. Gen., and C. J. Ellis, Dist. Atty., of Rayville (T. R. Hodge, of Rayville, Percy Sandel, of Monroe, and Vernon A. Oco, of Marksville, of counsel), for the State.

MONROE, C. J. [1] 1. Defendant, through counsel, excepted to the ruling of the trial court sustaining an objection, made by the prosecuting officer, to certain questions propounded on behalf of defendant in the examination, on voir dire, of F. Tillman, a prospective juror. The questions are summarized in the brief of counsel as follows:

"If accepted as a juror, are you willing to accept as evidence, and give due weight to the testimony of experts as to the cause, effect, treatment, and cure of insanity, and that, in their opinion, the long-continued use of morphine (drugs) will result, under given conditions, in insanity, maniacal outbursts and irresistible insane impulses." (Objected to for the reason

that it is an improper question to ask a juror on his voir dire, there being no such question pending before him, and that (it is) to ask him to prejudice the testimony before the case is tried.)

We discover from the record that the prospective juror to whom the questions were propounded did not serve on the jury by which defendant was tried, but it does not appear whether he was challenged for cause, or peremptorily, and, if so, by whom, and it is admitted that defendant did not exhaust his peremptory challenges; from which it is argued by the state that defendant "has failed to show wherein he was injured, in that he does not show that he was forced to accept this juror," or, it may be said, any other juror who was objectionable to him by reason of the exhaustion of his challenges. Counsel for defendant, on the other hand, contends that it was unnecessary that his peremptory challenges should have been exhausted in order to entitle him to relief in the case as presented.

"To so require," he argues "would force the accused to ask questions of the first twelve men and then challenge, and this would be unreasonable and very nearly, if not quite, contempt of court. The question was not permitted, and it was then that defendant was not permitted to select an unprejudiced and unbiased jury. If a juror is prejudiced against, and unwilling to accept, the very class of evidence defendant relies upon to establish his defense, it matters very little that the juror has no bias for or against the accused, and has neither formed nor expressed an opinion as to the guilt or innocence of the accused. \* \* \* The mere fact that a juror may show himself to be a competent juror in answer to the set and usual questions propounded to him on his voir dire does not, by any means, conclude the examination. The defendant ought to be allowed to ask such further questions, within reasonable limits, as will disclose any tendencies of mind or reason which, in the opinion of the defendant, would make the juror unacceptable."

We concur in the view expressed by defendant's counsel to the extent that we do not consider the well-established rule invoked by the state applicable to the condition here presented. That rule is predicated on the idea that, while the purpose of the Constitution and statutes is to obtain an impartial jury in every case, the rejection of a particular juror has no tendency to prevent the accomplishment of that purpose, quoad the defendant in a criminal case, so long as he has not exhausted his peremptory challenges before the jury is completed, since, until then, he has it in his power to challenge any juror whom he may consider partial or incompetent.

In this case, however, the purpose of defendant's counsel was to ascertain the views, not only of the proposed juror, but of others to be tendered, upon the matter concerning which the excluded questions were propounded, in order that defendant might be able to form an opinion as to whether the proposed jurors would be acceptable, and, according to his view, competent to serve in the case. It is obvious therefore that, if the matter in

question was a proper subject of inquiry, the suppression of that inquiry was the denial of a right, and the error, so committed, was never cured or rendered harmless, even though defendant had used none of his peremptory challenges, since he must have been compelled to accept all of the jurors by whom he was tried without knowing the views of either of them upon the question about which he sought information. We are therefore of opinion that he is entitled to a ruling upon the main question brought up; i. e., whether the views of the proposed juror, concerning the credibility of expert testimony, was a proper subject of inquiry.

It must be conceded that, though a juror be impartial as to the particular defendant on trial—having no prejudice, personal to him, either in his favor or against him—he may entertain views on other subjects which may disqualify him from trying such defendant, as, for instance, he may be a member of an association organized for the prosecution of the offense for which the defendant is to be tried, or may be particularly prejudiced against that offense, or against the business in which defendant is engaged, or the race of which he is a member, or upon so many other matters that may affect his judgment that the courts of last resort have been unable to establish any rule that can properly be applied in all the cases that arise and much is left to the discretion of the trial courts. Counsel for defendant concedes, and the authorities sustain that view, that the examination of a juror on his voir dire should be confined "within reasonable limits"; but he associates the idea of "reasonable limits" with such an inquiry as will satisfy the defendant, or, to use his language, "as will disclose any tendencies of mind or reason, which, in the opinion of the defendant, would make the juror unacceptable," whereas, as we understand it, the question of reasonableness vel non is to be determined by the courts, with reference to the recognized rules which govern the practical administration of justice in criminal cases. Considering, then, the immediate question presented, it would appear that if the credibility of the witnesses, upon whom a defendant in a criminal prosecution expects to rely, can be made the subject of investigation and discussion, as one of the incidents in the selection of the jurors by whom he is to be tried, the more notorious the depravity of such defendant and his witnesses, the greater the likelihood of his escaping trial altogether. If he be prosecuted for perjury and his sole witness be a person who has been many times convicted of that offense, it would, probably, be difficult, and perhaps impossible, to find a juror who would give "due weight" to the testimony of either; and, in any case, it would seem to be necessary to marshal the witnesses on either side and obtain from each juror, in advance of the trial, an opinion as

to the weight that he will give to the testimony of each witness, after he shall have heard it, and all that without any notice of an intention to impeach, and with the expectation that the trial judge will make a ruling which will necessarily involve an inferential expression of opinion upon a matter which our law has relegated to the jury, when impaneled and charged with the case, and concerning which it has prohibited the trial judge from intimating that he has any opinion.

In *Commonwealth v. Porter*, 4 Gray (Mass.) 423, the defendant's counsel, before the jury had been impaneled, offered to prove that some of the jurors had stated that they would believe a certain Howard, who was thereafter to be called as the main witness for the state, and whom defendant had, unsuccessfully, attempted to impeach, in a prosecution under another indictment. The trial court rejected the evidence, and its ruling was affirmed by the Supreme Judicial Court, where it was said:

"The counsel for the defendant proposed to inquire of the jury if they had formed and expressed any opinion as to the credibility of Howard. The court declined to have the question put. The inquiry was novel, and, if competent, would certainly be a great relief to persons indicted, who are anxious not to be tried; for just in the degree that the character of the witnesses to be called was well known and respected would the objection prevail. If the witness happened to be an individual known and revered by all his fellow citizens as a man without reproach, every member of the panel would have formed an opinion as to his credibility."

In *State v. Everitt*, 14 Wash. 574, 45 Pac. 150, a prospective juror was asked several questions, the substance of which was whether, in the event that defendant should take the stand as a witness, the fact, that he was charged with cattle stealing, would prejudice the juror against his testimony. The court, after referring to the peculiar position of a defendant in such case, appearing as a witness in his own behalf, and the law concerning his failure so to appear, proceeded as follows:

"Again, as to the other phase of the question, when the defendant enters a witness stand, he enters it under the same rules and on the same footing as any other witness, and he has no right to attempt to ascertain in advance what the jury may think of his credibility as a witness. All questions of this character would simply have a tendency to confuse and entrap jurors and render the selection of a legal juror almost impossible."

Our conclusion is that the examination proposed by defendant would have been unreasonable, would have established a bad precedent, which, if followed, would lead to confusion and obstruction in the administration of criminal justice, and that it was properly denied.

[2] 2. In a motion for new trial, to the overruling of which a bill was reserved, it is alleged (and the allegations are supported by an affidavit that appears in the record, signed by two of the jurors who served in

the case) that the foreman of the jury had stated to the other jurors, during their deliberations, that he would not believe under oath the main witness called, as an expert, by defendant (and who had testified that he had received defendant at his sanitarium a few months after the homicide, that he was then insane, and that the witness had treated him for the morphine habit and believed him to have been insane at the time of the homicide), and had made other statements of fact which were prejudicial to the character of said witness, none of which had been testified to on the trial, and which were untrue and calculated to prejudice the jury against defendant, and did induce one of the members to change from "not guilty," to "guilty," in the rendition of the verdict.

It does not appear from the transcript that the affidavit to which we have referred was offered in evidence, or even filed in the clerk's office, nor is it referred to in the minutes, or the ruling of the court. We must assume therefore that it was not admitted in evidence, or considered by the trial judge; and hence we are unable to consider it. We may say, however, that our examination of the many adjudged cases to which we have been referred by defendant's learned counsel has failed to satisfy us that they furnish authority for holding the instant case to be an exception to the rule that a juror cannot be heard to impeach his verdict.

[3] 3. It appears from the remaining bill (which has not been made the basis of any argument) that the jury, at first, brought in the verdict:

"We, the jury, find the defendant guilty as charged, and recommend him to the mercy of the court."

Whereupon they were asked by defendant's counsel if they understood that their verdict condemned the accused to be hanged, and, upon the reply from several of the jurors that such was not the verdict upon which they had agreed, the judge ordered them to retire for further deliberation, but, before doing so, instructed them as to the several verdicts, either of which might be returned, to which order and charge defendant's counsel objected and asked that a mistrial be entered; and, the objection having been overruled and the jury having retired, they again returned into court, with the verdict (quoting from the minutes):

"We, the jury, find the defendant guilty as charged, without capital punishment."

Whereupon each member of the jury was polled—

"and asked if that was his verdict, and, when the name of Clint Thompson was reached, he stated that he wished to have added to the verdict that the mercy of the court was asked, but that there was a misunderstanding and the foreman did not ask it, and, upon the clerk reading the verdict and asking if this was his verdict, after some delay, he stated that it was. To all of which proceedings counsel for defendant reserved a bill."

[4] We find no error in the ruling thus recited. The verdict, as originally returned, not having been received and recorded, was open to alteration by the jury. *State v. Jeanisse*, 125 La. 363, 51 South. 290. The penalty for murder being fixed by law, and a jury's recommendation of a person found guilty of that offense to the mercy of the court being futile, it is competent for the court to direct the jury to retire and return a verdict which may be given effect. *State v. Brannon*, 133 La. 1030, 63 South. 507.

Judgment affirmed.

(141 La. 157)

No. 20851.

ROOS v. ROGERS et al.

(Supreme Court of Louisiana. March 12, 1917.  
Rehearing Denied April 16, 1917.)

(Syllabus by the Court.)

1. MORTGAGES  $\S$  380 — FORECLOSURE — FORM OF PROCEEDING.

The holder of mortgage notes, executed by a nonresident, may sue to foreclose via *ordinaria* or via *executiva*, in the district court for the parish in which the mortgaged real estate is situated.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1144, 1145, 1154.]

2. MORTGAGES  $\S$  499 — FORECLOSURE — LEVY OF EXECUTION.

Where, in such a case, the holder sued via *ordinaria*, and obtained judgment both in rem and in personam, and caused a writ of *fieri facias* to issue, under which only the mortgaged property was seized and sold, *held*, that the writ was properly issued on the judgment for the seizure and sale of the mortgaged premises to pay and satisfy the mortgage debt; and that, as no other property of the defendant was seized under the writ, neither he nor his assigns have any grounds of complaint.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1478-1485.]

Appeal from First Judicial District Court, Parish of Caddo; J. R. Land, Judge.

Action by Ed. Roos against B. F. Rogers and others. From judgment for defendants, plaintiff appeals. Affirmed.

Lane, Wolters & Storey, of Houston, Tex., and Wise, Randolph, Rendall & Freyer, of Shreveport, for appellant. Alexander & Wilkinson, of Shreveport, for appellees.

LAND, J. In the case of *Rogers v. Binyon*, 124 La. 95, 49 South. 991, the plaintiff sued via *ordinaria* on three promissory notes executed by the defendant, and secured by special mortgage and vendor's privilege on certain lands sold by the plaintiff to the defendant.

By special stipulation in the act of sale and mortgage, the liability of the purchaser and maker of the notes was restricted to the property sold, and no proceedings were to be taken against the purchaser except to foreclose on the property.

The suit was brought against the defend-

ant, as a nonresident, represented by a *curator ad hoc*.

The petition prayed only for a judgment of foreclosure, but the judgment rendered was both in rem and in personam.

Under a writ of *fieri facias* issued on said judgment, the lands subject to the mortgage and vendor's privilege were seized and sold at sheriff's sale, and adjudicated to the plaintiff, Rogers.

Subsequently, the defendant, Binyon, prosecuted a devolutive appeal from said judgment.

On this appeal, the judgment was so amended as to make it one of foreclosure, to pay and satisfy the notes sued on, with interest, attorney fees, and costs.

Ed. Roos, the plaintiff in the present suit, purchased the same lands from Binyon, subject to the mortgage and vendor's privilege in favor of Rogers or other holder of the notes given for the purchase.

Rogers purchased the lands at the sheriff's sale on February 29, 1908, and conveyed the same to the Rogers Oil & Gas Company on August 30, 1909.

Roos filed the present suit against Rogers and the Rogers Oil & Gas Company on October 30, 1913, to recover said lands as owner by virtue of his title from Binyon.

Plaintiff's suit was dismissed, except as to ten acres of land, which the judge found was not included in the sheriff's sale.

Plaintiff has appealed, and the defendant has answered praying that the judgment be amended so as to reject plaintiff's demands in toto.

The plaintiff argues that said sheriff's sale was a nullity, because the judgment in personam on which it was based was subsequently reversed by the Supreme Court, and "there was no judgment in the case which would serve as a foundation for the issuance of a writ of *fieri facias*, which was made the basis of the sale to Rogers and Lewis, and that such a writ and sale should be declared a nullity."

Reduced to its essence, the plaintiff's contention is that a judgment in rem in a suit via *ordinaria* to foreclose a mortgage cannot be enforced by a writ of *fieri facias*, but must be executed by a writ of seizure and sale.

The writ of *fieri facias* issued in the suit of *Rogers v. Binyon* directed the sheriff to seize and sell "especially" certain described tracts of land to pay and satisfy the mortgage indebtedness recognized by the judgment.

No other property of the defendant was seized under the writ of *fieri facias*, which served the purpose of a writ of seizure and sale.

[1] In *Rogers v. Binyon*, *supra*, this court held that the district court had jurisdiction in rem, and that the plaintiff had the right to proceed either via *executiva* or via *ordinaria*, and in either case by substituted

service; and the opinion concludes as follows:

"We are therefore of opinion that, to the extent that plaintiff is seeking to enforce his rights against the real property found within the jurisdiction of the district court, the suit was properly brought and the judgment properly rendered, but the relief granted must be confined, not only under the law, but, under the contract sued on, to the property."

As the relief was confined to the property, the contention of the plaintiff is narrowed to the technical objection that the writ should have been one of seizure and sale, and not one of fieri facias.

The objection is one of form, and not of substance, as the property was sold in conformity with the terms and stipulations of the act of mortgage.

As Binyon appealed, and was represented in the appellate court by counsel of his own selection, the judgment of the Supreme Court is binding on him.

As the act of mortgage contained the pact de non alienando, the plaintiff Rogers had the legal right to issue a fi. fa. on his judgment, and to seize and sell the mortgaged property regardless of its sale to Roos, and without notice to or process against him. *Levy, Jr., v. Lake*, 43 La. Ann. 1034, 10 South. 375.

Roos, a stranger to the proceedings, had no standing to object to the sheriff's sale, as made under a writ of fieri facias, instead of a writ of seizure and sale.

[2] But we are of opinion that such objection has no force, as the judgment orders the payment of money, and a writ of fieri facias is the proper mode of enforcing such a judgment. C. P. 641.

On the other hand, executory process issues on an ex parte order of seizure and sale, based on an authentic act importing a confession of judgment, and containing a mortgage of privilege in favor of a creditor. C. P. 732.

In *Rogers v. Binyon*, supra, this court held that a mortgage creditor has the right to foreclose either by via ordinaria, or by via executiva.

This ruling is in accord with our jurisprudence on the subject-matter, which favors the former mode of proceeding, and even permits the creditor to convert his executory process into an ordinary suit. See *Dumonchel v. Lemerick*, 21 La. Ann. 31; *Brooks v. Walker*, 3 La. Ann. 150.

The plea of the plaintiff that the proceedings in *Rogers v. Binyon*, supra, deprived him of his property without due process of law, is without merit.

While the ten acres of land was included in the petition in the suit of *Rogers v. Binyon* for the foreclosure of the mortgage, it was expressly excepted from the judgment, the writ of fieri facias, the notice of seizure, and the sheriff's sale.

The small tract of land was not sold at

the sheriff's sale, and hence the title of the mortgagor to the property was not divested by the sale.

Doubtless, the small tract was excepted through clerical error; but intention cannot supply the place of judgment, writ, notice, sale, and adjudication.

Judgment affirmed.

SOMMERVILLE, J., concurs.

(41 La. 163)

No. 20794.

GASTON v. RAINACH.

(Supreme Court of Louisiana. March 12, 1917.  
Rehearing Denied April 16, 1917.)

(Syllabus by Editorial Staff.)

1. INFANTS §11—MINORS—EMANCIPATION  
PROCEEDINGS—FAILURE TO APPOINT TUTOR.

Under Rev. Civ. Code, art. 385, providing that the petition for emancipation shall be accompanied by the written assent of the tutor, if there be one, otherwise by that of a special tutor appointed for that purpose, a judgment of emancipation of a minor having no tutor, after proceedings in which no special tutor was appointed, is absolutely void.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 12.]

2. INFANTS §11—MINORS—EMANCIPATION  
PROCEEDINGS—SPECIAL TUTOR—CRUELTY.

Even if the abandonment of a minor by his father is cruelty within Rev. Civ. Code, art. 387, providing that consent of father or mother to emancipation is not necessary if the application is made on the ground of ill treatment, refusal to support or corrupt example, a petition for emancipation after the death of the minor's mother alleging that the father had left the parish 18 years ago and had never been heard of since, does not allege abandonment, since it does not show that the failure to return was the father's fault, and therefore does not sustain a judgment of emancipation in proceedings where no special tutor was appointed.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 12.]

3. INFANTS §11—MINORS—EMANCIPATION  
PROCEEDINGS—SPECIAL TUTOR—ABSENCE OF FATHER.

The ill treatment to which Rev. Civ. Code, art. 387, dispensing with consent of the father or mother if the application for emancipation is made on the ground of ill treatment, refers is that of a father living and present, and article 84, providing for the appointment of a provisional tutor for the children if at the time of the disappearance of the father the mother should be dead or if she should die during their minority, applies in case of the unexplained disappearance of the father and the death of the mother.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 12.]

4. GUARDIAN AND WARD §13(7)—TUTORSHIP—APPOINTMENT OF TUTOR—ORDERS OF CLERK.

Orders of the clerk of the proper court directing a family meeting to be heard and commissioning himself to hold it, and thereafter making the proceedings of the family meeting recommending plaintiff's appointment as tutor a judgment of the court, and issuing the letters of tutorship, in which it was recited that plaintiff had been appointed tutor, are equivalent to the appointment of plaintiff as tutor, though there was no formal order of appointment.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 47.]

Appeal from Third Judicial District Court, Parish of Claiborne; William C. Barnette, Judge.

Suit by J. E. Gaston, as tutor, against A. M. Rainach, to annul a sale made by the minor. Exception of no cause of action and of want of authority of plaintiff tutor were sustained, and plaintiff appeals. Judgment set aside, and case remanded.

Richardson & Richardson, of Homer, and Goff & Barnette, of Arcadia, for appellant. McClendon & McClendon, of Homer, for appellee.

PROVOSTY, J. In this suit a sale made by an emancipated minor is sought to be annulled on the ground that the judgment emancipating him was null, for the reason that it was procured fraudulently, and was rendered without the assent of a special tutor.

Exceptions of no cause of action and of want of authority of the plaintiff tutor to stand in judgment were sustained, the first, founded on the contention that the judgment of emancipation cannot be treated as an absolute nullity, and the second on the ground that no order appointing plaintiff as tutor has ever been made, and that, if such an order has been made, it is null, because a tutor cannot be appointed to an emancipated minor.

The father of the minor disappeared 18 years before the emancipation proceedings, when the minor was not yet born, and has not been heard of since. The mother died 5 years later. No tutor has ever been appointed.

[1] The emancipation proceedings were carried on without the appointment of a special tutor. This made them absolutely void, in the same way that a judgment rendered without citation is void. Article 385 of the Code, under which the proceedings were had, provides:

"This petition [for emancipation] shall be accompanied by the written assent of the tutor, if there be one, otherwise by that of a special tutor appointed for that purpose."

[2, 3] It is argued that the disappearance of the father was an abandonment of the mother and of the unborn child, and was cruelty to the child such as justified an emancipation without the intervention of a special tutor, under article 387 of the Code, reading:

"Art. 387. If any minor, desiring to avail himself of the provisions of the two preceding articles, has a father or mother living, the consent of the father or mother, or both, shall be necessary to authorize the judge to act; but such consent shall not be necessary if the application be made on the ground of ill treatment, refusal to support, or corrupt examples."

The only allegation in the petition for emancipation with reference to the father, or to any cruelty on his part, was that:

"He left this parish some 18 years ago and has never been heard of since."

Assuming that abandonment is cruelty within the intendment of this article of the Code, this allegation is not one of abandonment, as it does not show that the failure of the father to return was not due to causes beyond his control; and, moreover, the cruelty to which said article has reference, is evidently that of a father living and present, not that of one merely absent. In such a case of absence of the father and death of the mother the Code requires that a provisional tutor shall be appointed. Article 84. There is no merit, therefore, in this contention that the case was one in which the assent of a special tutor was unnecessary.

The minor was therefore unemancipated, and the appointment of a tutor was in order.

[4] On the question of whether the plaintiff tutor was in fact appointed, the facts are: That a petition was addressed to the court, alleging the necessity of a tutor being appointed, and asking that a family meeting be held to recommend some suitable person for appointment. That the clerk of court made an order on this petition directing this family meeting be held, and a commission to issue to himself to hold it; that he issued this commission to himself, and, by virtue of it, held the family meeting, and drew up the procès verbal of its deliberations and of its recommendation of plaintiff for appointment, and returned it into court. That a petition was filed in which the allegation was made that this family meeting had been held and had recommended that the plaintiff be appointed tutor, and in which the prayer was that the plaintiff be so appointed. That upon this petition the same clerk of court made the following order:

"By reason of the law and recommendations of the family meeting duly and legally convoked, it is ordered that the proceedings of said family meeting be allowed, homologated, and made the judgment of the court.

"Thus done and signed officially this May 23, 1914.

"[Signed] E. H. Fortson, Clerk Dist. Court."

That on the same day the same clerk of court administered to the plaintiff tutor the oath of office, and issued to him letters of tutorship, as follows:

"Tutorship of the Minor Heir, Zinnie Lee Williams.

"State of Louisiana, Parish of Claiborne.

"I, J. E. Gaston, of the above state and parish, do solemnly swear that I will well, faithfully, and impartially discharge and perform all and singular the duties incumbent upon me as tutor to the minor heir, Zinnie Lee Williams, of the parish of Claiborne, La., to the best of my ability and understanding so help me God.

"[Signed] J. E. Gaston.  
"Sworn to and subscribed before me this May 23, 1914.

"[Signed] E. H. Fortson, Clerk of Court.

"State of Louisiana, Parish of Claiborne.

"Whereas, by an order of the Third district court in and for the parish of Claiborne, La., J. E. Gaston has been appointed tutor to the minor, Zinnie Lee Williams, of the parish of Claiborne, and has taken the oath prescribed by law and the abstract of inventory therein made

having been duly inscribed in the mortgage records of the parish of Claiborne, La.:

"Now, therefore, he is fully commissioned, authorized and empowered to do and perform all the acts duties devolving upon him by law in said capacity and all such acts declared to be of full force and credit in law.

"Given officially this 23d day of May, A. D. 1914.

"[Signed] E. H. Fortson, Clerk of Court."

It would have been more regular to have made a formal order of appointment in express terms; but, the clerk of court being the proper authority for making the appointment, we think the foregoing acts of his are equivalent to an appointment.

That the absence of an express order of appointment of a guardian to a minor may be supplied by other proceeding equivalent to or implying an order, has been held in other jurisdictions, and, it is the impression of the writer, by this court, although he has not succeeded in finding the decision in the digests. 22 Cyc. 858; 10 Ency. Pl. & Pr. 664.

The judgment appealed from is set aside, and the case is remanded to be proceeded with according to law.

SOMMERVILLE, J., concurs.

(141 La. 166)

No. 22392.

#### STATE v. COLEMAN.

(Supreme Court of Louisiana. March 12, 1917.

Rehearing Denied April 16, 1917.)

(Syllabus by Editorial Staff.)

#### CRIMINAL LAW §1156(1)—REVIEW—DISCRETION OF COURT—DENYING NEW TRIAL.

Where the trial court in its discretion denied a motion to set aside a plea of guilty and grant a new trial on the ground that the evidence in aid of sentence had shown that defendant knew what he was doing when he entered his plea, and that the motion came too late as it was offered after sentence had been passed and judgment signed, the judgment denying the motion will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3067.]

Appeal from Thirtieth Judicial District Court, Parish of La Salle; F. E. Jones, Judge.

Elisha Coleman was convicted of a crime upon his plea of guilty, and, from a judgment refusing his motion to set aside his plea and grant a new trial, he appeals. Affirmed.

Perrin & Perrin, of Jena, for appellant. A. V. Coco, Atty. Gen., and C. W. Flowers, Dist. Atty., of Jena (Vernon A. Coco, of Marksville, of counsel), for the State.

PROVOSTY, J. The request of the accused that his plea of guilty and the sentence passed upon him thereon be set aside having been refused, he has appealed. A full statement of the case is contained in the solitary bill of exception in the case, and the per curiam thereon, as follows:

"Be it remembered that after the defendant in the above-entitled cause had pleaded guilty and been sentenced by the court to serve a sentence of not less than two nor more than four years, he filed a motion which is hereto attached, and made part hereof, in which he requested the court's permission to withdraw his former plea and go to trial on the issue for the reasons and on the grounds that he had been arrested, a bill of information filed against him, had been arraigned and had pleaded guilty all within an hour or two, without having had the advice of counsel or his father or any friend and having talked to no one but the officers of the court; that he was only 18 years old and knew not what his rights were in the matter; that he offered to produce evidence to show that he was unable to read and write, which was denied him upon the objection of the district attorney, the court having held that the motion came too late after plea.

"To all of which, the defendant through his counsel objected and excepted for the reason and on the grounds that, while it is within the sound discretion of the court to grant or refuse such motion, that discretion should be exercised in such contingencies, and a man who cannot read and write should not be sent to the penitentiary for forging and uttering as false.

"The court having overruled the defendant's motion to take testimony, the defendant objected and excepted and files this his bill of exceptions to the court's ruling and presents same to the district attorney and the court for approval and signature."

"Defendant was arrested on the 20th of December, 1916, and arraigned on the 21st day of December, 1916; before arraignment, the court explained to the defendant the nature of the charge against him, and asked the defendant if he desired to plead guilty as the court had been informed the defendant desired to enter a plea of guilty. Whereupon the defendant informed the court that he desired to enter a plea of guilty. Defendant then was arraigned and plead guilty.

"The court, desiring to know some of the facts by which to be guided in imposing the penalty of the law, ascertained that the defendant had presented spurious orders to the White Sulphur Lumber Company and had received the coupon books on same; that on the 20th of December, 1916, the day of his arrest, he had presented one of the spurious orders to the said company and had received a \$2 coupon book for same, and that identical coupon book was found in the possession of the defendant. The sheriff found the said coupon book hidden in the shoe of the defendant.

"For these reasons, the court was well satisfied that the defendant knew what he was doing when he entered a plea of guilty, and the court was further convinced that the ends of justice had been met and nothing could be gained by granting defendant a new trial.

"The motion for a new trial came too late, as same was offered to be filed after sentence had been passed and judgment signed. State v. Smith, 46 La. Ann. 1433, 16 South. 372.

"For the above reasons, the court refused to permit defendant to file motion for a new trial and refused to grant him same."

See, further, State v. George, 134 La. 861, 64 South. 800.

Judgment affirmed.

SOMMERVILLE, J., concurs.

➡ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes



(441 La. 168)

No. 20735.

**TOLEDO BRIDGE & CRANE CO. v. D. K. JEFFRIS & CO. (CONCORDIA LAND & TIMBER CO., Intervener).**(Supreme Court of Louisiana. March 12, 1917.  
Rehearing Denied April 16, 1917.)*(Syllabus by the Court.)***1. PLEADING**  $\S$  36(3) — **CONCLUSIVENESS — SHIFTING GROUNDS OF DEFENSE—OWNERSHIP OF ATTACHED PROPERTY.**

A defendant in attachment, sued for the price of the property attached, who sets up the defense that he acquired the property under a contract of sale and purchase, wherein he acted as the agent of a third person, who has intervened and claimed the property as owner by virtue of such contract, cannot thereafter shift his ground, and be heard to say that there was no contract, because the agreement between the buyer and seller was to have been reduced to writing, and was not so reduced.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 82.]

**2. SALES**  $\S$  1(1) — **ACTION FOR PRICE—DEFENSE.**

A contract for the building, erection, and operation of a piece of machinery, such as a traveling, electric, lumber crane, wherein the price, general design, and clearance dimensions are agreed on may very well be left open for changes in the details of construction, to be determined upon approval of detailed specifications, and it is no defense to an action for a balance due upon the price, brought after the machine has been delivered, accepted, and put in successful operation, following a long correspondence, in which the buyer had insisted upon compliance with his "contract," that the entire contract had not been reduced to writing, and signed by him, particularly where it appears that he had persistently evaded the signing of such instrument.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1.]

**3. ATTACHMENT**  $\S$  308(4) — **INTERVENING CLAIMANT—PRINCIPAL AND AGENT.**

One who intervenes in an attachment suit, claiming to be the owner of the property attached, by virtue of a title acquired by his agent for his benefit from the plaintiff and vendor, must needs go out of court where it appears that the property was sold to the alleged agent for his own account.

[Ed. Note.—For other cases, see Attachment, §§ 1106-1109, 1111-1113.]

Appeal from Tenth Judicial District Court, Parish of Concordia; John E. Clayton, Judge ad hoc.

Action by the Toledo Bridge & Crane Company against D. K. Jeffris & Co., wherein the Concordia Land & Timber Company intervened. From judgment for plaintiff, defendant and intervener appeal. Affirmed.

Dale, Young & Dale, of St. Joseph, for appellant D. K. Jeffris & Co. M. G. Jeffris, of Janesville, Wis., for appellant intervener. Robert Dabney Calhoun, of Vidalia (Tracy, Chapman & Welles, of Toledo, Ohio, of counsel), for appellee.

**Statement of the Case.**

MONROE, C. J. Plaintiff brought this suit and caused a seizure to be made by attach-

ment upon a claim of \$4,044.75, being the unpaid balance (amounting to \$3,954) of the purchase price of a traveling electric lumber crane, and the unpaid price (amounting to \$94.75) of certain other articles, which crane is alleged to have been manufactured for, and sold and delivered to, defendants (described as a commercial firm, domiciled in Chicago and composed of D. K. and Fred. J. Jeffris), as per verbal contract of date February 6, 1912, subsequently confirmed, and which articles are likewise alleged to have been sold and delivered to defendants. Plaintiff also asserted a claim for damages for certain extra expenses, alleged to have been incurred through the fault of the defendants, but during the trial accepted a judgment of nonsuit with respect thereto. The Concordia Land & Timber Company intervened, alleging that the contract sued on had been entered into by defendants as its purchasing agents for its account, praying that the crane be released to it on bond, that it be decreed the owner thereof, and that its right of action against plaintiff for damages be reserved. Plaintiff (having its domicile in Ohio) excepted to the intervention for want of citation, and, the exception having been sustained, a curator ad hoc was appointed to represent it, and he thereupon filed an answer in its behalf and a plea of estoppel, alleging that the crane had been sold to defendants for themselves and not for intervener, that intervener was well aware of the negotiations leading to, and culminating in, the sale, and, having remained silent with respect to its alleged interest, could not now be heard to assert the same to plaintiff's prejudice. Defendants then moved to dissolve the attachment, on the grounds that the allegation upon which it was obtained (i. e., the nonresidence of the defendants) was untrue, and that the counsel, by whom the attachment was obtained were unauthorized to that effect, which motion was overruled. Defendants then filed an exception, which was sustained to the extent of requiring an amendment to the petition, and thereafter filed an answer, denying, admitting, and alleging in substance as follows: They deny that they are a commercial firm domiciled in Chicago, and allege that they are an ordinary partnership, with their principal place of business in Concordia parish; deny any indebtedness to plaintiff; deny that they purchased the crane for themselves, and allege that, to the knowledge of plaintiff, they acted in the matter as the purchasing agents of, and bought the crane for, intervener; deny plaintiff's allegation that they paid \$5,000 on account of the price of the crane, or any other amount, but admit that \$5,000 was so paid by intervener; admit that the crane ordered for intervener—being that described in plaintiff's petition—was delivered and erected about December 15th, instead of June 1,

1912, as stipulated in the contract, but allege that the erection was accomplished in an unsatisfactory, inefficient, and unworkmanlike manner, and that there was unnecessary delay therein, as also in the manufacture and shipment of the crane, by reason whereof and of the alleged illegal attachment the intervenor sustained loss and damage in an amount exceeding \$40,000; that, upon February 28, 1912, they entered into a contract with intervenor to have the crane in question furnished "in all respects as has been, or may hereafter be, agreed upon by said Crane Company," and undertook to protect intervenor in all respects and assume all obligations on the part of said Crane Company with respect to the said crane; that, feeling themselves legally and equitably responsible to intervenor, by virtue of said contract, for the damage that it has thus sustained, and demand being made upon them by intervenor, they have compromised and adjusted the same by paying intervenor \$8,500, in consideration whereof it has sold and assigned to them its claim for damages against plaintiff, and subrogated them to its rights with respect thereto. Wherefore, assuming the character of plaintiff in reconviction, defendants pray for judgment against plaintiff in the sum of \$43,728.43, as the damages sustained by intervenor. Towards the close of the trial, defendants took a nonsuit with respect to the larger part of said amount and are here claiming only \$2,399.04, representing alleged loss and expense incurred by intervenor, on account of the attachment of the crane.

There was judgment in the district court in favor of plaintiff for the amount claimed by it and sustaining the attachment. Defendants and intervenor have appealed, and plaintiff has answered, praying that the judgment be affirmed.

#### Opinion.

As against defendants' sworn denial that they are commercial partners and allegation that they are ordinary partners, with their principal place of business in Concordia parish, we find in the record the following contradicted testimony, upon examination in chief, of F. J. Jeffris, one of the members of the firm, to wit:

"Q. What is the class of business that D. K. Jeffris & Co. do? A. Dealers in lumber—buyers and sellers of lumber. Q. Do you do a small or extensive business? A. Sometimes we have done considerable; we have done a good deal of business. Q. Whereabouts, and state the volume? A. In Chicago is our main office—or head, or only, office; we buy lumber all over the country. \* \* \* Q. Where else do you do business? A. All the business is done in Chicago."

As against their denial that they paid plaintiff \$5,000 or any other amount on account of the price of the crane, we quote their letter of September 17, 1912, written after the crane had been delivered to them and prior to its erection, to wit:

"Inclosed herewith please find check for \$5,000, which kindly credit to our account, and oblige.

"Yours very truly, D. K. Jeffris & Co.,  
"[Signed] W. O. S."

The letter was written on paper bearing the heading (with some other matter):

"David K. Jeffris Fred J. Jeffris  
"Chicago Chicago  
"Clarence Boyle, General Sales Mgr.  
"Chicago.

"D. K. Jeffris & Co.  
"Manufacturers and Wholesale Dealers  
"Hardwoods, Cypress,  
"Yellow Pine and Pacific Coast Woods.  
"501 Pullman Building, Chicago."

It is not disputed that the \$5,000, so forwarded, was intended and applied as part payment on the price of the crane.

As against their denial that they dealt with plaintiff for their own account in the matter of the purchase of the crane in question, and their allegation that, to plaintiff's knowledge, they acted as the purchasing agents and bought the crane for intervenor, we find the evidence entirely conclusive to the effect that, in December, 1911, plaintiff's agents in Chicago, learning that defendants were in the market for the purchase of a crane, called on them and obtained information, together with a rough sketch of some kind (on the back of an envelope), which were forwarded to plaintiff's main office in Toledo, Ohio, and led to a call, during the same month, upon defendants by plaintiff's engineer in charge of crane construction, followed by correspondence, in January and February, 1912, and the preparation of drawings and specifications, of a somewhat general character, as we infer, which, prior to February 6th, were submitted to and discussed with F. J. Jeffris, representing his firm. On February 3d defendants wrote a letter to plaintiff, addressed on the inside to Mr. Tucker, its engineer, requesting him to call on the following Monday or Tuesday, and "bring complete drawings and specifications," and saying:

"We are now ready to close this matter up, and your prices will be in line, provided the weight of your crane and the specifications and design are satisfactory."

Mr. Tucker accordingly called at defendant's office on Tuesday, February 6th, and testifies that he took with him and delivered to Mr. F. J. Jeffris, who represented defendants in the matter, a form of contract and certain specifications which had been made out in triplicate, one of which is attached to the amended petition.

There was an interview in the morning, and another at 2 o'clock, from which latter the gentlemen went to the office of Mr. Keller (an engineer whose advice Mr. Jeffris desired to obtain), where they spent three hours in discussion; they then returned to the office of D. K. Jeffris & Co., had further discussion, and an agreement was reached (the particulars of which will be referred to hereafter), which resulted in Mr. Tucker's being instructed to "go ahead with the

crane." On the following day a letter was written by defendants to plaintiff, which reads:

"We wish to confirm the order we gave your M. C. H. Tucker last night for Gantry crane at \$8,950, delivered to our sawmill plant, being constructed one mile north of Morville, La. This price covers complete crane, erected and run by you in our plant, you to leave competent engineer with us a week after the crane is constructed and running to teach our employes to handle same; the crane to be built and designed in a manner satisfactory to our engineers, and to be fully guaranteed in every way to do our work, which we have already outlined to you in detail.

"You may go to work at once on this crane, as you understand that we will desire it delivered and erected complete by June 1st.

"This letter is merely a preliminary order authorizing you to go to work on same, but with the understanding that all details of construction, design and material shall be fully and completely satisfactory to our engineers, and that you guarantee the crane to do the work required of it." (Italics by court.)

"You may forward us complete details, specifications, and contract, fully covering what you propose to furnish, as early as possible, so that the same may be looked over, discussed, and when approved it will constitute a contract between us. The object of this letter, as I said to Mr. Tucker, is merely to confirm the fact that we want the crane built, and relying upon his assurance that he can give us a crane satisfactory in every way and strong enough to do the work and designed particularly for the excessive travel which we expect to put it to. We will ask you to give this your prompt and best attention, as we desire to have the matter pushed with all possible speed."

The third and fourth paragraphs of the letter thus quoted, otherwise somewhat difficult to construe with the first and second paragraphs, are explained by the following testimony of Mr. Tucker, and by the subsequent correspondence between, and acts of, the contracting parties, to wit:

#### Testimony of Mr. Tucker:

"Q. Did you make a contract, on February 6th, with D. K. Jeffris & Co. for the delivery of the crane in question? A. I did. Q. The crane sued on? A. I did. Q. What was the agreement at that time with regard to any changes that might be made? A. As the drawings were made certain changes would be decided upon, and, from time to time, there were suggestions made, through the mail, regarding items referring to the general construction of the crane. The matter of speed was brought up several times. The speed, the hoist, the height of the crane were changed two or three times, and then the drawings were completed, and we finally arrived at a definite understanding as to how we should build the crane. \* \* \* Q. Was it understood with Mr. Jeffris, at that time, that it would have to have such changes made as might be necessary? A. He understood that thoroughly. Q. Were you to submit to him freely, from time to time, suggestions as to such changes as might be evidenced by the building of the crane? A. We were. Q. Was he to submit to you suggestions? A. He was, so long as it did not materially change the weights of the machine and the device. Q. And were suggestions, from time to time, made by Mr. Jeffris in regard to this machine, as it developed? A. There were."

#### On cross-examination:

"Q. Was the right to make these changes a part of the contract? [This question refers to certain partly written and partly printed forms

of contract which had been prepared for signatures.] A. That was the understanding. Q. Is it embodied in the contract? A. It is not. Q. Does not that document contain all of the contract between you all? A. It does, in general."

Following the letter of February 7th, and up to February 21st, inclusive, defendant wrote other letters to plaintiff concerning the crane, in all of which they treated the matter of its construction as one which had been agreed on and in which they alone were concerned. On February 28th they wrote, saying that they had received an inquiry from their Vidalia office for a rough sketch of the crane, that it was more than likely that other such inquiries would come from the same source, and that such correspondence might be carried on directly with plaintiff, after which we find the following:

"In order to save time, we will ask that the information requested in the beginning of this letter be forwarded to our southern office, and inasmuch as this crane is for the Concordia Land & Timber Company you had better address the mail to them and enter it on your records as for the Concordia Land & Timber Company. You can, however, draw the contract with us if you wish, although it is for the Concordia Land & Timber Company, and will be paid for by them, and is really bought for them."

The evidence shows, without attempt at contradiction, that plaintiff had never before heard of the Concordia Land & Timber Company; that they entirely ignored the suggestion that that company be substituted for defendants as the party with whom it had contracted; that in a correspondence, of which 79 letters from defendants to plaintiff and 74 letters from plaintiff to defendants (all concerning the crane) have been copied in the transcript, the name of the timber company is nowhere again mentioned or alluded to, and that, as we have stated, on September 17, 1912, defendants (not as purchasing agents, but for themselves) wrote to plaintiff inclosing a check (drawn by the company, whether to plaintiff's order or defendant's does not appear) in part payment of the price of the crane and requesting that the proceeds be placed to the credit of "our [their] account," which was done, as plaintiff had no other account to which the price of the crane was debited. The evidence also shows that the Concordia Land & Timber Company is composed of D. K. Jeffris, president, who holds  $15/48$  of the stock, M. O. Mouat, vice president, who holds  $6/48$ ; F. J. Jeffris, treasurer, who holds  $5/48$ , M. G. Jeffris, secretary, who holds  $12/48$ , and Mervin Hughitt, Jr., who holds  $10/48$ , and that the three Jeffrises are brothers and Mouat is their cousin; the family connection of Hughitt not having been inquired into.

It appears also that in support of their allegation as to their moral and legal obligation towards the intervener and their settlement with it, defendants attached certain documents to their answer, and made them part

of the same, and among them a communication purporting to be of even date (February 28th) with the letter last above quoted, and to contain a proposition from defendants to intervenor, and "accepted by M. G. Jeffris, secretary," which reads in part as follows, to wit:

"Chicago, Ill., Feb. 28, 1912.

"Concordia Land & Timber Co.: We have been negotiating with the Toledo Bridge & Crane Company \* \* \* for a crane to handle your lumber. \* \* \* We have made a contract for such crane in your behalf. This contract is by correspondence, and will probably be followed by a more formal contract, but, in any event, the contract is now complete. We have this day notified said Crane Company that the crane was for you, and they may, if they choose, make a formal contract with you, or at their option they may make it run to us as heretofore. In consideration of your accepting this and agreeing to pay for said crane and assume all liability on our part, we agree to furnish said crane fully as it is now, or may hereafter be, agreed on between us and said Crane Company."

M. G. Jeffris, who dictated the proposition on behalf of defendant, and accepted it, on behalf of intervenor, was unable to say, positively, whether it bears the correct date or not, and, though he attempted to refresh his memory by referring to a letter written to D. K. Jeffris after the institution of this suit, we do not see very clearly how he could have become enlightened in that way.

D. K. Jeffris testifies that M. G. Jeffris suggested the proposition "to protect" them (D. K. Jeffris & Co.) "from the corporations" (referring to various milling corporations in which D. K. Jeffris & Co. have interests), and, further, as follows:

"Q. You acted as purchasing agents, you say, of the Concordia Land & Timber Company? A. Yes, sir. Q. You don't act as purchasing agent any longer? A. No, sir. Q. Why not? A. Because they have got established, more or less; they didn't have any credit rating and were unknown at this time. Q. At the time this letter was written, the Concordia Land & Timber Company had no credit rating, and were not known? A. No, sir. Q. And contracts were made by you in your individual name because the Concordia Land & Timber Company had no credit standing? A. Yes, sir; that is a fact."

Referring to the affidavit, affirming the verity of the allegations contained in defendants' answer and demand in reconvention, the witness recognized his signature, but said that he did not know that he read the affidavit at all; that the attorneys told him to sign it, and he did so; also that he took the oath as therein recited. He further testified that, though he recognized his signature to the letter and proposition submitted to, and accepted by intervenor, he did not know when or where he signed it, or what it contained.

[3] From all of which we conclude that defendants dealt with plaintiff throughout in their own name and for their own account; that intervenor did not acquire the crane from plaintiff, with whom it has had no contractual relations; and hence that the al-

leged basis upon which it rests the claim here set up has never existed, and that the claim has therefore been properly rejected.

[1] Considering the question of *contra vel non*, as between plaintiff and defendants, we are of opinion that defendants cannot be heard to assert, in argument, that there was no contract, since their position in the case, concurring with that of the intervenor, is predicated upon their sworn pleadings to the effect that the title to the crane passed from plaintiffs to intervenor by virtue of a contract entered into between plaintiff, of the one part, and intervenor, acting through defendants as its purchasing agents, of the other.

The petition of intervention, sworn to by D. K. Jeffris as intervenor's president, contains the allegation and prayer:

"That petitioner acquired said traveling crane by purchase from the Toledo Bridge & Crane Company, under a contract made and entered into by and between said Toledo Bridge & Crane Company and D. K. Jeffris & Co., acting as purchasing agents for petitioner, which contract of purchase was made, verbally, at Chicago, Ill., on February 6, 1912, and confirmed by letters of date February 7th and February 8, 1912. \* \* \* Wherefore petitioner prays that, \* \* \* after due and legal proceedings and delays, there be judgment in favor of your petitioner decreeing it to be the owner of said traveling crane," etc.

The proposition of February 28th, said to have been submitted by defendants and accepted by intervenor, is annexed to, and made part of, defendants' answer, which is also sworn to by D. K. Jeffris, defendants' president, and it contains the statement that the contract for the purchase of the crane, as made by correspondence, would probably be followed by a more formal contract, but "*in any event, the contract is now complete.*"

[2] Beyond that, all of the, say, 150 letters, interchanged between plaintiff and defendants during the period of 9½ months, following the letter of February 28th, presuppose or declare that work was begun, was progressing, or was complete, in the matter of the building and shipping by plaintiff of the crane which defendants had ordered at a fixed price, and which, time and again, they complained was not being completed within the delay contemplated by their "contract" with plaintiff. Time and again, also, in those letters, before and after they had made the first payment of \$5,000 on the contract price of the crane, and after the crane had been delivered, and was in operation, defendants offered excuses for not signing the form of contract which had been placed in their hands, and which, in fact, they have never signed; but the entire correspondence makes it clear that they never intended, and that plaintiff never intended, that the existence of the contract for the building of the crane should depend upon their signing such an instrument; and the only explanation that occurs to us of their failure to sign is that they feared that, by signing, they

might cut themselves off from the privilege of making changes in the details of the work as freely as they were accustomed to making them.

The bill of \$94.75 represents the price of material delivered by plaintiff, in response to defendants' telegram of October 5th, and required for the purposes of a change in the method of supplying the electric power to the crane—another method having been previously agreed on and provided for by plaintiff. After the material was sent, defendants' president again changed his mind and concluded to adopt still another method, and the material sent by plaintiff was not used for the purpose for which it was sent, though whether it has or may be used for some other purpose does not appear, nor does it affect plaintiff's right to recover the \$94.75.

For the reasons thus assigned, we are of opinion that there is no error in the judgment appealed from, and it is therefore

Affirmed.

(141 La. 180)

No. 21005.

ATKINS v. BUSH et al.

(Supreme Court of Louisiana, March 12, 1917.  
Rehearing Denied April 16, 1917.)

(Syllabus by the Court.)

NEGLIGENCE — 35—CONDITION OF PROPERTY — LIABILITY.

A property owner is required to maintain his premises in a condition of safety to travelers on the public road. Hence if, by his negligence or lack of attention, the end of a strand of barbed wire becomes detached from the fence post in front of his residence and remains lying in the public road, the owner of the property is liable in damages for injuries suffered by a traveler who, without fault or negligence on his part, becomes entangled in the wire and is thereby injured.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 54.]

Appeal from Thirteenth Judicial District Court, Parish of Grant; W. F. Blackman, Judge.

Action by Jesse Atkins against Thomas A. Bush and others. Judgment for defendants, and plaintiff appeals. Judgment annulled and set aside, and adjudged that plaintiff recover of the defendants the sum of \$5,000 and costs.

Hundley & Hawthorn, of Alexandria, for appellant. J. B. Roberts, of Colfax, and Blackman, Overton & Dawkins, of Alexandria, for appellees.

O'NIELL, J. This is an action for \$15,000 damages for personal injury suffered by the plaintiff.

While he was riding on a wagon on the public road, a piece of barbed wire attached to a fence and extending into the public road caught his foot and cut it off at the ankle joint.

The action is founded upon the allegations that the fence, of which the wire had formed a part and to which one end was attached, belonged to the defendants Thomas O. Bush and Miss B. V. Bush, and was on their property, under the management of Thomas O. Bush; and that the defendants were guilty of gross negligence and had disregarded the safety of travelers along the public road, in allowing their fence to be and remain in a condition of danger to passers-by. The plaintiff alleged that the defendants had permitted the wire to remain, for several months before the accident, in coils in the public road, a menace to travelers passing there; but that he (the plaintiff) was not aware of the danger and was not guilty of any negligence in failing to avoid the accident.

In their answer, the defendants admitted—and the evidence shows—that the plantation adjoining the public road at the place of the accident was the property of one of the defendants, Thomas O. Bush, and was under his personal management; but they denied that the barbed wire on the fence separating the plantation from the public road had become loosened from the fence posts or was lying in the public road before or at the time of the accident. They alleged that the driver of the wagon on which the plaintiff was riding at the time of the accident was racing with the driver of another wagon, and, in attempting to pass the other wagon, drove one of the wheels of his wagon against the fence and pulled off the wire, which inflicted the injury to the plaintiff. They alleged therefore that the accident was due to the negligence and recklessness of the driver, who was not in the employ of the defendants and for whose conduct they were not responsible. They alleged that, if the wire had become loosened from the fence and was lying in the public road before or at the time of the accident, the plaintiff and the driver of the wagon should have seen and avoided it, and, if it was hidden by the dust in the road, that also was caused by the fast and reckless driving by the men, for whom the defendants were not responsible. In that connection, they alleged that the plaintiff and the driver of the wagon on which he was riding at the time of the accident, and the driver of the other wagon, were all in the employ of the same person, were engaged in the same work, and were therefore fellow servants.

The case was tried without a jury. Judgment was rendered in favor of the defendants, rejecting the plaintiff's demand, and he has appealed.

The evidence does not sustain the defendants' allegation that the driver of the wagon on which the plaintiff was riding at the time of the accident was racing with, or attempting to pass, the other wagon on the road. The proof is that the wagon on which

the plaintiff was riding did not strike the fence or leave the beaten path in the public road.

The men on both wagons were engaged in the hauling of hay from the farm of their employer. They had delivered a load to the warehouse, where they received a telephone message from their employer to hurry back to the farm; and they were returning on the empty wagons when the accident occurred. The horses were trotting briskly, galloping at times, but were under the control of the drivers, who were not engaged in a race. The road was very dusty. The front wagon was drawn by four horses and was raising a cloud of dust. The wagon on which the plaintiff was riding was drawn by two horses and was traveling at a distance of about 30 or 40 feet behind the other wagon. The vehicles consisted of the running gear of ordinary farm wagons, from which the bodies had been removed and on which two planks formed the bed. The rattling of the loose planks made such a noise that two of the witnesses who testified in the case thought the horses were running away.

The plaintiff was seated on one of the planks forming the bed of the wagon, about midway between the axles, with his feet hanging over, between the front and hind wheel. He testified that, when the coiling wire appeared over the front wheel, he dodged to avoid its striking his neck or head, and called to the driver to stop; and, in an instant, without his realizing what was happening, his foot was caught in the wire and cut off. The noise of the wagons prevented the driver from hearing the plaintiff's first cry. He screamed twice again, and the driver stopped the wagon immediately. Strange to say, the plaintiff was not pulled off of the wagon. His foot was found in his shoe, in the road, a short distance behind the wagon, and the top part of his sock, which had been cut in two, remained caught in the wire that had sprung back to the side of the road.

The surgeons who attended the plaintiff, one of whom was on the scene very soon after the accident, were unable to explain how the wire had severed the foot at the ankle joint without pulling the man off of the wagon. They testified that the severing of the foot must have been done with a very quick stroke of the wire. Hence it is argued by the defendants' counsel that the teams must have been running at a very fast gait. Our opinion is that the speed at which the plaintiff was traveling could not possibly have been fast enough to give the plaintiff's foot such a quick stroke against the wire as to cut it off in that way. The only possible explanation of the severing of the foot at the ankle joint without pulling the plaintiff off of the wagon is that the end of the wire caught on the wagon and the plaintiff's ankle was caught in a kink in the wire. Be that as it may, the theory that the man's foot was cut off by a quick stroke of the ankle against

a loose wire cannot destroy the positive proof that the drivers were not running a race nor the teams running away.

Four disinterested witnesses, whose business required their traveling along the public road at the place of the accident nearly every day, testified that they had seen loose strands of wire, extending from the defendant's fence into the public road, on several occasions before the accident. Two of them testified that the ends of the wire were lying loose and in coils or kinks, beside the road, in more than one place near the scene of the accident; and one of them testified that his horse came very near being entangled in the wire at the place of the accident, some days or weeks before the plaintiff got hurt. The evidence shows that the identical wire that cut off the plaintiff's foot was loose for a distance or length of about 36 feet and was coiled up in a ball at the loose end; that wire had been lying, sometimes in the beaten path and sometimes on the side of the road, several weeks, possibly months, before the accident.

The defendant Thomas C. Bush, who went to the scene of the accident immediately after it happened and endeavored to ascertain the cause of it, testified that he thought cattle had put their horns through the fence and pulled off the wire. He had had the fence renovated a short time before the accident. Some new posts had been put in, and new wire had been put on in place of that that had rusted out or had been pulled off; from which it might be inferred that the ends of the wire were left dangling from the posts when the fence was repaired.

The defendants testified that they were not aware that any loose ends of wire extended from their fence into the public road, or that the fence was in any condition of danger to passers-by, before this accident occurred; and there is no evidence to the contrary. The defective fence, however, was in front of the defendants' residence; the gate being immediately in front of, and about 150 yards from, the front porch, and the scene of the accident being about 200 yards from the gate.

Our opinion is that the duty imposed by law upon the defendant Thomas C. Bush to maintain his property in a condition of safety to travelers along the public road made him responsible for his failure to know of the dangerous condition of his fence, that had existed such a long time, and had been observed by several travelers on the public road, before the accident.

In the case of *Tucker v. I. C. R. Co.*, 42 La. Ann. 114, 7 South. 124, where the defendant was held liable for the death of a passer-by who was killed by the collapse of the defendant's shed, it was held that the defendant's ignorance of the dangerous condition of the premises, being due to a lack of prudent attention, did not excuse the defendant. Cit-

ing *Barnes v. Beirne*, 38 La. Ann. 280, it was said that the owner was bound to know the condition of his property; and the fact that the condition of danger had been produced by trespassers on the premises, without the defendant's knowledge, did not exempt the defendant from liability for the resulting injury to an innocent passer-by. Citing that case and that of *Lorenz v. City of New Orleans*, 114 La. 804, 38 South. 566, it was said in an opinion handed down this day, in *Serio v. American Brewing Co.* (No. 20972) 74 South. 998, that negligent ignorance of the condition of one's property was equivalent to actual knowledge.

The liability of the defendant Thomas C. Bush is imposed by the provisions of the Civil Code that every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; and that men are responsible for the damage occasioned, not only by their own acts, but by the things which they have in their custody. Articles 2315 and 2317. Our opinion is that the liability of the custodian of a thing for damages for injury caused by the thing in his custody is not limited to what is committed actively by the thing, but extends to injuries resulting from a dangerous condition of an inanimate thing if that condition was due to the fault of its owner or custodian; and, in that sense, fault means negligence. R. C. C. 2316. Other provisions of the Code expressly declare that a person is responsible for damages caused by the acts of those for whom he is answerable, by the acts of his children or servants, by the act of an insane person of whom he is curator, by the act of a scholar or apprentice of whom he is the teacher or artisan, or by the act of an animal of which he is the possessor or owner. R. C. C. 2317, 2318, 2319, 2320, and 2321. And other provisions of the Code declare that the owner of a building is answerable for any damage caused by its ruin or fall, or by that of any part of the material composing it, if the injury was the result of neglect to repair the building, or the result of a vice in its original construction. R. C. C. 670 and 2322. On the principle that the owner must maintain his premises in a condition of safety to his neighbors and to persons passing, it has been held quite often that an individual or corporation is liable in damages to any person injured by a dangerous animal kept or permitted to remain on the premises. See *Serio v. American Brewing Co.* (No. 20972, decided this day) *supra*, citing *Vredenburg v. Behan*, 33 La. Ann. 639; *Holmes v. Murray*, 207 Mo. 413, 105 W. 1085, 17 L. R. A. (N. S.) 431, 123 Am. St. Rep. 386, 13 Ann. Cas. 845; *Bartlett v. Malden & Melrose R. Co.*, 3 Allen

(Mass.) 101; *Chicago & Alton R. Co. v. Kuckkuck*, 197 Ill. 308, 64 N. E. 358; and *Keenan v. Gutter Percha & Ribbon Mfg. Co.*, 120 N. Y. 627, 24 N. E. 1096.

In the case of *Williams v. Louisiana Electric Light & Power Co.*, 43 La. Ann. 295, 8 South. 938, the defendant was held liable in damages for maintaining a wire over a highway so low that a wagon carrying a load 16 feet high struck the wire, knocked down the pole, and injured the driver of the wagon. It was held that the wire was an obstruction to the highway, which should have been left safe for travel and transportation. That case was cited with approval in *Claussen v. Cumberland T. & T. Co.*, 126 La. 1087, 53 South. 357, where the defendant was held liable in damages for injury inflicted upon a traveler on the public road, whose horse and buggy became entangled in the defendant's telephone wire, that had been blown down in a storm and had not been removed from the road within a reasonable time. In that case, it is true, the defendant had been notified that the wire obstructed the public road; but, from the cases cited above, it appears that negligent ignorance is equivalent to actual knowledge.

The fact that the accident that happened in this case was an extraordinary one does not relieve the defendant from liability. In *Payne v. Georgetown Lbr. Co.*, 117 La. 983, 42 South. 475, where the negligent act of a servant of the defendant caused injury to the plaintiff, it was said to be no defense that the particular injurious consequence was unforeseen, improbable, and not to have been reasonably expected, so long as it was the natural consequence of the negligence of the defendant's servant. Quoting Wharton's *Law of Negligence* (2d Ed.) par. 77, it was observed that the consequences of negligence are almost invariably surprises; that a man may be negligent in a particular matter a thousand times without mischief; yet, though the chance of mischief be only one in a thousand, if the mischief or injury does occur, the person to whose negligence it is imputable is liable in damages.

Our conclusion is that the defendant Thomas C. Bush is liable in damages for the injury which the plaintiff suffered in consequence of the defendant's negligence, in failing to know of the dangerous condition of his fence, and in permitting it to remain a menace to travelers on the public road. And we fix the amount of the damages at \$5,000.

The judgment appealed from is annulled and set aside, and it is now ordered, adjudged, and decreed that the plaintiff, Jesse Atkins, recover of and from the defendant Thomas C. Bush the sum of \$5,000 and the costs of this suit.

241 La. 189)

No. 22185.

## Succession of FISHER.

(Supreme Court of Louisiana. April 16, 1917.)

(Syllabus by the Court.)

## 1. EXECUTORS AND ADMINISTRATORS — 510(6, 8)—SUCCESSION—OPPOSITION TO ADMINISTRATOR'S ACCOUNT—APPEAL—BOND.

When a judgment has been rendered on an opposition to the account of an administrator, allowing the opponent's claim in part and rejecting it in part, and each party, the administrator and the opponent, obtains a separate order of appeal, and the administrator furnishes an appeal bond, and files the transcript in the appellate court, it is not necessary that the opponent should also furnish an appeal bond or file a transcript of appeal. The opponent's right to an amendment of the judgment in so far as it rejects the opposition to the account may be asserted by an answer to the appeal taken by the administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2241, 2246, 2247, 2249.]

## 2. EVIDENCE — 265(18)—WEIGHT AND SUFFICIENCY.

The testimony of witnesses to admissions alleged to have been made by a person who has died is the weakest kind of evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1050.]

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Oppositions by Lucinda Cuspear and by Martha Kent to the provisional account of Joshua Fisher, as administrator of the estate of Louis Fisher, deceased. Judgment recognizing the claim of Martha Kent and the claim of Lucinda Cuspear in part, and the administrator and Lucinda Cuspear appeal. Judgment affirmed.

St. Clair Adams and Francis P. Burns, both of New Orleans, for Joshua Fisher. Andrew M. Buchmann, of New Orleans, for Lucinda Cuspear and Martha Kent.

O'NIELL, J. Louis Fisher died, intestate, in the city of New Orleans, on the 29th of March, 1914, leaving an estate valued at \$6,123.33, and no debts, except \$14, due for medical services rendered during his last illness. The estate consisted of a house and lot valued at \$1,000, household furniture and effects valued at \$15, a life insurance policy, payable to his legal representatives, for \$500, cash on deposit in the Commercial-Germania Trust & Savings Bank, \$2,755.09, and cash on deposit in the Whitney-Central Trust & Savings Bank, \$1,853.24. His son, Joshua Fisher, and his daughter, Carrie Fisher Elsy, were his heirs at law. The daughter died, intestate, and without issue, about two months after the death of her father.

Joshua Fisher qualified as administrator of his father's estate; and, to his provisional account, two oppositions were filed, one by Lucinda Cuspear, a sister of the decedent, and the other by Martha Kent, his niece.

Lucinda Cuspear claims that she is entitled to the occupancy of two rooms in the house left by the deceased, for the term of her life, having paid the cost of building the rooms, \$150. She also claims that she is entitled to \$240, that is, \$20 a month for the last 12 months of the life of Louis Fisher for services rendered to him, as cook, washerwoman, nurse, and housekeeper. She also claims to be a creditor of the estate for the further sum of \$2,500, which she alleges she deposited with her brother for safe-keeping, in various sums, from time to time, during a period of about 20 years.

Martha Kent claims that she is a creditor of the succession for the sum of \$519. She alleges that she deposited with her uncle, for safe-keeping, on or about the 14th of September, 1914, the proceeds of certain life insurance paid to her on the death of her son, amounting to \$499, and thereafter deposited with her uncle, for safe-keeping, \$45 out of her earnings; and that, at the time of her uncle's death, she had withdrawn only \$25 of the amount deposited.

The district court rendered judgment recognizing Lucinda Cuspear's right of occupancy of the two rooms, and allowing her claim of \$240 for services rendered to the deceased. The court rejected entirely her claim of \$2,500, alleged to have been deposited with her brother for safe-keeping. Martha Kent obtained judgment recognizing her claim of \$519.

The administrator and Lucinda Cuspear each obtained an order of appeal. The administrator furnished an appeal bond and brought up the transcript of appeal. Lucinda Cuspear did not furnish an appeal bond; but she and Martha Kent filed an answer to the appeal taken by the administrator, praying that the judgment appealed from be affirmed, except in so far as it rejected Lucinda Cuspear's claim of \$2,500, and that it be amended in that respect by increasing the judgment in her favor to \$2,740.

[1, 2] The learned counsel for the administrator contend that Lucinda Cuspear's failure to furnish an appeal bond and file the transcript of appeal was an abandonment of her appeal, and that she is therefore not entitled to an amendment of the judgment appealed from. The decisions cited in support of that proposition, however, are not applicable to the situation presented here. It was not necessary for Lucinda Cuspear to furnish an appeal bond and file the transcript in this court when the administrator had perfected his appeal and filed the record here. Her answer to the appeal, taken by the administrator, is an appropriate remedy for obtaining an amendment of the judgment appealed from on any contest between the appellant and appellee.

Lucinda Cuspear's right of occupancy of two rooms in the house belonging to the es-



tate of the decedent is proven by his written acknowledgment, and is not seriously disputed. In that respect the judgment appealed from is correct.

The evidence in the record also supports the judgment rendered in her favor for \$240 for the services she rendered, as cook, washerwoman, and housekeeper, for the decedent.

Her claim for \$2,500 depends for its support upon the statement of the claimant, Lucinda Cuspear, that she deposited all of her wages with her brother for safe-keeping, during a period of about 20 years, and that she thinks the sums deposited amount to \$2,500 or more. In corroboration of her testimony, several witnesses testified that Louis Fisher told them he had his sister's earnings deposited to his credit, to an amount sufficient for the interest to maintain her during the balance of her life. Only one of those witnesses testified that Louis Fisher had stated that the amount he had on deposit for Lucinda Cuspear was \$2,500. The others testified that he did not state the amount. On account of the impossibility of contradiction, testimony of witnesses repeating admissions said to have been made by one who has died is the weakest kind of evidence to support a large claim against the succession of the deceased. The accounts taken from the books of the banks in which Louis Fisher kept his funds show that it is highly probable that Lucinda Cuspear did have her earnings deposited to the credit of her brother. The evidence shows that Louis Fisher was an honest, industrious, economical colored man; but his wages were only \$1.85 per day, and he was out of employment at times. It is very improbable, if not quite impossible, for him to have deposited the sums placed to his credit in the banks, unless he was depositing, with his own earnings, the funds of some one else. But we cannot render a judgment for a definite sum on the mere conjecture or probability, however strong it may be, that the claimant deposited some money from time to time with the decedent for safe-keeping. There is one circumstance that would have strengthened her claim greatly if she had not, in her own testimony, contradicted the presumption arising in her favor. We refer to the fact that, about a month before the date on which she made a loan of \$500 to her sister, Louis Fisher drew that amount out of bank. If the \$500 withdrawn from the bank by Louis Fisher was given to Lucinda Cuspear, to be loaned to her sister, the inference would be very strong that Fisher had Lucinda Cuspear's money deposited to his credit. But she, in her testimony, denied that the \$500 which she loaned to her sister was obtained from Louis Fisher. She insisted that she got the \$500 from her employer. He testified that he had no recollection of having paid her \$500 at one time, although he expressed faith in her

honesty and veracity, and would not deny positively that he had never paid her such a large sum at one time. Although we are of the opinion that this estate has been enriched at the expense of Lucinda Cuspear to some extent, we cannot determine that extent exactly, or even approximately, from the evidence before us; and we are therefore constrained to affirm the judgment in so far as it rejects the demand of Lucinda Cuspear for the money alleged to have been deposited with her brother for safe-keeping.

The evidence supports the claim of Martha Kent for \$519. Louis Fisher gave her a written acknowledgment that the amount he had received and owed her was at one time \$548. Two witnesses testified that the receipt was not written or signed in the handwriting of Louis Fisher. But they were men of very little education, and we do not believe they were familiar with his handwriting or signature. Other receipts signed by him were introduced in evidence to show by comparison that the handwriting and signature on the receipt given to Martha Kent were not genuine; but the originals were not brought up in the transcript, and we are unable to make the comparison. We are convinced that the receipt was given by Louis Fisher to Martha Kent. Her testimony that she deposited the amount she claims with Louis Fisher for safe-keeping is corroborated by other evidence, particularly by the proof that she collected the money from the insurance companies, and that a deposit approximating that sum was credited to the account of Louis Fisher soon after the date at which Martha Kent and Lucinda Cuspear say he deposited Martha Kent's money to his credit.

Our conclusion is that the judgment appealed from is correct.

The judgment appealed from is affirmed, at the cost of the estate of Louis Fisher.

(141 La. 194)

No. 21284.

ABSHIER v. LOUISIANA RY. & NAV. CO.  
(Supreme Court of Louisiana. March 12, 1917.  
Rehearing Denied April 16, 1917.)

(Syllabus by the Court.)

MASTER AND SERVANT §243(11)—INJURY TO RAILROAD EMPLOYÉ—VIOLATION OF RULES.

A rule of a railroad company, which reads, "If your duty requires you to go around, under, or on cars, in any track, protect yourself with blue signal," and which is understood to mean that a blue flag is to be displayed by day and a blue light by night by those whose duties require them to expose themselves to danger in the manner indicated, is intended, not only for the protection of the employé, but also for the protection of the employer, and applies to an inspector who, in the discharge of the duty to inspect cars, places himself in either of the positions mentioned in the rule; hence, where, for the inspection of a car, standing, with others, upon a track which is being used for switching purposes, an inspector goes underneath the car and disappears from sight, or introduces the up-

per part of his person between the truck, or a wheel, and the floor of the car, leaving only his legs outside of, and against, the wheel, beneath the overhang of the body of the car, and displays no blue signal, he is not entitled to recover damages from the company for injuries sustained by reason of the switching of other cars against the dead cars, of which the car under inspection is one, and of the consequent movement of that car.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 773.]

Appeal from First Judicial District Court, Parish of Caddo; R. D. Webb, Judge.

Action by Julius Abshier against the Louisiana Railway & Navigation Company. From judgment for plaintiff, defendant appeals. Reversed and suit dismissed.

Wise, Randolph, Rendall & Freyer, of Shreveport, for appellant. Clem V. Ratcliff, of Shreveport, for appellee.

#### Statement of the Case.

MONROE, C. J. This is an appeal, by defendant, from a verdict and judgment awarding plaintiff \$5,000 for the loss of a leg; the case as presented by the petition and evidence being as follows:

The accident which resulted in the loss thus mentioned occurred about half past 2 o'clock p. m., on February 20, 1914, whilst plaintiff was engaged in inspecting a certain "Rock Island" car, which had been "tagged" as in bad order and was one of a number that were standing on defendant's switch or side track No. 2 in its yards at Shreveport. Plaintiff was, at that time, 43 years of age, had been an inspector and repairer of cars for 20 years, and employed by defendant in that capacity for say, 4 years; his position being rather an independent one, in that, though he was subject to the orders of the "car foreman," the situation was such that he was, generally, left to determine for himself what his duties required and the manner of their discharge and received few specific instructions. The foreman had charge of the work of repairing cars, whether done on the "rip track" (being a particular track set apart for the making of repairs which do not require the sending of the cars to the shops) or in the shops, but he spent most of his time in the shops—going into the yards perhaps once a week. In order to determine whether cars needed repairs, and whether the repairs were such as could be made on the "rip track," or as to require that the cars be sent to the shops, inspections were necessary, and, as they were to be made wherever the cars were found, that work was left to the plaintiff, as was, no doubt, some of the repairing. Being asked, on cross-examination, "You are the boss of your department?" he replied, "Yes, sir;" and it is shown that he was allowed an assistant, who was subject to his orders, which position was, at one time filled by a young man named Kelly, and at the time of the accident by a young man named Meyers, who was called as

a witness for plaintiff and testified in this case. It is alleged, in the petition, that it was plaintiff's duty to inspect the car in question and make such repairs as were needed; that in the discharge of that duty he placed himself "between the bottom of said car and the top of the wheels or trucks under the end of said car, for the purpose of examining and repairing \* \* \* the center pin"; that while so situated, defendant, without notice or warning to him, "carelessly and negligently switched, or shoved, with its locomotive, a number of other cars against and into the cars standing on said switch. \* \* \* and against and into the car under which plaintiff was working and inspecting by severe and negligent contact with the car next to it," thereby throwing him "from the top of the trucks, in front of them and on the rails, or track, before the wheels, and negligently causing said trucks and wheels to pass over and across" his left leg, cutting it almost in two, below the knee; that he was so situated at the time "that he could not see or hear the approach of the cars that were thus shoved against the string of standing or dead cars," of which the car under which he was working was one, and no signal of such approach was given, nor was there any flagman or other person upon the approaching cars to give warning of their approach. We are thus particular in stating the cause of action, as alleged in the petition, for the reason that it differs materially from a statement made by plaintiff shortly after the accident, and the further reason that on the trial, some evidence was adduced for the purpose, apparently, of showing that plaintiff had been led to believe, by some saying attributed to the yardmaster, that no cars would at that time be sent down on track No. 2, and hence that he would be safe in making his inspection of the Rock Island car as he was making it when injured.

The evidence does not enable us to say whether the different tracks that are referred to in the testimony run north and south, east and west, or otherwise; but we shall assume, in order the more conveniently and intelligibly to describe the physical situation, that they run north and south. Proceeding upon that assumption, there is a switch upon the north side of the yards which leads from the main track into the "rip track" which lies on the west side of the main track, and, a little farther down, there is another switch, leading from the main track into a track on the east side, known as the "scale track," also known as "track No. 2," upon which, about 250 feet south of the switch, there is a scale for the weighing of cars, and to that part of which, extending below the scale, the term "track No. 2" seems to be more particularly applied. The "Rock Island" car which plaintiff was inspecting was standing on track No. 2 at a point 1,439 feet below the scale, with other "dead" cars both above and below it. The

point at which cars on the scale track clear the main track is only about 150 feet above the scale, so that, when a string of cars of any considerable length is brought in to be weighed, they must necessarily, after being weighed, be shoved on, past the scale, down track No. 2; and in this instance there were 12 or 14 of such cars which were so shoved, and, it is said, uncoupled from the locomotive (that was behind them) and "kicked," down the track and grade, with no one aboard of them, until they collided with the dead cars, of which the Rock Island car was the fifth or eighth in the line, thereby starting that car in motion and causing the accident.

Defendant's "Rule XXVI," shown to be practically the same as that of other railroad companies entering Shreveport (and probably of all such companies in this country), reads:

"A blue flag by day and a blue light by night, displayed at one or both ends of an engine, car, or train, indicates that workmen are under or about it. When thus protected, it must not be coupled to or moved. Workmen will display the blue signals, and the same workmen alone are authorized to move them. Other cars must not be placed on the same track, so as to intercept the view of the blue signal, without first notifying the workmen."

An employe's "service card," upon which plaintiff and all other workmen were required to make daily reports of the time made by them, contains the following, printed in large, clear type upon the back, to wit:

"If your duty requires you to go around, under, or on cars in any track, protect yourself with a blue signal."

Plaintiff, in the course of his testimony, denied repeatedly that he knew of the existence of any rule requiring the use of blue flags, or signals, but finally, when shown a number of service cards that had been turned in by him, admitted that he had read the "notice" printed on their backs, and knew that the paragraph quoted was a rule of the company, but said:

"How are you going to do that [protect yourself with a blue signal when your duty requires you to go around, under, or on cars, on any track] when they don't furnish you with any signals?"

And he denied that any signals had ever been furnished him, and specifically denied that he had any blue flag in the "shanty" (the "shanty" being a little place, such as the name indicates in the yards, that he used as his office). It was then shown, on the cross-examination of his assistant, Meyer (who was evidently reluctant to make the admission), that there was a blue flag in the "shanty"; and it was also shown, by the testimony of Reed, the car foreman, that plaintiff could have obtained a blue flag at any time by asking for it, and that he made no such request.

It was further shown, by the testimony of defendant's superintendent, that he at one time observed plaintiff's assistant, Kelly, under a car on a loading track, though no blue signal was displayed; that he called him out,

and asked why he was not using the flag, to which Kelly replied that he knew where the switch engine was and didn't think it necessary; and that he (the superintendent) took the matter up vigorously with the master mechanic.

The car foreman refers to the same occasion in his testimony, and states at one time that he spoke to plaintiff about it "in a casual way," and at another time as follows:

"I told him, in substance, that it would be necessary that we keep that flag out; that the company demanded it for their protection, and for his protection. What I meant by 'a casual way' was this: You always get the best results with Mr. Abshier by talking to him in an easy way; he is that kind of a man."

Q. Did you tell Mr. Abshier of the trouble that had been caused by Mr. Coppage [the superintendent] discovering Kelly, or the other man, under a car out at the freight shed? A. Yes, sir. Q. Did Mr. Abshier say anything in reply to you, when you told him that the company was demanding that the blue flags be used for its own protection and for the protection of its employes? A. He did not resent it—he might have said 'O. K.,' or 'All right,' or something like that. Q. Did he say anything, at that time, about not having any blue flags? A. No; I don't think that question came up; but I did ask the boy at the shop if he had a blue flag. Q. What boy was that? A. The Kelly boy. Q. Did he say that he had? A. Yes, sir; that there were some down there."

Plaintiff, cross-examined upon the same point, at first stated that he did not remember the "row" raised by Mr. Coppage about Kelly's failure to display the blue flag; but his further examination reads:

"Q. You don't remember, in 1912, when Mr. Coppage found Kelly under a car without a blue flag and jumped on him about it, and took it up with the vice president of the company and with the master mechanic, and they came down and made an investigation of the matter? A. Yes, sir. Q. Then there were flags used in the yard? A. I have never seen any. Q. And still they jumped on Kelly for not using a flag? A. Yes; and I went and told them that there were flags there. Q. The reason they didn't furnish you with any flags was because you told them that you had flags there? A. Well, I told Mr. Marshall that there were flags there, and then I went and made a demand on the master mechanic and did not get any."

It is shown that the person to whom plaintiff should have applied for blue flags was the foreman of the shop, and he testifies that no such application was made. The master mechanic, at the time of the accident, and of the trial, was Nicholson, who, of course, knew nothing of any application said to have been made to his predecessor in 1912 or 1913, but he testifies that blue flags were always to be had, and, if not on hand, would be obtained. Meyers, however, was plaintiff's assistant and witness, who had left defendant's employ after the accident (as suggested in the course of the examination, because he was not promoted to the vacant position), and had, thereafter, been unsuccessful in an attempt to get back into his old place, and he testified, rather reluctantly, as we have stated, that there was a blue flag in the

"shanty" at the time of the accident. The truth, as we conclude from all the testimony on the subject, is that blue flags are not used by inspectors for one or the other of two reasons, viz.: In many—perhaps most—instances, their work may be done without requiring them to go under the cars; or, where it is necessary to go under a car, the inspection may be made in so short a time that they prefer to ignore the rule and take the risk of inspecting without the blue flag, rather than the time and trouble that would be required to get it, for mere momentary use. In fact, plaintiff's position, throughout his testimony, is that blue flags were not used in the inspection of cars, and it required considerable cross-examination to induce him to admit, first, that he knew of any rule upon the subject, and then that he would have used a blue flag, even if he had had it; the latter admission being coupled with a denial that any such flag was furnished to him, a denial which is entirely overborne by the testimony to which we have referred.

It is further shown that Doyle, who is employed by defendant to investigate claims of this character, called on plaintiff about two weeks after the accident and obtained a statement, or partial statement, from him, in answer to certain questions printed upon a form used for that purpose, but concerning which plaintiff testifies that he did not sign it, because it does not contain all the facts, and, because he was not in a physical condition to affix his signature. He further testifies, on cross-examination, as follows:

"Q. Mr. Abshier, you said that the statement that Mr. Doyle took does not contain all the facts: the facts that were given, those that were told him, he wrote down? A. Yes, sir; pretty well all of them, I think. Q. Then what he read, as having been stated by you to him, was stated, was it? A. Yes, sir."

Referring to Doyle's testimony, we find that "what he read," and what plaintiff thus admitted that he (plaintiff) had stated, included the following (the witness reading the printed questions from the form used by him, and the answers as given by plaintiff and taken down by the witness), to wit:

"Q. Did you propound the questions on that form to Mr. Abshier? A. Yes, sir. Q. Referring to question 8, what question did you ask him there (indicating)? A. 'State cause of injury and give full particulars how the accident occurred.' \* \* \* Q. Did he answer it? A. Yes, sir; in this way: 'Was standing between two cars, looking at draft sill in Rock Island car; looked out; brought up the engine, so it would cut off the cars, and, when I was stepping down, my leg struck cut of cars and threw me across the rail.'"

It is evident, we think, that the answer as read by the witness was erroneously taken down, or transcribed, by the stenographer, for, as it appears upon the instrument from which the witness was reading, and which has been copied in the record, the answer appears:

"Was standing between two cars, looking broken draft sills in Rock Island car. Looked

up towards scales. Saw engine with cut of cars. Thought they were weighing. When I was stepping down, looking, struck cut of cars I was at. Threw me across rails; wheel struck me, and I shoved myself in middle of track. Axle then struck me, and I jumped out on south side of track, and got my body all in clear, except left leg."

Which, taking it to mean that, while plaintiff was stooping down, between the two cars, looking, the engine with cut of cars, coming from the scale, struck the cut of cars in which he was working, is a perfectly intelligible, and, as we believe, truthful, explanation of the accident. On the other hand, the descriptions, or statements, of his position, which plaintiff gives in his petition, and his testimony, can hardly be considered intelligible, but, if susceptible of being understood, are in direct conflict with the statement made to Doyle, and are wholly improbable, not to say incredible. Thus he alleges in his sworn petition:

"That he did then and there place himself between the bottom of the car and the top of the wheels or trucks under the end of said car for the purpose of examining what is commonly known as and called the center pin," etc.

And his testimony upon the subject reads (on his examination in chief):

"Q. What position did you have to place yourself in, in order to inspect the car properly? A. Had to mighty near get under the car to see the center pin. Q. Explain what are the center pins? A. They are the pins that come down through the center of the car and hold the trucks that carry the load of the car. \* \* \* Q. Now what is the position of that pin with reference to the truck? Where does it come in contact with the truck? A. In the center of the truck. \* \* \* Q. You placed yourself under the car there? A. Yes, sir; had to. \* \* \*"

On cross-examination:

"Q. Are blue flags used by railroads for some purposes? A. Used on rip tracks, but never used in inspecting cars. Q. Never used, except on rip tracks? A. No, sir; I never did; never saw one used in inspecting cars. Q. What is a blue flag used for? A. It is to protect workmen when working under cars on the rip track. \* \* \* Q. Does this rule specify that it is to be used only on the rip track? A. I do not know about that. Q. The reason for using the blue flag on the rip track is to let the switchmen and switching crews know that there is a man under the car? A. Yes, sir; I suppose so. Q. Then, if a man gets under a car, to inspect it, or to repair any cars, on a side track, would you not think that the same rule would apply for the protection of the man? A. If he had a flag to put out, it might; but we did not have any. Q. Then the purpose of a blue flag, to protect a man under the cars, would apply just as well on cars, or on any cars, when he gets out of sight under the cars? A. A man is not supposed to get out of sight in inspecting cars. Q. You were out of sight? A. No, sir; they could have seen me. Q. You were under the car? A. Part of me. Q. What part? A. About from my waist up was under, and my legs were out, and, when [I was?] knocked down, went across the rail. Q. How did you enter that car; from the side or from the end? A. From the end, right about under the wheel. Q. From the end? A. Yes; from the end, there; climbed up on the wheel, right by the end, there—by the wheel. Q. Went in between two cars and got on the truck in that

way? A. No, sir; I was up against the side of the wheel, leaning up against the side of the wheel. Q. You allege in your petition, and which is sworn to by you personally, that you placed yourself between the bottom of the car and the top of the wheels on the truck? A. That is what I said. I was leaning up in the wheel, between the wheel and the truck. Q. Between the bottom of the car and the top of the wheel, or the truck? A. Yes, sir."

Another answer, which was read by Doyle, and which plaintiff admits that he gave, to the question:

"State here any other information that you may have that you believe will be beneficial in assisting the company to arrive at a proper conclusion as to how this accident occurred"

—reads as follows:

"I was examining the draft sill under the Rock Island car, to see if it would be safe to run down."

In that connection, it may be here stated that plaintiff had inspected the Rock Island car in question on February 17th (three days before the day of the accident), and appears to have passed it. It was, however, subsequently inspected by Saunders, an inspector employed by all of the railroad companies entering Shreveport, at what is called the Shreveport Joint Car Interchange and Inspection Bureau, who found that the sills were broken, and sent it back to defendant's yards on that account. Saunders, who was called by plaintiff and testified very strongly in his favor, nevertheless develops the following on his cross-examination:

"Q. Mr. Saunders, this was a C. R. I. & P. car 57805? A. Yes; 57805 C. R. I. & P. Q. Bad order, and found the glass sills were broken, did you not? A. Yes, sir. Q. Now you didn't find anything the matter with the center pin, did you? A. No, sir. Q. That was all right, so far as your inspection went? A. Yes, sir; as far as I knew. Q. And you tagged it bad order, and your tag showed what the trouble was? A. Yes, sir."

Mr. Saunders further testifies that, although he is in the employ of all the companies, he has never read the rules of any of them, except those of the Texas & Pacific, and has never asked for any, and his cross-examination then proceeds as follows:

"Q. Now, I understand you to interpret the rule of the T. & P. as applying to workmen? A. Yes, sir. Q. Now that rule reads: 'If your duty requires you to go around under cars, you should protect yourself with the blue signal.' Now, you are familiar with that? A. I have never read it. Q. That don't say workmen, does it? A. Well, I had never read it. Q. If your duty requires you to go around, under, or on cars on the track, you should protect yourself with the blue signal? A. Well, you couldn't live up to that to save your life. Q. Well, suppose you are clear up under a car, and you can't be seen—A. That rule says—Q. In this case, we are applying this rule to a man who gets under a car? A. Well, I don't see why he should do that. Q. If the car was on the switching track, would you think it safe, where a man is on a switch track, would you think it safe—such as No. 2, where the cars are switching, and shoved down from the scale track, do you think it safe for a man to get up under a car there, like Mr. Abshier said he did, without taking some precaution for his own safety, by the use of the blue flag, or something

like that? A. Well, I don't know whether it is safe or not; we do it every day. Q. Is it safe? A. No. Q. He is taking a chance? A. He is taking a chance every way."

And he goes on to speak of an instance in which, as he intimates, an engineer had deliberately disregarded a blue signal and knocked him seven car lengths, and says that the engineer was never reported, and would not have been discharged if he had been reported.

The matter of plaintiff's position when the accident occurred is not the only one in which his allegata and probata fail to agree. The second question asked him by his counsel, after he had been placed on the stand, was, to state what he was doing on February 20, 1914, and he answered, and his examination proceeded as follows:

"A. About 2:30 on the 20th day of February, I closed [the word used was probably 'repaired'] the side door on a car on the L. R. & N. yard, and the yardmaster came to me and told me to go and look at a bad order car and see if it could be fixed up so as to ship it south; told them the day before to take it to the rip track. I asked him when he was going to the T. & P. and he said he was going 'now'; and I told him I would go while they were gone to the T. & P. He started to the T. & P., and I went to look at the car, and I got under there and looked at the brake draft sills, and, instead of going to the T. & P., they threw the cars back on me and knocked me down, and, in the fall, I jumped up to get in between the cars, and it caught me and cut my leg off. \* \* \* Q. They sent cars from that track to the T. & P. [meaning Texas & Pacific yards]? A. Yes, sir. Q. What did you tell him? A. I told him that I would go and inspect the car while he was gone to the T. & P. \* \* \* Q. You went right on? A. Yes, sir. \* \* \* Q. You went immediately to do this after you had received the directions from the yard foreman? A. Yes, sir; right straight. \* \* \* Q. How long were you under the car, inspecting it, before those cars were shoved in on you? A. Between 8 and 10 minutes, I suppose. \* \* \* Q. He didn't go to the T. & P. with the cars that he told you about? A. No, sir; he did not."

Mr. Saunders, the witness to whom we already referred, testifies that he was in defendant's yards about the time of the accident, and as follows:

"Q. Did you hear the yard foreman talk to him [plaintiff] that day about going over to the T. & P.? A. No, sir; I never heard him talk about going to the T. & P.; about going to the T. & P., yes, I heard him. Q. What did you hear him say about it? A. Well, he said he was going over to the T. & P., and Abshier was there, and he said he would go down and look at this Rock Island car. As well as I remember, there was something said about the Rock Island car, and Abshier was to look at that while he was gone to the T. & P."

On cross-examination:

"Q. When this conversation took place, who was it talking in regard to going over to the T. & P.? A. Well, I asked him when he was going to the T. & P., and he said, 'In a few minutes.' \* \* \* Q. When was that? A. About 2:30. \* \* \* Q. Now, who was present when that conversation took place? A. Well, Mr. Abshier and Mr. Meyers were standing close to there. I walked up and said: 'When are you going to the T. & P.?' And he said: 'In a few minutes.' \* \* \* Q. When you had your conversation there, and you all left, and you

stopped talking, he went on the main line there, and you went across? A. Yes, sir. \* \* \* Q. Now, you did not hear any further conversation between Mr. O'Malley [the yardmaster] and Mr. Abshier? A. I heard talk about the car; I don't know what the reference to the car was. Q. Before or after your conversation? A. Before. Q. Where were you then? A. Going to see Mr. O'Malley; he was talking there, and I heard them say something about the bad order car, and then I asked him when he was going to the T. & P., right in front of Abshier."

Meyers' testimony on the subject reads as follows:

"Q. I will ask you to state whether or not you heard any conversation between the yard foreman and Mr. Abshier? A. \* \* \* Mr. Abshier asked the yard foreman if he was going to the T. & P., and he said that he was, and about that time I had to go to the scale house and get some polish. Q. What did Abshier tell him? A. He told him he was going to cross to No. 2 to inspect a car. \* \* \*"

On cross-examination:

"Q. Who else was there besides Mr. O'Malley and Mr. Abshier when this conversation took place? A. Well, I don't know whether the switching crew was there or not. They might have been there, but I don't know. \* \* \* Q. Now, I believe you said that the conversation that took place was that Mr. O'Malley told Mr. Abshier that he was going over to the T. & P., and Mr. Abshier told Mr. O'Malley that he was going to No. 2 to inspect a car. A. Yes, sir; the car had come in on Interchange. Q. Was that the conversation that took place? A. Yes, sir; that is all I heard; I left there then."

Meyers had also been interviewed by Doyle, on the day of, or day after, the accident, and had made and signed a statement which included the following:

"I had been walking around in the yard with Rabbit [meaning plaintiff] all the evening, prior to the accident. We finished repairing a door on a car on the main line. I walked up to the scale track; in fact, when I left Abshier, he was still working on the door. I had walked up to the scale house to get some weights(?) to stencil a car, and had not left him over five minutes when I saw that he had been hurt. He evidently had just walked over to the track on which he was hurt, for, as above stated, I had not left him over five minutes. I had not heard him say anything about the R. I. bad order car, and did not know he intended going over to it."

O'Malley testifies that he had a passing conversation with Abshier some time after 2 o'clock, on the day of the accident, but did not say to him or to Saunders that he was going over to the T. & P.; that he was not making up any cars to take over there; that, according to his recollection, the time for delivering cars at the T. & P. yards expired at 2 o'clock, and had passed when he talked to Abshier. And he is corroborated, as to the matter last mentioned, by Mr. Higginbotham, defendant's local freight agent at Shreveport, and is wholly uncontradicted.

#### Opinion.

In *Roux v. Morgan's La. & Tex. R. & S. S. Co.*, 127 La. 240, 53 South. 550, it appeared that defendant had rules identical in terms with those which have been hereinabove quoted; that Louis Torres, employed as a carpenter

and car repairer, was furnished with blue flags wherewith to protect himself while working around, under, or on cars, and lost his life by reason of his failure to make use of them, and it was held that defendant was not liable in damages therefor. It was said in the course of the opinion:

"It is not shown that this rule [referring to a rule corresponding to defendant's rule 26] was ever specifically brought to the notice of Torres, or that he was furnished with a copy of the book of rules in which it is contained; but it was shown that he had been in defendant's employ for four years, and that he was given time cards bearing the printed notice, which, at the beginning of his employment, was read to him by one of the officers of the defendant company, to wit: [Being the same notice that is printed on the time cards that were given to, and used by, the plaintiff herein, and with which he admits that he was familiar.]"

The conclusion reached by the court, as to the law of the case, is stated in the syllabus as follows:

"Where a car repairer goes to work on a car, on a railroad track, without putting out proper signals, with which he is provided, and the use of which he knows, to prevent collision by other cars, whilst he is so engaged, there can be no recovery of damages for injuries sustained by him the fault is his."

We can discover no reason why the same law should not be applied in this case. To the contrary, the reasons for its application are stronger than in the case cited; for here the person who, for his own protection as well as for the protection of his employer, assumed a certain obligation, and who now seeks to hold his employer liable in damages for an injury sustained by him in consequence of his violation thereof, was somewhat a person in authority, and owed it to his employer to comply with his obligation, not only because he had so agreed, but as an example to others, and particularly to those who were placed under his authority. The rule, and the reasons of the rule, which require a signal to be displayed by an employé who is engaged in work around, under, or on a car, standing upon a railroad track, are none the less applicable in the case of one who goes under a car in order to inspect it than in the case of one who assumes that position for any other reason, and as plaintiff herein, for every day that he worked, signed and turned in to the defendant a card in which he recognized that fact, defendant had the right to assume that he was not only observing, but, as to his assistant, was enforcing, that rule.

The evidence falls to satisfy us that plaintiff, or any part of his person, was reasonably visible, in either of the positions which he attempts to describe, to a person on a car, or train, approaching from the direction of the scale, or that the yardmaster understood, or could have been expected to understand, even though we should assume that he knew plaintiff's purpose was to inspect the R. I. car, that he intended to disappear beneath it, and, in so doing, violate the rule of their common employer by failing to display a

blue flag. In that view of the matter, it is unnecessary for us to consider whether, if plaintiff and the yardmaster had deliberately agreed that the rule should be disregarded, their employer could be required to pay the penalty.

Our conclusion being that plaintiff is not entitled to recover it is ordered and decreed that the judgment in his favor be set aside and annulled, and his demands be rejected, and that this suit be dismissed, at his cost in both courts.

SOMMERVILLE, J., takes no part.

(141 La. 209)

No. 22308.

GLISSON v. BIGGIO et al.

(Supreme Court of Louisiana. Feb. 12, 1917.  
Rehearing Denied April 16, 1917.)

(Syllabus by the Court.)

1. LIBEL AND SLANDER ¶83 — MALICIOUS PROSECUTION ¶40 — CAUSE OF ACTION — MALICE — WANT OF PROBABLE CAUSE.

In a suit for damages for libel and malicious prosecution, it is necessary to allege and show malice on the part of defendant, and want of probable cause, in the suit complained of.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 198; Malicious Prosecution, Cent. Dig. §§ 94-96.]

2. MALICIOUS PROSECUTION ¶64(1) — JUSTIFICATION — JUDGMENT.

Where defendant in such suit introduces record evidence to show justification of the charges made in the suit which was charged to have been a malicious prosecution; held, that there should be judgment for defendant.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 151, 153.]

3. LIBEL AND SLANDER ¶38(2) — MALICIOUS PROSECUTION ¶4 — RIGHT OF ACTION.

An action for libel or malicious prosecution does not lie because of the filing of a petition with the district attorney charging want of integrity or other cause of unfitness in a public officer or employé, subject to removal by or under supervision of the court to whom the communication is addressed, where the communication to the proper officer, is made in good faith, without malice, and with probable cause.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 118, 119; Malicious Prosecution, Cent. Dig. § 4.]

(Additional Syllabus by Editorial Staff.)

4. WORDS AND PHRASES — "MALFEASANCE."  
"Malfeasance" is the unjust performance of some act which the party had no right to do, or which he had contracted not to do.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Malfeasance.]

5. MALICIOUS PROSECUTION ¶51 — RIGHT OF ACTION — TERMINATION OF PROSECUTION.

In an action for malicious prosecution based on the bringing of a suit for impeachment and removal from office, it was necessary that plaintiff allege that the suit had terminated favorably to himself.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 98, 99.]

Appeal from Twenty-Sixth Judicial District Court, Parish of St. Tammany; Prentiss B. Carter, Judge.

Suit by J. E. Glisson against Charles Biggio and others. Judgment for plaintiff, and defendants appeal, and, plaintiff answering the appeal, asks that judgment be amended by an increase to the amount applied for in his petition. Judgment annulled and reversed, and judgment for defendants, dismissing plaintiff's suit.

See, also, 71 South. 204.

L. C. Molse, of Covington, and E. J. Meral, Charles J. Theard, and Delvaile H. Theard, all of New Orleans, for appellants. William H. Byrnes, Jr., and Paul A. Sompayrac, both of New Orleans, and Adrian D. Schwartz, of Covington, for appellee.

SOMMERVILLE, J. Plaintiff sues the several defendants for \$50,641 damages because of an alleged libel and malicious prosecution. He alleges that defendants circulated a petition, addressed to the district attorney, wherein were made libelous, defamatory, and false charges against him; that in said petition plaintiff was charged with nonfeasance and malfeasance, gross misconduct, and conduct unbecoming an officer; with the request that the district attorney, under article 222 of the Constitution, have the plaintiff, as mayor of the town of Abita Springs, impeached and removed from office. The petition to the district attorney is annexed to the petition in this case. Plaintiff charges that defendants made said charges without probable cause, and that they were false, unfounded, libelous, and malicious; that the district attorney filed suit based upon said petition, and that in said petition the additional charge of habitual drunkenness was made against him; that it was charged by said district attorney that plaintiff wrongfully and unlawfully signed a warrant on the treasurer of the town for \$50 in favor of C. E. Whitehead, which debt had been contracted for his own personal account, and that it was not a debt of the town of Abita Springs, La., incurred by it through its proper officers; and that by said act he attempted to unlawfully take from the funds of said town the sum of \$50, and convert same to his own use, by paying a personal obligation. Further that after said suit for removal had been on trial for a day and a half, the plaintiffs in said suit having failed to sustain the charges and allegations, the said suit was dismissed by the district attorney.

An exception of no cause of action was filed by defendants, and was sustained by the district judge, and overruled by a judgment of this court. See Glisson v. Biggio, 139 La. 23, 71 South. 204.

Defendants answered, pleading justification. They denied that they had acted mali-



ciously, but alleged that the petition and suit were filed with probable cause. They denied that they placed witnesses upon the stand during the trial of the impeachment suit, and alleged that the entire suit was under the control of the district attorney. They alleged that, before the petition was presented to the district attorney, they consulted private counsel in the matter, and were advised by him that they were acting legally, and that they should present the petition to the district attorney, that they also consulted the district attorney about the matter, and that he advised them to have the suit brought, as they had a legal and valid cause of action. They further pleaded that:

Plaintiff "is estopped from bringing this action, for the reason that before this suit was discontinued by the district attorney, all parties in interest, together with their counsel, consented that the district attorney discontinue said suit; that the said compromise will appear in the minute books of this honorable Twenty-Sixth judicial district court, Thursday, June 26, 1913, in which the said minutes are as follows: 'State ex rel. v. J. E. Glisson. This case came up this day, continued from yesterday, and upon the district attorney appearing in open court, and having announced that all parties to this suit, having agreed to settle their differences, and, by mutual consent of all parties, he asked that this suit be withdrawn, and that the costs thereof be paid as agreed upon by the parties thereto.'

The said minute of the court was specially made a part of the answer of defendants.

There was judgment in favor of plaintiff and against defendants in the sum of \$15,000. Defendants have appealed. Plaintiff has answered the appeal, and asks that judgment be amended by an increase to the amount prayed for in his petition.

[1-3] Plaintiff charged malice against the several defendants because of the petition circulated and signed by them, in which it is charged that he, as mayor of the town of Abita Springs, La., "has been guilty of non-feasance and malfeasance, favoritism, gross misconduct, and conduct unbecoming an officer," with the request to the district attorney "to institute proper proceedings, under article 222 of the Constitution of the state of Louisiana, to have said officer, said J. E. Glisson, mayor of the city of Abita Springs, La., impeached and removed from office as such mayor." But he has failed to prove malice, direct or implied, on the part of these defendants. He has shown that he was not the choice of some of them for mayor, and that some other person was, at the time of his election; but this does not prove malice on the part of these persons at the time that this petition was circulated and signed by them.

It is the duty of all persons, who have an interest in the pure administration of justice and efficiency of their public officers in the several departments of state, to inform, by petition or otherwise, the proper authorities of any misconduct on the part of public officials; and any such communication,

made without malice, in good faith, and with probable cause, is privileged. Bad faith, on the part of defendants, has not been shown; while probable cause has been shown.

"So, too, it is the duty of all who witness any misconduct on the part of a magistrate or of any public officer to bring such misconduct to the notice of those whose duty it is to inquire into and punish it; and, therefore, all petitions and memorials complaining of such misconduct, if forwarded to the proper authority, are privileged. And it is not necessary that the informant or memorialist should be in any way personally aggrieved or injured; for all persons have an interest in the pure administration of justice and the efficiency of our public officers in all the departments of the state." *Odgers, Libel and Slander*, 1911, p. 276.

"No action for libel or slander lies for a petition or remonstrance imputing want of integrity or other cause of unfitness to a public officer or employé subject to removal by or under the officer or board to whom the communication is addressed, provided such communication is made in good faith and without malice." 25 Cyc. 339, citing authorities from Illinois, Kentucky, Maryland, Nebraska, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Virginia, and England.

Cooley on Torts (1906) p. 434, states that:

"The cases conditionally privileged are those in which the utterance or publication is on a lawful occasion, which fully protects it, unless the occasion has been abused to gratify malice or ill will (citing authorities). A petition to the executive or other appointing power, in favor of an applicant for an office, or a remonstrance against such an applicant, is a publication thus privileged. No action will lie for false statements contained in it, unless it be shown that it was both false and malicious (citing authorities). And this rule will apply to petitions, applications, and remonstrances of all sorts addressed by the citizen to any officer or official body, asking what such officer or body may lawfully grant, or remonstrating against any thing which it might lawfully withhold. It is a necessary part of the right of petition that such papers presented in good faith should be protected (citing authorities). And it is privileged while being circulated as well as after it is presented (citing authorities)."

"The plaintiff has alleged, but not proven, any malice, expressed or implied, on the part of either of the defendants. \* \* \* They had probable cause and acted bona fide in matter pertaining to their functions and which required their action. Under English and American authorities and common sense, they are privileged and are fully protected and exonerated (citing *Townsend on Libel and Slander*; *Larkin v. Noonan*, 19 Wis. 82; *King v. Gantt*, 33 La. Ann. 1149; *Cooley on Torts*, pp. 408 et seq.). The district judge properly rejected the claim." *Fisk v. Soniat*, 33 La. Ann. 1400.

Words "uttered without malice, and under circumstances from which no malice is in law implied, \* \* \* carry with them [no] pecuniary responsibility." *Gilbert v. Palmer*, 8 La. Ann. 130.

Plaintiff further charges that defendants libeled him by making representations to the district attorney which were false, malicious, and damaging, which allegations were contained in the petition filed by the district attorney for his removal from office. He repeats the charges of malfeasance, etc., which were contained in the petition circulated and signed by the defendants, and shows that the petition filed by the district



attorney contained the additional charge of habitual drunkenness. But he has failed to show that these defendants made such a charge, or communicated with the district attorney as to it. It rather appears to be a charge made by the district attorney, and for which these defendants are not responsible. The district attorney is not made a defendant in this cause.

It has already been seen that the allegations, contained in the original petition of defendants, were not made maliciously; and it will be seen that they were made with probable cause.

The next allegation in the petition is that defendants maliciously and falsely charged plaintiff with having wrongfully and unlawfully signed a warrant on the treasurer for the sum of \$50, directing the treasurer to pay same to C. E. Whitehead, which debt had been contracted for and by him (plaintiff) for his own personal account, and that same was not a debt of the town of Abita Springs, contracted for and by it through its proper officers.

The above is only one of several charges made by the district attorney in his petition of impeachment, with reference to which nonfeasance and malfeasance in office were charged, together with corruption, favoritism, oppression in office, gross misconduct, conduct unbecoming an officer, etc. There followed several specific charges, some of which were sought to be proved on the trial of the case.

The libel charged by plaintiff with reference to the alleged wrongful issuance of a voucher for \$50, drawn on the treasurer of the town of Abita Springs, is shown by the minutes of the town council, which were offered in evidence, to have been for a road machine which the mayor had ordered on his own account, without any authority whatever from the town council. He ordered the road machine, and made himself responsible in a letter for the cost thereof. He testified that he did this upon his own authority. As mayor, he had no right to make any contract for the town, without the authority of the town council.

"Sec. 31. Be it further enacted, etc., that all expenditures of money for any purpose whatever, shall be in pursuance of a specific appropriation made by order, and in no other manner. Every warrant drawn on the treasury shall express on its face to whom issued and for what purpose allowed; and the ordinance authorizing its issue shall be cited by minute book and page, in or upon it." Act 136, 1898, p. 224.

Plaintiff usurped the authority of the council, when he undertook to expend the money of the town on his own authority.

"The powers and duties of the mayor depend entirely upon the provisions of the charter of the corporation and valid ordinances, by-laws, and resolutions of the council passed in pursuance thereof. He has no authority but what is expressly conferred upon him by the charter, or by the council or governing legislative body acting within the scope of the law." McQuillin, *Municipal Corporations*, § 433, p. 967, vol. 2.

"The power of the mayor depends entirely upon the provisions of the charter, and valid ordinances passed in pursuance thereof." Dillon, *Municipal Corporations*, § 206.

"Corporate bodies act or contract in the manner and form prescribed by law or by their charters." *Condran v. City of New Orleans*, 43 La. Ann. 1202, 9 South. 31.

Defendants offered in evidence the minutes of the town council, dated January 6, 1918, which show that at a regular session of the town council on that day, the plaintiff, as mayor, being in the chair, only three members of the council were present while three members were absent; that it was declared that no quorum was present, and that "the mayor declared quorum present and proceeded to business"; and that one of the items of business passed upon at that time was the payment for the road machine above mentioned.

The action of the mayor in declaring a quorum present when there was no quorum was arbitrary and illegal, and subjected him to strong criticism. The mayor clearly had no right to declare a quorum present when it was not present. At that illegal meeting, the bill for the road machine, which the mayor had purchased without having been authorized so to do, was ordered paid by the treasurer; and when the treasurer refused to pay the bill, he was suspended from office by plaintiff. He, as mayor, had no right to do these things.

[4] Malfeasance is the unjust performance of some act which the party had no right to do, or which he had contracted not to do. And, defendants have shown that they acted with probable cause, and without malice, when they charged plaintiff with malfeasance in office.

"On principles of policy and convenience the prosecutor will be protected, even though his private motives were malicious, if he had probable cause." *Grant v. Deuel*, 3 Rob. 17, 38 Am. Dec. 228; *Digard v. Michaud*, 9 Rob. 387; *Penny v. Taylor*, 5 La. Ann. 714.

As plaintiff has failed to show malice on the part of the defendants, and as the defendants have shown justification and probable cause for their action in having the impeachment suit against plaintiff filed, the judgment should have been with them.

The defendants further pleaded an estoppel in their answer, to the prosecution of plaintiff's suit for malicious prosecution, on the ground that all the parties in interest, together with their attorneys, consented that the district attorney discontinue the impeachment suit, and that this discontinuance was effective, without a final judgment in favor of the plaintiff. And they embodied in their answer a copy of the minutes of the court showing that the case had been discontinued by the district attorney on the ground:

"That all parties to this suit having agreed to settle their differences, and with the consent of all parties, he asked that the suit be withdrawn," etc.

The minutes of the court were offered in evidence by plaintiff, and they were again

offered in evidence by defendants. These minutes are prima facie correct. And, when this plea of estoppel and the minutes of the court were presented, and urged in the Supreme Court, and a judgment thereon was asked by defendants, because the prosecution of the impeachment suit had not terminated favorably to the plaintiff, the plaintiff says, on a supplemental brief:

"It is frankly admitted that we were completely swept off our legal feet when we noticed with alarm the importance that two of the learned justices seemed to give defendants' counsel's argument that the extract from the minutes show that plaintiff had compromised the impeachment suit, and was therefore precluded from bringing this present action. We had never dreamed that such a statement would be taken seriously."

It is argued on the brief that the extract from the minutes do not say that a written compromise was filed, or entered into, but—

"merely that the district attorney announced that the parties had agreed to settle their differences, and that this statement was not made in the presence of Glisson or of his counsel, and counsel ask that the case be remanded, that evidence be taken on this point."

The view already expressed in this opinion would preclude remanding of the case, if there were otherwise any necessity for so doing.

The minutes of the court, reciting that an agreement had been entered into by all parties, and showing that a dismissal of the suit was asked for that reason by the district attorney, may not show an actual compromise in writing signed by all the parties, but the agreement referred to was pleaded by defendants in their answer, and the minutes of the court reciting said agreement, were copied in full in their answer. And plaintiff also in his petition alleges that the suit was dismissed by the district attorney. He also offered in evidence the minutes showing the dismissal with the consent of all the parties, which on its face indicates that all parties were present in court at the time the motion for dismissal was made, based on their consent. The minutes were again offered by the defendants in support of their plea of estoppel. We, therefore, fail to appreciate the surprise pleaded by plaintiff on his brief when counsel for defendants argued that a suit for malicious prosecution would not lie, where there had been no final judgment in favor of the plaintiff in the former suit for removal from office. It may well be that the minutes of the court do not

show conclusively that there was a compromise; but the minutes do show that a settlement was declared in the motion to dismiss and these minutes are prima facie evidence as to what took place in open court.

The minutes of the court do not show an acquittal of plaintiff, and they do not show an abandonment by the prosecution equivalent thereto. The abandonment of the prosecution was, as declared in open court on dismissing the case, with the consent of all parties in interest. *State v. Finlay*, 33 La. Ann. 113, 118.

[5] Plaintiff does not allege in his petition that the suit for impeachment and removal from office had terminated favorably to him. This was a necessary allegation; and the proof in the record does not show that the dismissal of the cause was a judgment favorable to the plaintiff, or an abandonment of the prosecution thereto. *Irby v. Harrell*, No. 21202, decided January 15, 1917, 140 La. 82, 74 South. 163.

"A settlement or compromise after the commencement of the suit will preclude an action for malicious prosecution." 26 Cyc. 46; *Slaughterhouse Case*, 37 La. Ann. 879.

"A plaintiff cannot maintain an action for the malicious prosecution of a civil suit until after the legal termination in his favor of the suit complained of." *Davis v. Stuart*, 47 La. Ann. 378, 16 South. 871.

In *Morgan v. Illinois Central R.*, 117 La. 674, 42 South. 216, the court say:

"The prosecution against plaintiff was abandoned. Defendant did not, because of the abandonment, become liable in damages, as there was probable cause."

Plaintiff has failed to prove malice on the part of these defendants in the impeachment suit brought against him. He has failed to prove the want of probable cause, and he has failed to prove that the alleged malicious prosecution of him had terminated favorably to him. There should have been judgment in favor of defendants.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that there be judgment in favor of defendants, dismissing plaintiff's suit, with costs.

O'NIELL, J., concurs in the decree only on the ground that the plaintiff did not attack or question the correctness of, the minute entry showing that the suit to remove him from office was abandoned with the mutual consent and satisfaction of all parties.

(141 La. 220)

No. 21799.

**FALLIN v. J. J. STOVALL & SONS, Limited,**  
et al.Supreme Court of Louisiana. June 30, 1916.  
On Rehearing, April 16, 1917.)*(Syllabus by the Court.)***1. EXECUTION §24—IMMOVABLES—SEIZURE  
SEPARATE FROM LAND—STATUTE.**

The mere fact that standing crops, ungathered fruit, and trees before they are cut down are declared by the Civil Code to be immovables does not, of itself, furnish a reason why they should not be owned and seized under execution separately from the land upon which they are produced, and still less does it furnish a reason why things which become part of the land and immovables merely by destination should not be so owned and seized.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 59, 60.]

**2. EXECUTION §127—EXEMPTIONS §37—  
IMMOVABLES—IMPLEMENTS AND FODDER.**

The first paragraph of article 645 of the Code of Practice (being the original article as amended by Acts 1843, p. 45, § 1), prohibiting the seizure, separate from the land to which they are attached, of agricultural implements, working cattle, and plantation supplies for the current year, is properly confined in its application to objects thus exempted which are placed on, and thereby attached to, the land or plantation for the service and improvement thereof by the owner, and which thereby become immovable by destination; but the second paragraph of the article (having been originally in independent statute, No. 33 of 1865, Ex. Sess.), as also article 244 of the present Constitution, provide for the exemption of implements, working cattle, and corn and fodder for the current year on a farm, and whether "attached" to a homestead or not.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 282-286.]

**3. EXEMPTIONS §43—"FODDER"—CONSTITUTIONAL PROVISIONS.**

Peanuts may be "fodder" under some circumstances, within the meaning of article 244 of the Constitution, but not where the occupant of the farm on which they are raised has planted and intended them to be sold, and discovers that they are needed as fodder only when they are seized by a creditor.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 42, 43.]

**4. EXEMPTIONS §148—CLAIM OF EXEMPTION  
—GOOD FAITH.**

The claim that property is exempt from seizure for debt must be made in good faith and supported by credible testimony.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 172-174.]

On Rehearing.

*(Additional Syllabus by Editorial Staff.)***5. EXECUTION §172(7)—INJUNCTION—ATTORNEY'S FEES.**

Attorney's fees are not allowed as special damages when the plaintiff in injunction is the defendant in execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 538, 539.]

Appeal from Fifth Judicial District Court, Parish of Winn; Moss, Judge.

Action by B. F. Fallin to enjoin proceedings by J. J. Stovall & Sons, Limited, on a writ of scire facias in execution, in which

plaintiff's father intervened, claiming ownership of part of the property seized. Judgment for plaintiff condemning defendant to pay attorney's fees, motion for new trial overruled, and defendant appeals, and plaintiff, answering, prayed that the award in his favor be increased. Judgment affirmed except in so far as it maintains the injunction against certain peanuts in the ground, and allows plaintiff damages for attorney's fees, and in those respects set aside, and the injunction dissolved, and plaintiff's suit dismissed.

Wallace & Bentley, of Winnfield, for appellant. Julius T. Long, of Winnfield, for appellee.

**Statement of the Case.**

MONROE, C. J. Defendant, having obtained judgment against plaintiff, caused execution to issue, by virtue whereof the sheriff seized, as the property of plaintiff, and on his premises, one mule, 700 pounds of seed cotton, and seven acres of peanuts hanging by the roots, also, on the premises of plaintiff's father, one bale of lint cotton. Plaintiff thereupon filed a sworn petition alleging that the property seized which he specified belonged to him, and that the mule and peanuts were not subject to seizure, and praying that the sheriff be enjoined from further proceeding in the matter of their seizure, and he obtained the injunction as prayed for. His father at the same time filed a petition of intervention, setting up title to the seed and lint cotton, alleging that he had bought it from his son, and had credited \$79.88 as the price upon his son's indebtedness to him, amounting to \$126. In the alternative he alleged that, should it be held that he is not the owner of the cotton, he is entitled to a lien and privilege on it to secure the sum of \$75 which he advanced for the purchase of provisions and supplies used in the making of the cotton and other crop seized, and which were furnished with the understanding that the money was to be reimbursed from said crops. The petition, like that of plaintiff, was verified by the affidavit of the petitioner, and an order was made thereon for the separate appraisal of the property described, etc. Some two weeks later plaintiff filed a supplemental petition making the sheriff a party defendant, and praying for judgment against him in solido with the original defendant. Defendant then answered, putting the petitions at issue, and the case was tried, with the result that there was judgment for plaintiff perpetuating the injunction, ordering that the mule and peanuts be returned to plaintiff, and condemning Stovall & Sons to pay to plaintiff \$25 as attorney's fees. What disposition was made of the intervention or of the cotton therein claimed does not appear. Defendant (Stovall & Sons) took the appeal, and several months after it had been lodged

In this court plaintiff filed an answer, praying that the award in his favor be increased by an allowance of \$53 for loss of the service of the mule. Defendant has moved that the prayer be not considered, on the ground that plaintiff was granted a devolutive appeal, which he abandoned, and cannot now be heard asking for an amendment of the judgment.

The immediate questions to be here decided concern the peanuts, but the decision of those questions involves a consideration of most of the facts developed on the trial, which facts we find to be as follows:

At the time of the seizure defendant was married, had a dependent family, and did not own property to the value of \$2,000. He was farming upon a tract of land containing 120 acres, for which, according to his oral testimony, he had five years before agreed to pay \$750, in annual installments, but had paid only \$150, and, as we infer, was considerably in default with respect to such payments. He also testified that he had received a bond for title, and upon the request of defendant's counsel stated that (with the consent of his own counsel) he would produce it, which he never did. The judgment under which the seizure was made was rendered in March, 1915, and had been anticipated for some time, and the seizure was made in October. Plaintiff appears to have had some misgivings from the time of the institution of the suit lest, under the judgment when obtained, two mules and a cow owned by him should be seized, and, probably in February, he attempted to negotiate an arrangement with Leslie Caskey, a young neighbor, the purpose of which was to place Caskey in the position of an apparent vendee of those animals, and thus to screen them from the pursuit of the defendant. Caskey appears to have declined to take care of both mules, but there were transactions about one of them and the cow concerning which, as the parties subsequently disagreed, there is a conflict in their testimony. The purpose of those transactions is, however, made entirely clear by the testimony of plaintiff.

Thus, after having made a good many statements which were irreconcilable with each other, he was asked what his idea was in returning to Caskey immediately \$20 which he had received as the price of the cow, and his reply was:

"Simply because this man [referring to Caskey's father, who was a party to the negotiations] came to me, simply because I didn't know anything about the law, and he claimed they [referring to the defendant herein] would get my stuff, and they overpersuaded me because I didn't know what to do."

He subsequently concluded, and was probably advised, that his mules and cow were exempt from seizure, and towards the conclusion of his testimony, in reply to questions propounded by his own counsel, he said that he realized that they were exempt, and that "it wouldn't be necessary to sham them off"

to protect himself. The other mule was sent to his father's place, but, as at the time of the trial plaintiff had become satisfied that it was exempt, he frankly admitted that he still owned it. He alleged in his petition that the sheriff had "seized the following property belonging to your petitioner: One bale of cotton, marked B. F. F. No. 22; \* \* \* 700 pounds of seed cotton, more or less." And he made affidavit that he had "read and considered" the petition, and that the allegations of fact therein contained were true; but, when called as a witness, he testified that he had sold the cotton to his father some two or three weeks before the seizure, as it lay, in the seed, on his premises; that there were 1,997 pounds of it; that a week later, at the request of his father, he hauled, say, 1,297 pounds of it to a public gin (leaving the remaining 700 pounds on his place) and directed that it be ginned and baled for account of his father; that upon the same day, after it had been ginned and baled, he hauled the bale of lint cotton, which was marked with his initials, to his father's premises (where it was seized), and there delivered it, but that he then realized that he needed the seed to feed his cow with, so he bought it back, for about \$8, which he paid in cash, and took it home with him. He accounts for the fact that the man in charge of the gin marked the bale with his initials, instead of his father's, by saying that it must have been a mistake, and he was corroborated in that by the man himself, who was his brother-in-law, and who in the two years that he worked at the gin had made but one other such mistake. It soon developed that plaintiff did not know the difference between selling and giving in payment, and that, what he meant to say was that he had given the cotton to his father in payment, or part payment, of a debt of \$126 that he owed him, which debt is said to have originated as follows, to wit: His father paid \$35 for him as the balance of the price of a wagon that he bought in 1914, and settled a debt of \$65, which he had contracted to Caskey for money received, either as a loan (according to plaintiff's testimony) or as the nominal price of the mule to which we have referred (according to Caskey's testimony), and the balance of \$26 represented money loaned to him by his father during the year 1915.

Charles F. Fallin, the father, alleges in his intervention, and swears to the truth of his allegations, as follows:

"That he is the owner of one bale of cotton marked B. F. F. No. 22, and 625 pounds of seed cotton, seized by the sheriff, \* \* \* that he bought said cotton in the seed from his son, B. F. Fallin; \* \* \* that since buying said cotton in the seed he had enough of it hauled to the gin by his son to make, and out of which was made, the said bale; \* \* \* that he gave B. F. Fallin credit for \$79.88 on an indebtedness of \$126 which said B. F. Fallin owed petitioner. \* \* \*

"That he furnished the said B. F. Fallin the

sum of \$75 in money of said indebtedness of \$126 for the purpose of buying provisions and supplies, \* \* \* upon which said B. F. Fallin did make said cotton and other property seized; \* \* \* that said B. F. Fallin used said money in buying provisions and supplies on which he made and cultivated said cotton; that said money was furnished said B. F. Fallin after the 1st day of April, 1915, and before the cultivation of said cotton had been completed by him; that he furnished said money to said B. F. Fallin with the distinct understanding that the said money was to be paid back to the petitioner out of the said cotton and other crop raised, and that, if it be held that said cotton or any part thereof is not the property of petitioner, then in such event petitioner has a lien and privilege on said cotton, not declared to belong to him for said money furnished; \* \* \* that he has a lien and privilege on the seven acres of peanuts seized, \* \* \* for and in the sum of \$75 furnished to said B. F. Fallin for the purpose and in the manner above set forth. \* \* \* Petitioner shows and avers that the said \$75 which he furnished his said son was actually advanced and used for the purchase of necessary supplies and the payment of necessary expenses in cultivating and making said cotton and peanuts."

On the trial of the case there was no pretense on the part of either plaintiff or intervenor that the former had borrowed or the latter loaned \$75. Plaintiff at first testified that he owed his father "\$126, all told," and afterwards, in answer to a leading question, said that his father had advanced \$17 for him in the fall of 1914 which was not included in the \$126. He also testified that the \$126 was made up of the two items \$35 and \$65 to which we have referred, and \$26, consisting of two loans of \$10 each, and one loan of \$6, made during the year 1915 with the understanding that the money was to be repaid from or when he made his crop. The testimony of Charles F. Fallin in regard to his son's indebtedness and the alleged sale of the cotton reads, in part, as follows:

"Q. How much did he owe you? A. \$126. Q. Did he owe you anything else? A. He owed me \$17 that I neglected putting in. Q. What did he owe you that \$126 for? [He here gives the items \$35 and \$65 heretofore mentioned, and proceeds:] A. He owed \$26 that he got from me last spring. \* \* \* Q. Well, the cotton that he let you have, what was that to apply on? A. The general debt, the \$126, the whole indebtedness. \* \* \* 2. The \$26 you let him have through the year, what did you let him have that for? A. I let him have it to make his crop."

#### Cross-examination:

"Q. Mr. Fallin, you stated that you were over at your son's place at the time the cotton was picked? A. Somewhere right after it was picked. Q. You stated that you didn't know just where you saw him? A. I don't know; it was probably right at his house. Q. Where did you have the conversation about the cotton? A. At his house there, about the house, on the place. Q. You don't know whether it was right at his house? A. It was on his place; yes, sir. Q. You can't state whether it was at the house or in the field? A. I don't remember whether it was right in the yard, but it was on his place. Q. What delivery was made to you of that cotton? A. There wasn't any, except the bale he was to carry to the gin. \* \* \* Q. You didn't receive it when you receipted for it? A. No, sir; I left it there at his house. \* \* \* Q. Now, Mr. Fallin, at the time you gave your son this receipt for this seed cotton, or within a short time before that, what con-

versation did you have with him with reference to the Stovall judgment? A. My understanding was that they had a judgment against him, and I bought that cotton to get my money, because they were more able to wait than I was. I had paid that money and I bought the cotton to hold it, honest, square, bought it. Q. You went over there and bought this cotton and gave your receipt to your son so that Stovall couldn't get it by reason of their judgment? A. Yes, sir. \* \* \* Q. Now, about this \$26 that you advanced for supplies, do you know what supplies were gotten with that money? A. No, sir. \* \* \* Q. As a matter of fact, didn't you lend him that money just as any father would? A. Sure; he had it in his possession to do what he pleased with it. Q. He first borrowed the money from you and was going to pay it back to you when he made his crop? A. Yes, sir. \* \* \* Q. When he sold his crop and got his money? A. When he sold his cotton. \* \* \* Q. What was said at the time he borrowed the money about your having the right or privilege on his cotton? A. He was to let me have my money out of the crop—out of the cotton. Of course the cotton was supposed to pay it, as far as it would last. Q. That was what you expected to make it out of? A. Yes, sir; because I couldn't have gotten it out of the other because he needed it."

The evidence, as we understand it, shows that plaintiff had married and settled on the place in question in 1912, but it does not appear that he made any crop during that year. However that may be, he testifies that he raised peanuts in 1913 and 1914, and that he sold the crops of both years. Moreover, he was unable, or unwilling, to say that it was not his intention to sell the crop of 1915, and his testimony discloses no condition which made it any more necessary, as a supply or provision crop, during that year than during the preceding years.

#### Opinion.

[1, 2] Plaintiff invokes C. C. 465, C. P. 645, and Const. art. 244, which provide, respectively, as follows (quoting in part):

##### Article 465, C. C.:

"Standing crops and the fruit of trees not gathered and trees before they are cut down, are likewise immovable, and are considered as part of the land to which they are attached."

##### Article 645, C. P.:

"Nor, can he (sheriff or constable) seize the agricultural implements, and working cattle, separately from the land to which they are attached; nor the corn, fodder, hay, provisions, and other supplies necessary for carrying on the plantation to which they are attached, for the current year."

"And in addition to the property and effects exempted as aforesaid, there shall also be exempted \* \* \* 160 acres of ground, and the buildings and improvements thereon occupied as a residence, and bona fide owned by the debtor, having a family; \* \* \* also, one work horse, one wagon or cart, one yoke of oxen, two cows and calves, twenty five head of hogs or 1,000 pounds of bacon or equivalent in pork; and, if a farmer, the necessary quantity of corn and fodder for the current year. \* \* \*"

##### Article 244, Const.:

"There shall be exempt from seizure \* \* \* except as herein provided, \* \* \* the homestead, bona fide, owned by the debtor and occupied by him, consisting of lands, not exceeding 160 acres, buildings, \* \* \* whether rural or urban, of every head of a family; \* \* \* also two work horses, one wagon or cart, one yoke

of oxen, two cows and calves, twenty five head of hogs, or 1,000 pounds of bacon or its equivalent in pork, whether these exempted objects be attached to a homestead or not, and on a farm the necessary quantity of corn and fodder for the current year, and the necessary farming implements, to the value of \$2,000."

Act 188 of 1904 provides:

"That standing timber shall remain an immovable, and be subject to all the laws of the state on the subject of immovables, even when separated in ownership from the land on which it stands: Provided that nothing in this act shall be construed as altering, affecting or modifying existing laws relative to the assessment and taxation of such timber."

Standing timber, though by law, if not by nature, made part of the land to which it is attached, may, however, be separated in ownership from the land, even as the title of the land itself may be dismembered so that the surface rights become vested in one person and the subsurface or mining rights in another, and there are many thousands of acres of land in this state the titles to which are so dismembered, as there have been, and perhaps are, many thousands of orange and pecan trees the ungathered fruit of which has been sold to one person whilst the ownership of the trees and of the land upon which they stand has remained in another. The mere fact that standing crops, ungathered fruit, and trees before they are cut down are declared by the Civil Code to be immovables does not, therefore, of itself, furnish a reason why they should not be owned and seized separately from the land on which they are produced, and still less does it furnish a reason why things which become part of the land, and immovable merely by destination, should not be so owned and seized; hence the necessity, or supposed necessity, for article 645 of the Code of Practice. That article in its original form prohibited only the seizure of agricultural implements and working cattle separately from the land to which they were attached, and, when it was amended (by Acts 1843, p. 45), the amendment extended the prohibition only to "corn, fodder, hay, provisions, and other supplies necessary for carrying on the supply of the plantation, to which they were attached for the current year."

It is evident that the word "attached," as thus used in the original article, and repeated in the amendment, cannot be ignored, but must be recognized as of distinct significance, for the lawmaker seems to have gone out of his way to make use of it, and thereby to impose a limitation of some kind upon the restriction that he was placing upon the right of a judgment creditor to seize any property belonging to his debtor that he could find. Considering the question thus presented, we can conceive of no way by which a stranger to or mere tenant of a tract of land or a plantation can, in legal contemplation, attach thereto a plow, or mule, a bushel of corn, or a bundle of fodder; nor can we conceive that it was the purpose of the lawmaker to provide a means whereby the owner of 100

mules worth \$25,000, could shield them from the pursuit of his creditors by placing them upon a tract of land, of which he was not the owner, as in a sanctuary. On the other hand, article 468 of the Civil Code declares that:

"The following things are immovable by destination when they have been placed by the owner for the service and improvement of a tract of land, to wit, cattle intended for cultivation. Implements of husbandry. Seeds, plants, fodder and manure. \* \* \* All such movables as the owner has attached permanently to the tenement or to the building, are likewise immovable by destination."

The owner, then, and the owner alone, has the faculty of placing movable objects upon his land under such conditions as to attach them to, and, with the aid of C. P. 645, make them inseparable from, it.

That view of the matter finds support, apparently, in subsequent legislative and constitutional enactments. In 1865 the General Assembly passed an independent statute, with no repealing clause (Act No. 33, p. 52, of 1865, Ex. Sess.), which appears to have been added to article 645 in the revision and re-adoption of the Code of Practice in 1870, and which declared that:

"In addition to the property and effects now exempt from seizure [the words 'there shall also be exempt' having apparently been omitted], \* \* \* 160 acres of ground and the buildings, \* \* \* occupied as a residence, and, bona fide, owned by the debtor, having a family; \* \* \* also, one work horse, one wagon or cart; \* \* \* and, if a farmer, the necessary quantity of corn and fodder for the current year," etc.

And in 1879 there was incorporated in the Constitution of that year, as a "homestead" provision, *eo nomine* article 219 *et seq.*, which, taking the act of 1865 as a basis, extended the exemption therein granted to lands, "whether rural or urban," within the limit of \$2,000 for all exemptions, but without limit as to the quantity of land "bona fide owned by the debtor and occupied by him as a homestead," and exempted one work horse, one wagon or cart, etc. (as in the act of 1865), "whether those objects be attached to a homestead or not, and on a farm the necessary quantity of corn and fodder for the current year and the necessary farming implements."

Article 244 of the present Constitution, as we have seen, limits the exempted land to 160 acres and exempts two work horses, instead of one, and it is otherwise the same (with respect to the matters now under consideration) as article 219 of the Constitution of 1879.

Applying the law as now existing to the facts of the instant case, we are of opinion that plaintiff has not shown that he is the owner of the land occupied by him, and that, in the absence of the assertion of rights by any such owner, or any mortgagee of the property, article 468 of the Civil Code and the first paragraph of article 645 of the Code of Practice have no bearing upon the issues here presented.

[3, 4] We are further of opinion that those issues are to be determined by that provision of article 244 of the Constitution which declares, in effect, that:

"There shall be exempt \* \* \* on a farm the necessary quantity of corn and fodder for the current year."

The remaining question is whether plaintiff's peanuts are "fodder" within the meaning of that provision. We think not. The word "fodder" is derived from the Anglo-Saxon "foda," meaning "food," and the first meaning attributed to it in Webster's International Dictionary is "food," and the second meaning by the same authority is "that which is fed out to domestic animals; esp., coarse food for cattle, horses, and sheep, as hay, vegetables," etc. We have no doubt, therefore, that under some circumstances peanuts may be dealt with and regarded as fodder, and so perhaps, might celery, or water melons, or sugar, but those circumstances are not here disclosed. The evidence satisfies us that plaintiff's peanuts were planted and intended to be sold just as he had planted and sold his two preceding crops, being the only two crops (so far as we are informed) that he had ever made. There is not a syllable of testimony to show that he or any one in that country has ever planted peanuts to be fed to cattle, or that the idea of so using the crop of 1915 had ever occurred to plaintiff until it was seized, or threatened with seizure, in this case, and the question whether it was at that time fodder, exempt from seizure, or a revenue producer liable to seizure is not to be determined by the considerations which then suggested themselves, for it appears from plaintiff's admission and the testimony adduced by him that his then purpose was to defeat defendant's execution by sham conveyances of his property which he must have expected that he would be called on to sustain by testimony. It is said that plaintiff's affidavit verifying the allegations of his petition that he was the owner of the cotton was made by inadvertence, and that it was a "little, insignificant mistake," but accepting counsel's statement as to the inadvertence does not strengthen our confidence in plaintiff's testimony; moreover, a petition for an injunction whereby a creditor is to be prevented from executing his judgment should be prepared and considered with at least sufficient deliberation to enable the petitioner to know what he is swearing to. The affidavit to the petition was, however, merely a cumulative incident, of which another was the affidavit of the intervener to the effect that he advanced plaintiff \$75 for the purpose of buying provisions and supplies, and with the distinct understanding that he was to be paid from the cotton and other crop, whereas as a witness he was able to testify to advances to the amount of only \$26 for crop purposes, and that testimony fails to satisfy us that the transactions were

otherwise than loans of money from father to son, which the borrower was to use as he pleased, and is conclusive to the effect that the lender had no expectation whatever of being reimbursed from the proceeds of the peanuts. The explanation that the affidavit was made inadvertently is not offered in this instance.

We may say in conclusion that this court, in cases such as this, is disposed to extend the fullest exemption that the law allows, but we think it is not asking too much to require that the beneficiaries should assert their claims in good faith and support them with credible testimony, since the rights of their creditors are also to be considered. That requirement has not been met by plaintiff, and he is not entitled to the judgment that he has obtained.

Defendant in its petition prays that its right to claim damages for the wrongful issuance of the injunction be reserved, and it also claims that it be allowed \$50 damages as attorney's fees. The amount of the damages in such cases is regulated by C. P. 304, which provides that:

"In case the injunction be dissolved, the court, in the same judgment, shall condemn the plaintiff and surety, \* \* \* jointly and severally, to pay to the defendant interest at the rate of 8% per annum on the amount of the judgment, and not more than 20% as damages, unless damages to a greater amount be proved; and the sureties in such cases shall not be allowed to avail themselves of the plea of discussion."

The judgment upon which the execution issued has not been copied in the transcript, and we have no means of knowing the amount, and, in view of that fact and of defendant's prayer that its right to claim damages be reserved, we think it advisable to relegate the entire claim for damages (including attorney's fees) to another proceeding. It is therefore ordered that the judgment appealed from be annulled, and that there now be judgment in favor of the defendant herein and against the plaintiff rejecting the demands of said plaintiff dissolving the injunction herein issued and dismissing this suit at his cost in both courts.

It is further ordered that the right of defendant to claim damages for the wrongful issuance of the injunction be reserved.

#### On Rehearing.

PROVOSTY, J. The judgment appealed from condemned the defendants to pay the costs and maintained the injunction as to the mule. The defendants did not appeal from the judgment in those two respects. They expressly restricted their appeal to that part of the judgment maintaining the injunction as to the peanuts and awarding attorney's fees. The judgment is therefore open to review only as to the peanuts and attorney's fees.

On the question of the peanuts we find no reason for changing the conclusion heretofore arrived at, that the peanuts were in-

tended for sale, and not to be kept for fodder.

[5] As to the damages for attorney's fees, such are not allowed when the plaintiff in injunction is the defendant in execution. *Smith v. Bradford*, 17 La. 285; *Flynn v. Rhodes*, 12 La. Ann. 239; *Neveu v. Vorhies*, 14 La. Ann. 739; *Chappuis v. Preston*, 28 La. Ann. 729; *Townsend v. Sheriff*, 42 La. Ann. 892, 8 South. 616; *Oxford v. Colvin*, 134 La. 1098, 64 South. 919.

*White v. Givens*, 29 La. Ann. 571, a home-  
stead case, in which damages were allowed,  
must be considered to have been overruled  
by *Oxford v. Colvin*, supra, another home-  
stead case, in which they were denied. In  
*Shorten v. Booth*, 32 La. Ann. 397, damages  
were allowed to the defendant in execution;  
but the judgment had been extinguished by  
bankruptcy proceedings; hence the case is  
practically analogous to one in which the  
property of a third person has been seized.

As to damages for the seizure of the mule,  
we find no good reason for allowing any.

The judgment appealed from is affirmed,  
except in so far as it maintains the injunc-  
tion as to the peanuts and allows plaintiff  
damages for attorney's fees. In these two  
respects it is set aside, and the plaintiff's  
suit is dismissed, and the injunction is dis-  
solved as to the peanuts; the plaintiff to pay  
the costs of appeal.

SOMMERVILLE, J., takes no part.

(141 La. 235)

No. 21816.

SONIAT v. WHITMER et al.

(Supreme Court of Louisiana. Oct. 16, 1916.  
On Rehearing, April 16, 1917.)

(Syllabus by Editorial Staff.)

1. *LIS PENDENS* §26(1)—THIRD POSSESSOR—  
REMEDY—KNOWLEDGE.

A third possessor can be proceeded against  
only by the hypothecary action, and not by di-  
rect seizure; but this is not so where the third  
possessor acquired the property pending the liti-  
gation in which the judgment sought to be en-  
forced was rendered and after notice of its pen-  
dency had been conveyed to him by due registry  
as prescribed by law.

[Ed. Note.—For other cases, see *Lis Pendens*,  
Cent. Dig. §§ 58, 62.]

2. *VENDOR AND PURCHASER* §283—SALES—  
BONA FIDE PURCHASER—UNRECORDED  
CLAIM—NOTICE.

The purchaser of real estate cannot be af-  
fected by unrecorded claims against the prop-  
erty, even though at the time of the purchase  
he had actual knowledge of them.

[Ed. Note.—For other cases, see *Vendor and  
Purchaser*, Cent. Dig. §§ 563-566.]

3. *TAXATION* §531(1)—PAYMENTS OF TAXES  
—RIGHT OF THIRD POSSESSOR.

Legal subrogation does not take place in  
favor of the third possessor who pays taxes as-  
sessed to him.

[Ed. Note.—For other cases, see *Taxation*,  
Cent. Dig. § 986.]

4. *JUDGMENT* §731—MATTERS DETERMINED.  
The silence of the judgment on any demand  
which was an issue in the case under the plead-  
ings must be considered as an absolute rejection  
of the demand.

[Ed. Note.—For other cases, see *Judgment*,  
Cent. Dig. §§ 1250, 1261.]

5. *EXECUTION* §176—INJUNCTION—DAMAGES—  
ATTORNEY'S FEES.

Where error made it necessary for plaintiff  
to employ counsel to protect his property from  
a seizure under a judgment to which he was a  
stranger, the burden of the expense, including  
the attorney's fees, should fall upon the parties  
responsible for the error, and not upon plain-  
tiff, who was entirely without fault in the mat-  
ter.

[Ed. Note.—For other cases, see *Execution*,  
Cent. Dig. §§ 459½, 538.]

6. *EXECUTION* §176—INJUNCTION—ATTOR-  
NEY'S FEES—AMOUNT.

Where plaintiff through defendant's error  
was required to employ counsel to protect his  
property from seizure under a judgment to  
which he was a stranger, and the property was  
valued at \$175,000, an allowance of \$1,500 at-  
torney's fees to plaintiff was not excessive.

[Ed. Note.—For other cases, see *Execution*,  
Cent. Dig. §§ 459½, 538.]

On Rehearing.

(Syllabus by the Court.)

7. *EXECUTION* §176—WRONGFUL SEIZURE—  
LIABILITY IN DAMAGES.

Where property belonging to a third per-  
son is illegally seized as the property of the  
judgment debtor, and the owner goes into court,  
enjoins the seizure, and has it set aside, the  
plaintiff in injunction is entitled to counsel fees  
as damages.

[Ed. Note.—For other cases, see *Execution*,  
Cent. Dig. §§ 459½, 538.]

O'Niell, J., dissenting.

Appeal from Sixteenth Judicial District  
Court, Parish of St. Landry; B. H. Pavy,  
Judge.

Suit by Leonce M. Soniat against Robert F.  
Whitmer and others to enjoin a seizure of  
property to satisfy a demand against plain-  
tiff's vendor. Judgment for plaintiff includ-  
ing attorney's fees, and defendants appeal.  
Judgment amended by increasing the amount  
allowed as damages, and as amended af-  
firmed.

Gilbert L. Dupre, of Opelousas, and Dart,  
Kernan & Dart, of New Orleans, for appel-  
lants. J. Howell Pugh, of Plaquemine, and  
Dubuisson & Robertson, of Opelousas, for ap-  
pellee.

PROVOSTY, J. On January 15, 1910, a  
large body of timber land in the parish of  
St. Landry was adjudicated at sheriff's sale  
to J. E. Dunlap, and he made tender of pay-  
ment in compliance with his bid. The sher-  
iff thought the amount tendered was not suf-  
ficient, and so he recried the property, and  
adjudicated it to Robert F. Whitmer and C.  
W. Lamar, and in due course made and re-  
corded a deed in their favor.

On June 30, 1913, in a suit brought by Dun-  
lap, this court annulled the said adjudication  
and deed to Whitmer and Lamar, and order-



the tender of payment made by Dunlap to be accepted, and a deed to be made in his favor. *Dunlap v. Whitmer*, 133 La. 317, 62 Outh. 938, Ann. Cas. 1915C, 990.

Dunlap deposited in court the amount of the tender, and cited all parties appearing of record as having mortgages or privileges upon the property to appear and litigate their claims upon the said fund contradictorily with each other, and to show cause why the property should not pass to him free of said incumbrances.

Among these parties so cited were Whitmer and Lamar, who held mortgages upon the property. They in their answer to this litigation alleged that they had paid the taxes for the years 1910, 1911, and 1912 upon the property, while it stood of record in their name pending the suit of Dunlap against them to have the adjudication and deed made by the sheriff to them annulled, and that these payments had been thus made for the reservation of the property, and should be reimbursed to them, not out of the funds deposited, but out of the pocket of Dunlap, the owner of the property, to whose benefit the payments had inured, and they prayed for personal judgment against him, and they prayed further to be recognized as having, or the security of said reimbursement, the privilege which the state and parish had for the payment of these taxes, and that the said property be decreed to have passed to Dunlap subject to said privilege.

The case was appealed to this court, and a personal judgment was rendered by this court against Dunlap as thus prayed; but no notice was taken by this court either in its opinion or in its decree of that part of the said prayer asking for said privilege. The court, however, decreed that the reimbursement of said taxes was secured by the privilege accorded by article 3226 of the Civil Code to him who has incurred expenses for the preservation of the property of another. *Dunlap v. Whitmer*, 137 La. 792, 69 South. 189.

The date of this judgment was June 29, 1915; and the date of its recordation in the mortgage book of the recorder's office of the parish of St. Landry was July 6, 1915.

Meantime, by an act passed and duly recorded on April 9, 1915, Dunlap had sold the property to Leonce M. Soniat, the plaintiff in the present suit.

On July 19, 1915, Whitmer and Lamar caused a writ of *fi. fa.* to issue against Dunlap upon said judgment, and caused said property to be seized and advertised for sale to satisfy said judgment.

Soniat then brought the present suit, enjoining the said seizure, on the ground that his property cannot be seized to satisfy a debt of Dunlap, and that, if Whitmer and Lamar have a privilege upon said property which entitles them to proceed against it, they must do so by the hypothecary action, and not by a direct seizure.

[1] A third possessor can, of course, be proceeded against only by the hypothecary action, not by direct seizure; but this is not true where the third possessor acquired the property pending the litigation in which the judgment sought to be enforced was rendered, and after notice of the pendency of the litigation had been conveyed to him by due registry as prescribed by law.

Whitmer and Lamar contend that Soniat stood in close friendly and business relations with Dunlap, lending him large sums of money upon this very property, and must have had full knowledge of the pendency of said suit, and therefore must be held to have taken the property subject to said privilege.

[2] Whether actual knowledge of the pendency of a suit can in any case be made to take the place of notice conveyed by the registry of a notice of *lis pendens* as prescribed by Act 22, p. 25, of 1904 is a question which need not be considered in the present case, for two very peremptory reasons:

First, that Soniat testifies that at the time of his acquisition he had no knowledge of the pendency of any suit in which a privilege was being demanded on said property, and there is no reason for not believing him; and,

Second, that by the decision in *McDuffie v. Walker*, 125 La. 152, 51 South. 100, and many subsequent decisions, the once vexatious question of whether the purchaser of real estate can be affected by unrecorded claims against the property, even though at the time of the purchase he had actual knowledge of them, has been settled in the negative—let us hope forever. Soniat took the property, therefore, free of said privilege.

[3] Whitmer and Lamar invoke also the privilege which the state and parish had for the payment of these taxes. This privilege was duly recorded as an effect of the filing of the assessment rolls in the recorder's office, and the inscription has never been canceled. The contention is that by operation of law, or in other words, by legal subrogation, Whitmer and Lamar succeeded to this privilege when they paid the taxes, and that by virtue of this privilege they have the same right which the state and parish had to proceed directly against the property regardless of any transfers that had been made of it.

The answers to this contention are obvious.

First. Article 2161, C. C., provides in what cases legal subrogation takes place, and the payment of these taxes is not one of them. The point that legal subrogation does not take place in favor of the third possessor who pays taxes assessed to him was expressly decided in *Succession of Erwin*, 16 La. Ann. 132.

[4] Second. Whitmer and Lamar prayed for the recognition of this privilege in the suit itself in which the judgment now sought to be executed was rendered; and the trial court expressly rejected the demand. This court amended the judgment in certain particulars, and otherwise affirmed it; and the

denial of this privilege was not one of the respects in which the judgment was amended. Besides, the mere passing over this demand in silence was a rejection of it.

"The silence of the judgment on any demand which was an issue in the case under the pleadings must be considered as an absolute rejection of the demand." *Villars v. Faivre*, 36 La. Ann. 398.

[5] The trial court allowed Soniat \$1,500 damages for attorney's fees for procuring the setting aside of the seizure.

Whitmer and Lamar deny that this is such a case as calls for the allowance of any damages for attorney's fees, in view of the fact that, if error there was in the seizure of said property, it was an error of counsel, and an honest error induced by the judgment of this court, which recognized the privilege upon the property.

Honest or not, the error made it necessary for Soniat to employ counsel for protecting his property from a seizure under a judgment to which he was a total stranger, and the burden of this expense must fall either upon Whitmer and Lamar, who by their fault caused it, or upon Soniat who is entirely blameless in the matter. We think it should fall upon Whitmer and Lamar. In *Iberia Cypress Co. v. Thorgeson*, 116 La. 218, 40 South. 682, this court, after citing *Ludeling v. Garrett*, 50 La. Ann. 118, 23 South. 94, *White v. Givens*, 29 La. Ann. 573, and *Commission Co. v. Yale*, 47 La. Ann. 696, 17 South. 244, said:

"In all three of the cases cited there was an unlawful seizure of property under a writ of fieri facias. Such cases are exceptions to the general rule that a plaintiff in injunction is not entitled to recover attorney's fees as an element of damages."

[5] Soniat complains that the \$1,500 allowed is not enough, and Whitmer and Lamar that it is too much. We will allow \$500 for the counsel fees in this court.

The property is valued at \$175,000.

It is ordered, adjudged, and decreed that the judgment appealed from be amended by increasing to \$2,000 the amount allowed for damages, and that as thus amended it be affirmed; Whitmer and Lamar to pay the costs in both courts.

#### On Rehearing.

SOMMERVILLE, J. A rehearing was granted on the petition of defendants as to the attorney's fees, which were allowed in the opinion of the court as damages.

[7] In determining whether counsel fees should be allowed or not, and, if allowed, the amount, the court found that it was necessary for plaintiff to employ counsel to protect his property from seizure by judicial process in a suit by defendants in which he (plaintiff) was a stranger. His real estate had been seized to pay the debt of a third person, the judgment debtor of defendants. Such seizure by defendants was a quasi offense, for which they are responsible in dam-

ages to the owner of the property seized. C. O. 2315.

In the case of *Deliole v. Morgan*, 2 Mart. (N. S.) 24, it was held a trespass on the part of the sheriff to have seized and sold the property of plaintiff on an execution against another.

And in *Edwards v. Turner*, 6 Rob. 382, it is held:

"If the property of A. be attached under proceedings authorizing the seizure of that of B., it is a case of trespass."

In such cases actual damages are sustained, and the owner of the seized property is entitled to damages. And, where a writ of injunction is rendered necessary to protect the property from seizure, the costs of such proceedings and the fee of counsel for plaintiff in the writ are parts of the actual damages sustained by plaintiff in the writ.

In the case of *Townsend v. Fontenot Sheriff*, 42 La. Ann. 890, 8 South. 616, where plaintiff, the owner of the property, enjoined the sale of the property seized, and asked for attorney's fees as damages, the court say:

"The demand for attorney fees cannot be allowed. Such fees are allowed as damages when the injunction is dissolved; never when it is maintained; particularly in the absence of malice and probable cause. *Dyke v. Dyer*, 14 La. Ann. 701; [*Neveu v. Voorhies*] 14 La. Ann. 788; [*Smith v. Bradford*] 17 La. 263; [*Hill v. Noe*] 4 La. Ann. 304; [*Flynn v. Rhodes*] 12 La. Ann. 239; [*Bank v. Toledano*] 20 La. Ann. 571; [*Chappuis v. Preston*] 28 La. Ann. 729."

In the earlier case of *White v. Givens*, 29 La. Ann. 571, where the judgment debtor caused a writ of injunction to issue to preserve his homestead, the court allowed attorney's fees in sustaining the injunction. The court say:

"The plaintiff seeks in this suit, not only to prevent the sale of his homestead, but damages for the wrongful seizure. He treats the seizure as unlawful, a trespass, a violation of the right of exemption secured to him by law. He alleges as elements of damage the fees paid his attorney, the loss of his crop, the annoyance to his family, and his loss of time occasioned by the seizure. It is proper in estimating the damages occasioned by an unlawful invasion of the rights of a plaintiff to prove the loss, including the expense which he has incurred in preventing further wrong; and the reasonable fees of an attorney may be allowed as well as any other expense occasioned to the plaintiff by the unlawful act of the defendant."

The above decision is in line with *Cooper v. Cappel*, 29 La. Ann. 213, where the wife of the judgment debtor sued for damages because of the seizure of her property for the debt of her husband. Attorney's fees were allowed in that case.

In the case of *Shorten v. Booth*, 32 La. Ann. 397, where plaintiff enjoined the sale of property which he had acquired at the bankrupt sale of his own property, and where defendant had caused that property to be seized under a writ of fieri facias in execution of an alleged judicial mortgage, attorney's fees were allowed in maintaining the writ of injunction.

There has been diversity of opinion as to whether attorney's fees would be allowed as damages on the maintenance of an injunction to prevent the seizure and sale of one's property in a judicial proceeding against a third person. Such damages have been allowed in *Willis v. Scott*, 33 La. Ann. 1026, and *Ludeling v. Sheriff et al.*, 50 La. Ann., 118, 23 South. 94.

The general rule is that a litigant must pay his attorney. Attorney's fees are not parts of taxed costs in a suit. And such fees have not been construed as damages, except in those cases where a litigant has abused legal process and the other is compelled to go into court to have the illegal process set aside. In cases where a tort, or quasi offense has been committed, and the property of a third person has been seized for the debt of another, and the owner of the property invokes the process of the court to maintain his possession and ownership, the latter should be allowed reasonable attorney's fees, as damages.

In the case of *Iberia Cypress Co. v. Thorgeson*, 116 La. 218, 40 South. 682, attorney's fees were denied as damages to the plaintiff in injunction, who was the owner of the property which was being trespassed upon; but cases allowing such damages where property had been unlawfully seized under writs of fieri facias were approved.

Attorney's fees have been allowed as damages in suits for damages in the following cases: *Chapuis v. Waterman*, 34 La. Ann. 58; *Gilkerson-Sloss Co. v. Yale & Bowling*, 47 La. Ann. 690, 17 South. 244; *Gilkerson-Sloss Co. v. Baldwin*, 47 La. Ann. 696, 17 South. 246; *Am. Holst & Derrick Co. v. Frey*, 127 La. 183, 53 South. 486.

It is clear that, where one has abused legal process and causes the property of a third person to be seized for the debts of another, and the third person is compelled to go into court to maintain his title to the property seized and to have the illegal process set aside, a tort or quasi offense has been committed by the seizing creditor against the third person, for which he is responsible in damages, including attorney's fees.

That is the basis for the allowance of attorney's fees as an element of damages for the dissolution of the conservatory writs. The use of these writs affords an extraordinary, but harsh, remedy, and the law looks upon their misuse or abuse as a trespass for which the offender must render account. Attorney's fees are allowed only for services rendered in having the writs dissolved and the property seized thereunder released. The allowance of attorney's fees for the dissolution of the conservatory writs has passed beyond the pale of controversy.

The same reason exists for the allowance of attorney's fees in favor of a third person who is obliged to resort to the writ of injunction to have title to property maintained

and his property released from seizure as that of another as exists in favor of the defendant in one of the conservatory writs. In either case it is the abuse of the harsh, but extraordinary, powers of the court that entails the penalty. The plaintiff in one of the conservatory writs has his choice of taking the ordinary course and obtaining judgment before putting the mandate of the court into motion. If he chooses to put the mandate of the court into motion before judgment, he does so at his peril. So does the judgment creditor who wishes to test the title to property claimed by a third person by seizing it and defending an injunction suit instead of proceeding by an ordinary suit. In the one case, as in the other, the harsh remedy of seizing in advance of the judgment justifying the seizure entails the penalty of having to pay the other man's lawyer when the seizure turns out to have been wrongfully made.

Where property belonging to and in the possession of a third person is illegally seized as the property of the judgment debtor, and the owner goes into court, enjoins the seizure, and has it set aside, and maintains his title, the plaintiff in injunction is entitled to counsel's fees as damages.

The injunction in this case was sued out by plaintiff to rescue a piece of property from seizure and sale, valued at \$175,000, for the debts of a third person; and the fee of \$1,500 allowed by the district court is based on the value of the thing seized. It is reasonable and will not be disturbed.

The record discloses not only the value of the property of plaintiff which was seized, but also the attack made by defendants against the title of plaintiff, and the valuable services rendered by counsel for plaintiff. These are elements which will be considered in fixing fees of counsel in such cases.

There may be cases with extenuating circumstances which would relieve a seizing creditor from actual damages when the property of a third person is illegally seized. But this case is not such.

It is true that defendant Whitmer had illegal possession of the property at one time, and that he paid taxes thereon to preserve the property, for which amount of taxes he had a privilege. But he was dispossessed, and he retained only a privilege for the amount of the taxes; and, as this privilege was not registered at the time that plaintiff acquired the property, he bought without notice of its existence.

A mortgage certificate may have shown certain taxes to have been due at the time of the purchase, but the record showed at that time that these taxes had been paid. They were not therefore unpaid, and there was nothing suspicious in the waiving of the mortgage certificate by plaintiff.

Defendants say:

That "the plaintiff in execution was not a willful trespasser, but evidently acted in good

faith," and that this is not such a case as calls for damages.

They say further:

"Respondent avers that the plaintiff herein is not a purchaser in good faith."

And again:

"We are not concerned with his [Soniati's] outside understandings, if any he had. What should govern the infliction of damages is the fact that at the time of the levy, and at the time of the institution of the injunction suit, the circumstances surrounding Soniat's title were such as to justify any honest man in believing that the transaction was not bona fide, and was, on the contrary, a flank movement to defeat the operation of a judgment which in specific words granted to Whitmer the right to retain the property, and which recognized by its language that he was in possession of the property, with a privileged right of detention superior to all others."

The record fails to disclose that the purchase by plaintiff was not bona fide, or that it was a flank movement to defeat defendants in any of their rights. The judgment referred to found that defendants had been in unlawful possession of the property, and it deprived them of that possession. It recognized that they had a privilege on the property for the amount paid by them to preserve it while it was in their possession; but it did not give them any right to detain the property until the privilege was paid by Dunlap.

The seizure by defendants of plaintiff's property under a judgment against Dunlap was a trespass. The circumstances surrounding Soniat's title do not present such an exceptional case as to take the illegal seizure of it from under the rule that:

"Every act whatever of man that causes damages to another obliges him by whose fault it happens to repair it." C. C. 2315.

It is therefore ordered, adjudged, and decreed that the judgment of the district court fixing the attorney's fee at \$1,500 is affirmed, at the cost of the appellant.

O'NIELL, J. (dissenting). I respectfully dissent from the opinion and decree condemning the defendant to pay the plaintiff's attorney's fees. There is an irreconcilable conflict in the jurisprudence of this court on that subject, but the later and the majority of the decisions are against the proposition of condemning a litigant to pay his adversary's attorney's fee, except a fee incurred for the dissolution of a conservatory writ. The earlier and minority of decisions, which cannot be reconciled with the later and majority of decisions on that subject, ought to be declared overruled, if the profession of law is to be regarded as anything like an exact science. It is conceded in the foregoing opinion that, although there are decisions by this court on both sides of the question whether attorney's fees should be allowed as an element of damages on the maintenance of an injunction to prevent the sale of one's property seized in a judicial proceeding against a third person, the general rule is against the allowance of attorney's fees as an element of

damages in such case. It is also conceded in the foregoing opinion that this case is not an exceptional one. Hence I see no reason not to apply the general rule heretofore prevailing, unless we are to reverse that rule entirely; and in that event the decisions contrary to the rule now adopted ought to be overruled. As far as the confusion in our jurisprudence is concerned, I apprehend that the decision rendered in this case, without any attempt to reconcile the conflicting decisions heretofore rendered on this subject, and without overruling those that cannot be reconciled with this one, will only make matters worse. For example, the decision in *White v. Givens*, 29 La. Ann. 571, is quoted with approval and at considerable length in the foregoing opinion, notwithstanding that decision was declared, in an opinion handed down to-day, *Fallin v. Stovall & Sons*, No. 21,790, 74 South. 911, to have been overruled by the decision in *Oxford v. Colvin, Sheriff*, 134 La. 1094, 64 South. 919.

The allowance of attorney's fees as an element of damages in this case is directly contrary to the decisions rendered in the following cases, viz.: *Smith v. Bradford*, 17 La. 265; *Melancon's Heirs v. Robichaud's Heirs*, 19 La. 361, affirmed in *Hill v. Noe*, 4 La. Ann. 304; *Flynn v. Rhodes*, 12 La. Ann. 239; *Dyke v. Dyer*, 14 La. Ann. 702; *Neveu v. Voorhies*, 14 La. Ann. 739; *Bank of N. O. v. Toledano*, 20 La. Ann. 571; *Chappuis v. Preston*, 28 La. Ann. 729; *Campbell v. Short*, 35 La. Ann. 466.

The decision in *Dellole v. Morgan*, 2 Mart. (N. S.) 24, is cited in the opinion in this case as holding that a suit against a sheriff for having seized and sold the property of the plaintiff, under a writ directed against some one else, is an action of trespass. But in *Hake v. Lee*, 104 La. 148, 28 South. 1004, which was an injunction suit against a trespasser, it was held that attorney's fees were only allowed as an element of damages on the maintenance of an injunction against a trespasser in exceptional cases.

The ruling in *Edwards v. Turner*, 6 Rob. 382, is not appropriate to this case. It refers to the allowance of attorney's fees as damages for the dissolution of a writ of attachment. *Cooper v. Cappel et al.*, 29 La. Ann. 213, was indeed an exceptional case. The defendants had gone upon the plaintiff's premises and vi et armis carted away the cotton on which the plaintiff had a lessor's lien. Attorney's fees were allowed as an element of the damages for that willful and violent wrongdoing. That decision is not appropriate to the present case. Nor is the ruling in *Shorten v. Booth*, 32 La. Ann. 397, where the defendant in the injunction suit had persistently undertaken to seize the plaintiff's property after the latter had been discharged from the debt in a bankruptcy proceeding.

It is true attorney's fees were allowed as an element of damages in *Willis v. Scott*, 33

La. Ann. 1062, as stated in the majority opinion in the present case. But on rehearing the judgment in that respect was affirmed upon the ground solely that the claim had not been contested and evidence had been admitted in support of it without objection. Hence it was said:

"Without committing ourselves to any decision on this point, we do not feel authorized to disturb our decree affirming the decision of the lower court in this respect."

Surely that decision is not authority for the ruling in the present case.

Ludeling v. Garrett, Sheriff, 50 La. Ann. 118, 23 South. 94, ought to be overruled. In allowing the attorney's fees as an element of damages, the court said that only two cases were recalled where the allowance had been sanctioned, viz.: White v. Givens, 29 La. Ann. 573, and Gilkerson-Sloss Co. v. Yale & Bowling, 47 La. Ann. 696, 17 South. 244. White v. Givens was overruled by Oxford v. Colvin, 134 La. 1098, 64 South. 919, as was expressly declared in the opinion handed down to-day in Fallin v. Stovall & Sons. And in Gilkerson-Sloss Co. v. Yale & Bowling it appears to have been admitted that the plaintiff was entitled to recover attorney's fees to the amount of \$350. See page 696 of 47 La. Ann.

Iberia Cypress Co. v. Thorgeson, 116 La. 218, 40 South. 682, is another case where the court refused to allow attorney's fees as damages in maintaining an injunction against a trespasser. It is said that in that case decisions allowing such damages where property had been unlawfully seized under writs of fieri facias were approved. Yes; but the only cases there cited were Ludeling v. Garrett, 50 La. Ann. 118, 23 South. 94, White v. Givens, 29 La. Ann. 573, and Gilkerson-Sloss Co. v. Yale & Bowling, 47 La. Ann. 696, 17 South. 244. One of those three decisions has been overruled, and the other two are not applicable here.

Chapuis v. Waterman, 34 La. Ann. 58, was an ordinary suit for damages for the unlawful seizure of personal property after the party who provoked the seizure had been warned that the property did not belong to his debtor.

In Gilkerson-Sloss Co. v. Baldwin, 47 La. Ann. 696, 17 South. 246, as in Yale & Bowling's Case, it appears there was no dispute that a certain amount (\$150) was due to the plaintiff as damages for attorney's fees.

In American Holst & Derrick Co. v. Frey, 127 La. 183, 53 South. 486, the attorney's fees were allowed as damages for the dissolution of a writ of sequestration.

I consider it unfortunate that we should let pass this opportunity to reconcile, as far as we can, the apparent conflict in the decisions cited in the foregoing opinion, or overrule one line or the other of the conflicting decisions.

There was no fault in the sense of willful

wrongdoing on the part of the defendant in this case. He had no reason to believe that the present plaintiff would transfer his property during the pendency of the suit on rehearing in which the present defendant's lien or privilege was recognized on the property. Hence his failure to make an examination of the conveyance records before levying the seizure was excusable under the circumstances. The present plaintiff did not make a demand upon the sheriff or the present defendant to release the property from seizure before filing this action for an injunction and for damages. The present defendant could not then release the property from seizure without appearing to acknowledge liability for damages. And he appears to have acted in good faith in defending the injunction suit.

This is not a case of wanton or willful trespass, and the allowance of attorney's fees as an element of damages to the plaintiff in the injunction suit is not warranted, in my opinion, by any of the decisions cited in the opinion from which I respectfully dissent.

No. 21822.

(141 La. 247)

BOARD OF COM'RS FOR FIFTH LOUISIANA LEVEE DIST. v. CONCORDIA LAND & TIMBER CO.

(Supreme Court of Louisiana. May 22, 1916.  
On Rehearing, April 16, 1917.)

(Syllabus by the Court.)

1. TAXATION  $\S$  772—TAX DEED—CONSTRUCTION.

Where the language of a tax deed is susceptible of two constructions, it must be presumed that that meaning was intended which will sustain the validity of the deed, rather than that which will render it void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1540.]

2. TAXATION  $\S$  905(3)—TAX SALE—ACTION TO TRY TITLE—LIMITATIONS.

All irregularities and nullities in tax assessments and tax sales are barred as causes of action by the prescription of three years, as ordained in article 233 of the Constitution of 1898, except on proof of dual assessment, or of payment of the taxes for which the property was sold prior to the date of the sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1595.]

3. TAXATION  $\S$  764(2)—TAX DEED—SUFFICIENCY OF DESCRIPTION.

Any description of property in a tax assessment or tax deed is sufficient if it furnish the means of identifying the property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1520, 1521.]

4. TAXATION  $\S$  679(3)—TAX SALE—REDEMPTION.

Where property is adjudicated to the state for delinquent taxes thereon, the legal title passes to the state, subject to the right of redemption within one year from the date of the registry of the tax sale; and, if such right is not seasonably exercised, the title of the state becomes absolute. Where property has been adjudicated to the state, and not redeemed in time and manner provided by the statute, the taxing

officers of the state are without power to assess and sell said property as belonging to the former owner or any other person.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1361, 1362.]

**5. TAXATION**  $\S$ 217, 329 — **TAX SALE — REDEMPTION—EXEMPTION.**

Where the property assessed and sold at tax sale is wild land, which the owner failed or refused to return for taxation, no possible equity can exist in his favor.

Lands adjudicated to the state and deeded to the board of commissioners of the Fifth levee district under the provisions of Act No. 44 of 1886 are by the very terms of that statute exempt from taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 355, 356, 549, 550.]

**On Rehearing.**

**6. TAXATION**  $\S$ 773 — **TAX DEED—CONSTRUCTION OF RECITALS.**

Where a tax deed representing an adjudication to the state for unpaid taxes for two or more years contains the recital merely that, there being no bid for any part of the property for a sum equal to the amount of the taxes, interest, and costs due thereon, each specific piece of property described in the deed was separately adjudicated to the state, in conformity with the provisions of the Act No. 85 of 1888, it cannot be presumed that the tax collector made a separate adjudication or offering of the property for the taxes of each year.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1541.]

**7. TAXATION**  $\S$ 805(2) — **TAX SALE—VALIDITY.**

A tax sale made for the taxes of two years, when the taxes for one of the years had been paid, is an absolute nullity, not protected by the prescription of three years under article 233 of the Constitution.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1594.]

**8. TAXATION**  $\S$ 805(2) — **TAX SALE—VALIDITY—PRESCRIPTION.**

A sale for the taxes of two years, when the taxes for only one of the years have been assessed, although invalid, is protected by the prescription of three years, under article 233 of the Constitution.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1594.]

**9. TAXATION**  $\S$ 421(8) — **TAX SALE — SUFFICIENCY OF DESCRIPTION.**

For the purpose of a valid assessment and sale for taxes, it is a sufficient description to state the name by which the tract of land assessed is generally known, the name of its owner, the names of its former owners, the number of the ward and name of the parish in which it is situated, and the area of the land within a fraction of an acre.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 731, 732.]

**Appeal from Tenth Judicial District Court, Parish of Concordia; N. M. Calhoun, Judge.**

Action by the Board of Commissioners for the Fifth Louisiana Levee District against the Concordia Land & Timber Company to establish title to real estate. Judgment for plaintiff for tracts 5 and 8, and judgment for defendant for tracts 1, 2, 3, 4, 6, and 7, and plaintiff appeals, and defendant answering prays that the judgment be affirmed as

to tracts 1, 2, 3, 4, 6, and 7, and reversed as to tracts 5 and 8. Judgment reversed and amended and ownership of tracts 1, 2, 3, 4, 6, and 7 decreed to plaintiff, and on rehearing, as to tracts 1, 2, 3, 6, and 7 judgment appealed from in so far as it recognizes and decrees defendant to be the owner of tract 1 affirmed, and in so far as it recognizes defendant to be the owner of tracts 2, 3, 6, and 7 annulled and reversed, and ordered adjudged, and decreed that defendant is the owner of the property designated as tract 1, and that plaintiff is the owner of property designated as tracts 2, 3, 6, and 7.

G. P. Bullis and Philip Hough, both of Vidalia (Ernest T. Florance, of New Orleans, of counsel), for appellant. John Dale and Robert Dabney Calhoun, both of Vidalia (L. E. Hall, of New Orleans, of counsel), for appellee.

**LAND, J.** This is an action to establish title to real estate under Act 38 of 1908. The land in controversy is 1,833.10 acres, swamp woodland in Concordia parish. Plaintiff sets up titles emanating from tax sales to the state between the years 1894 to 1900.

Counsel for plaintiff state in their brief that part of the land in controversy, through error and mistake on the part of Mason & Dale, agents of the police jury of the parish, was assessed in 1900 for taxes of that year, and also for back taxes for the years 1897, 1898, and 1899; that said lands were assessed to a former owner, the Mississippi Delta Land Company, which accepted the assessment and sold the land through mesne conveyances to the defendant; that the remainder of the land in controversy was assessed on the same rolls to "unknown owner," sold for unpaid taxes so assessed, and conveyed by the purchaser, through mesne conveyances, to the defendant herein.

The defendants answering set up a disclaimer of title, tracing through the tax assessments of Mason & Dale above stated, and allege various nullities in plaintiff's titles, and plead prescription and estoppel, based on the action of Mason & Dale in having these lands assessed to the defendant authors in title, and the payment of them by taxes since 1901. Both parties pleaded the constitutional prescription of three years.

The parties agreed upon a statement of facts, with leave to introduce additional evidence; and further agreed that the land in controversy should be divided into eight tracts, numbered from 1 to 8, for brevity's sake and to avoid confusion.

The case was tried, and there was judgment in favor of the plaintiff for tracts 5 and 8, and judgment in favor of the defendant for tracts 1, 2, 3, 4, 6, 7. Plaintiff has appealed; and the defendant has answered, praying that the judgment be affirmed as to

tracts 1, 2, 3, 4, 6, and 7, and reversed as to tracts 5 and 8.

Defendant's plea of estoppel based on the action of Mason & Dale was overruled by the judge a quo, and is not pressed in this court.

#### Tract No. 1.

Was adjudicated to the state in 1894, for the taxes of 1892 and for the taxes for 1893. It is admitted that the sale for the taxes of 1892 was void for want of an assessment to "unknown owner" for that year.

It is also admitted in the statement of facts that tracts 1, 2, 3, 4, and 5 were in 1892 assessed to the Mississippi Delta Land Company, and that the tax was marked paid on rolls.

Defendant contends that the tax sale for the taxes of 1893 was also void, because the adjudication, on the face of the deed, was made for both years. The answer of the plaintiff is that the tax deed does not show a sale for the taxes of 1892 and 1893 "blended together, in solido."

The tax deed is the only evidence on this issue before the court.

The deed recites that the properties, three in number, offered at the tax sale, had been assessed to "unknown owners" for the years 1892 and 1893. Each property is twice described, first under the assessment of 1892, and then under the assessment of 1893. The deed recites that:

"In accordance with section 53 of Act 85 of 1888, each specific piece of property was respectively and separately adjudicated to the state of Louisiana."

The tax deed contains the following recital:

"Said properties being assessed to the following named persons as per assessment rolls on file in my office, and all described as follows."

Here follows six separate descriptions of property assessed each to "unknown owner" in different amounts, and six different tax bills. In other words, these descriptions, etc., were made just as if the properties belonged to different individuals, and there was no reason for making them except for the purposes of the tax sale.

[1] If the tax collector had intended to make one offer and one adjudication for the taxes of 1892 and 1893, one description would have sufficed. The duplication of the descriptions tends to show that the intention was to make a separate offer and adjudication of the property for each year's taxes. The contention of the defendant that the tax deed shows on its face but one adjudication for the taxes of both years is not supported by the language of the deed. Conceding that such language is susceptible of two constructions, it must be presumed that meaning was intended which will sustain the validity of the deed, rather than that which will render it void. *Cane v. Herndon*, 107 La. 591, 32 South. 83. Hence we construe the tax deed to mean that tract No. 1 was

offered and sold separately for the taxes of 1893. This being so, such adjudication was not affected by the absolutely void sale of the same property for the taxes of 1892. Each annual assessment of property is a separate entity. *Liquidating Com'rs v. Tax Collector*, 106 La. 130, 30 South. 305. The deputy tax collector who made the tax sales of June, 1894, was called as a witness for defendant, but was not asked to explain how the tracts were adjudicated.

The answer of defendant contains no attack whatever on the assessment for 1893. In the statement of facts, it was agreed that:

"A verbatim copy of pages 92, 93 of the assessment rolls for 1893 to 'unknown owner' shall be filed in evidence."

Such copy was filed in evidence. On the trial of the case, the defendant offered a witness, who assisted in making the assessment roll for 1893, to prove how he arrived at the estimate in fixing the acreage tax on the roll. Plaintiff objected on the grounds that the roll was the best evidence, and that there was nothing in the answer or pleadings authorizing the introduction of such evidence. The objections were overruled, and bill reserved. The witness testified in effect that the roll, without extrinsic evidence, did not furnish sufficient data for determining which specific sections were assessed with the 5-cent acreage levee tax. The assessor, however, as shown by the tax statements appearing in the tax collector's deed of sale, found data for fixing the acreage taxes. We think that the objection to this testimony should have been sustained. Other objections, such as the failure of the assessor to properly extend the taxes on the assessment rolls, are urged in defendant's brief. But no such issue was raised by the pleadings, and the contention that the filing of the assessment roll in evidence, as stipulated, enlarged the pleadings, is obviously without merit.

[2] Even if the irregularities above mentioned had been specially pleaded, it would have availed the defendant nothing, because all causes of nullity except dual assessment and prior payment of taxes have been barred by the constitutional limitation of three years.

#### Tract No. 2.

[3] Excerpts from statement of facts:

"That on the assessment roll for 1893 there appears the following: 'Greenleaf, Mrs. G. H.—Schwartz—Ward 9—1,260 acres, formerly owned by Wallace & Greenleaf.' That there was no other assessment of said property for said year, and the taxes were not paid.

"That the tax collector for Concordia parish, La., adjudicated to the state of Louisiana by deed dated July 1, 1895, recorded July 18, 1895, \* \* \* the following: 'Mrs. E. L. Greenleaf, the Schwartz tract, containing 1,280 acres; S.  $\frac{1}{2}$ , W.  $\frac{1}{2}$  and N. W.  $\frac{1}{4}$  Sec. 1, S. 2, T. 8 R. 8, lots 2 and 3 in N. E.  $\frac{1}{4}$ , west of Cocodra, Sec. 27, E.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  Sec. 84, E.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$  Sec. 84; frts.  $\frac{1}{2}$  section 35 W. of Cocodra, T. 7, R. 8, lots in N. W.  $\frac{1}{4}$  Sec. W. of Cocodra, T. 7, R. 8, less 16P acres sold to W. H. Payne.'"

It was also admitted that tract No. 2 was assessed to W. H. Payne for the year 1896, and there was no dual assessment and the tax was not paid; and that said tract was adjudicated under the assessment to the state of Louisiana in May, 1897, recorded July 19, 1897.

The defendant in its answer averred:

"That this assessment is not sufficient to identify the property, as Schwartz owned another tract of land in the parish in close proximity of the above tract, which was also known as the Schwartz tract."

Defendant adduced no evidence to prove that there was another Schwartz tract in the vicinity. Plaintiff proved that in 1857 J. C. Schwartz made two purchases of land in the parish of Concordia, aggregating 1,402.99 acres; in April, 1881, the same property described as "1,419 acres of land, more or less, known as the Schwartz lands," was sold at sheriff's sale and purchased by W. I. Wallace and George H. Greenleaf; in December, 1881, Wallace sold his interest to Greenleaf; and in December, 1889, Mrs. E. L. Greenleaf, as executrix of Geo. L. (H.?) Greenleaf, sold 160 of the Schwartz tract to W. H. Payne by special description.

It is to be noted that in the assessment of 1893 the Schwartz tract is described as containing 1,200 acres. This indicates that the assessor deducted the 160 acres sold to Payne. It is also described as in Ward 9, and as "formally owned by Wallace & Greenleaf."

The general revenue act 1890 (No. 106, p. 120, § 8) provides:

"That if the land to be assessed be a tract or lot known by a name, or if the owner's name be known, it shall be designated by those particulars and by its boundaries."

The assessment in question gives the name of the owner, the name of the tract, the number of acres, and the name of the former owners. An examination of the sheriff's sale to Wallace & Greenleaf, and of the sale of Greenleaf's executrix to H. H. Payne, would have furnished a perfect identification of the property.

Section 4 of Act 140 of 1890 reads as follows:

"That the tax sale shall convey and the purchaser shall take the entirety of the property, neither more nor less, intended to be assessed and sold and such as it was owned by the delinquent tax payer, regardless of any error in the dimensions or description of the property assessed and sold and the tax collector in the advertisement or deed of sale may give the full description" of the property assessed and sold.

Section 3 of the same act reads as follows:

"That no assessment or tax sale shall be set aside or annulled for any error in description or measurement of the property assessed, in the name of the owner, provided the property assessed or sold can be reasonably identified."

It is well settled that this identification may be completed by proof, allunde the title, of any and all relevant facts. See *Martinez Case*, 125 La. 663, 51 South. 679, and *In re Ferrault's Estate*, 128 La. 453, 54 South. 939.

In the latter case the description was as follows:

"Heirs of C. L. and J. L. Williams, 960 acres swamp land in T. 6, R. 5 E., parish of St. Landry."

And the identification was completed by proof that the tax debtors owned no other land in the township.

Under section 4 of Act 140 of 1890, cited supra, the tax collector had the right to give the full description of the property assessed in the advertisement and deed of sale; and the purchaser took the entirety of the property as it was owned by the delinquent taxpayer.

As descriptions, "giving lines and measurements," as set forth in recorded deeds, is all that section 8 of Act 85 of 1888 requires in assessments, it is obvious that an objection that such a description is insufficient to locate a certain tract of land is without merit. The purchaser takes the property in its entirety "regardless of any error in the dimensions or description." And the constitutional prescription of three years cures all irregularities and nullities in tax assessments which furnish the means to reasonably identify the property.

Tracts 2 and 3 were assessed to W. H. Payne in 1896 and adjudicated to the state in 1897. Tax was not paid on either for the year 1896. What has been stated under the head of tract 2 applies to tract 3.

#### Tract No. 4.

[4] This tract was assessed for the year 1899 to Samuel H. Marcus. There was no dual assessment, and the tax was not paid prior to the tax sale. The tract was adjudicated to the state by deed of date May 25, 1900, recorded May 28, 1900.

Tracts Nos. 1, 2, 3, 4, and 5 were assessed to the Mississippi Delta Land Company on the assessment rolls for 1900, and in the same year back-assessed to said company for the years 1897, 1898, and 1899. Since 1900, all the lands in controversy, tracts 1-8, inclusive, have been assessed to defendants or their authors in title, and all of said taxes have been paid.

Section 61 of Act 85 of 1888 required that the property adjudicated to the state be continued to be assessed to Marcus until the lapse of one year from the date of the recording the act of sale to the state. Hence the assessor had no authority to assess the property to the Mississippi Delta Land Company for the year 1900. The property was redeemable within said period on payment to the treasurer of the state of the taxes, interest, and costs, and 20 per cent. of the price given. Section 62, *Id.* No payment whatever was made to said treasurer at any time. Hence there was no redemption of the property. The payment of the taxes for 1899, without interest, penalties, and costs, would not have redeemed the property, even if it had been made to the treasurer of the state.



It is settled in our jurisprudence that the state is not estopped by reason of the fact that the tax assessor has erroneously assessed land, adjudicated to the state, for taxes, to some individual or corporation, and the taxes so assessed have been paid to the tax collector. See *Quaker Realty Co. v. Purcell*, 134 La. 1022, 64 South. 894, and authorities therein cited.

Lands adjudicated to the state may be re-deemed; but, if not, they become the absolute property of the state, to be sold in the manner prescribed by the statutes. The adjudication vests a present title in the state, with the right to the possession and to all the revenues of the property. Section 58, Act No. 85 of 1888.

#### Tracts Nos. 5 and 8.

We make the following excerpts from the statement of facts:

"That William Eby acquired the N. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  Sec. 36, T. 5 N., R. 6 E. in 1890, and that he owned no other land in Concordia parish, La. That said Eby was assessed for the year 1894, as follows: 'Wild Cow—Frl. N. E.  $\frac{1}{4}$  Sec. 32 T. 5 N., R. 7 E. and N.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$  Sec. 36 T. 5 R. 7, 80 acres.' That there was no dual assessment of the land assessed to said Eby for 1894, and the tax was not paid on said land."

It is admitted in the statement of facts that under said assessment the tax collector adjudicated to the state tracts Nos. 5 and 8 by deed of date July 1, 1895, recorded July 19, 1895.

The judgment below recognizes plaintiff's title to these tracts.

We make the following excerpts from defendants' brief:

"The facts developed show that, at the time of the assessment, W. Eby owned a 'forty' in Sec. 36, Tp. 5, R. 6, but that he owned none of the land assessed to him in Sec. 32 Tp. 5 R. 7, or in Sec. 36 Tp. 5, R. 7.

"Defendant, at that time, had a recorded title to tract 5, and its title to tract 8 having come into existence subsequently, in 1901, and not then being in Eby, was owned by other parties, as was Frl. N. E.  $\frac{1}{4}$  of Sec. 32, Tp. 5, R. 7."

Defendant contends that the assessment to Eby was one in globo of distinct governmental subdivisions, belonging to different owners, and for these reasons was absolutely null and void. This contention, we think, is fully answered by the following quotation in the opinion of the judge a quo:

"That it is immaterial for the purposes of prescription established by the provision (article 233, Const. 1898) whether an assessment has been made in the name of one person or another, or in no name, or whether the owner has been notified of the intention to sell, or has not been notified, or whether the sale has been advertised, or has not been advertised"—citing *Weber's Heirs v. Martinez*, 125 La. 666, 51 South. 679, and other authorities.

In other words, article 233 of the Constitution, where there has been an assessment and a tax sale, cures all nullities therein, where the taxes were due on the property,

and were not paid prior to the tax sale, under any assessment.

#### Tracts Nos. 6, 7, 8.

[6] These tracts were adjudicated to the state in 1895, and certified to plaintiff board in February, 1897. In 1901, these tracts were adjudicated to one Averill under tax assessments against sundry persons, and his title passed by meane conveyances to the defendant.

The contention of the defendant is that lands adjudicated to the state for delinquent taxes are not "public property" in the sense of the Constitution, and that in such case, if the taxing officers assess and sell the lands, while they are not authorized to do so, yet they act within the scope of their authority and bind the state and its municipal creatures. The defendant further contends that the constitutional prescription of three years is an absolute bar to the annulment of said tax sales to Averill. Per contra, the plaintiff contends that lands adjudicated to the state for taxes, and deeded to levee boards, are exempt from taxation. Section 11 of Act No. 44 of 1886, relative to the Fifth Louisiana levee district, granted to its board of commissioners, "all lands forfeited or sold to the state for nonpayment of taxes, situated in said district and liable to overflows," and declared:

"That said lands shall be exempted from taxation during the period they shall remain unsold by said board."

The lands in said tracts were deeded to said board of commissioners in the year 1897, and became the property of said levee district. The tax assessment and sale of these lands in 1900-01, by the state taxing officers, was a manifest violation of the exemption granted by Act No. 44 of 1886, which has never been assailed as unconstitutional. That property exempt from taxation cannot be assessed and sold for taxes is a self-evident proposition. The claims of the defendant to these tracts under the tax sales to Averill were disallowed by the trial judge.

It is admitted that from 1893 to 1899, both inclusive, tracts Nos. 1, 2, 3, 4, and 5 were not assessed to the Mississippi Delta Land Company, except part of W.  $\frac{1}{2}$ , section 2, township 4, range 7. In other words, said company made no return of said lands for taxation during those years.

The said company owned a large number of other tracts, containing many thousands of acres, which it returned for taxation. The omission of the five tracts from the company's lists of taxable property was due to its failure to return, under oath, a correct and complete list of all of its property in the parish as required by sections 13 and 14 of Act No. 106 of 1890.

The company had no actual possession of said five tracts of land, and therefore the cases cited by defendant's counsel where the tax debtor was in actual possession at the

time of the tax sale, and continued in possession, paying taxes to the state, have no application.

As to said five tracts, the constitutional limitation of three years has barred all causes of nullity, save dual assessment or prior payment of taxes.

As to tracts 6, 7, and 8, they belonged to the levee board, and were exempt from taxation.

The argument that the defendant has acquired these three tracts by the constitutional prescription of three years confuses prescription as a bar, with prescription as a mode of acquiring property.

We find in the transcript a copy of the assessment for 1893, and a copy of the tax sale of 1894, based on said assessment, but no copy of any other assessment or of any other tax sale. Hence, outside the statement of facts, there is no evidence as to how the other tax sales referred to in defendant's brief were made.

It is therefore ordered that the judgment appealed from be so reversed and amended as to decree that the plaintiff is the owner of tracts 1, 2, 3, 4, 6, and 7, less the S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , section 2, township 4, range 7, 43.24 acres, as described in the opinion of the trial judge, and it is further ordered that said judgment as thus amended be affirmed, and that the defendant pay costs in both courts.

#### On Rehearing.

O'NEILL, J. The rehearing granted in this case is limited to the contest over the lands designated as tracts 1, 2, 3, 6, and 7; as to which the district court rendered judgment rejecting the plaintiff's demand and confirming the defendant's title.

[6] The plaintiff's claim to tracts 1, 6, and 7 depends upon the validity of a tax sale made to the state in 1894 for the taxes of 1892 and 1893, under an assessment to "unknown owner." There was no assessment of these tracts of land to "unknown owner" in or for the year 1892. There was no assessment at all of tracts 6 and 7 in or for the year 1892, hence no warrant whatever for the sale of the property for the taxes of that year. Tract No. 1 was assessed to the Mississippi Delta Land Company in and for the year 1892. That company was the owner of tract No. 1 in 1892, and its title was a matter of record. The taxes assessed on tract No. 1 in and for the year 1892 were paid by the owner, the Mississippi Delta Land Company, before the adjudication. Hence the sale of that tract for the taxes of 1892, assessed to "unknown owner," was an absolute nullity, not only because there was no assessment of the property to "unknown owner" for that year, but because the taxes for that year were paid prior to the adjudication.

In the original opinion handed down in this case, it was held that the sale of tracts

1, 6, and 7, for the taxes of 1893, was valid; and that its validity was not affected by the illegality of the sale of the same property for the taxes of 1892. That was on the presumption that the tax collector had made two separate and distinct adjudications, one for the taxes of 1892 and the other for the taxes of 1893. After a more thorough examination of the tax deed and of the law under which it was made, we have concluded that it cannot be presumed that the tax collector made two adjudications of the same property, one for the taxes of 1892 and another for the taxes of 1893. The tax deed does not contain any recital to warrant that presumption. On the contrary, it is recited in the deed that, there being no bid for any part of the property for a sum equal to the amount of the taxes, interest, and costs due thereon, each specific piece of property described in the deed was separately adjudicated to the state. Hence it appears that the adjudication of each piece of property described in the deed was made for the full amount of the taxes, with interest and costs, due thereon for both years, 1892 and 1893.

The fact that each tract of land is described twice in the deed—that is, in the supposed assessment and tax list for the year 1892 and again in the assessment and tax list for the year 1893—does not signify that each tract was sold twice or offered for sale twice. In a tax sale for the accumulated taxes of two or more years, it is proper that the deed should contain a statement of the taxes, interest, and costs due for each year and that such statement should contain a description of the property assessed for each year. The tax deed, in this instance, contains the declaration that it was made in conformity with the provisions of the Act No. 85 of 1888. That statute did not require the tax collector to make a separate offering of the property for sale for the taxes of each of the years for which it was assessed. On the contrary, the law required him to offer for sale and sell the least quantity of each tract that any bidder would buy for the total amount of taxes, interest, and costs due thereon. If any one of the tracts had been offered for sale and adjudicated for the taxes, with interest and costs, due for only one year, the tax collector would have had no means of collecting the taxes, interest, and costs due for another year. Under the maxim, "*Omnia presumuntur rite et solemniter esse acta*," our presumption and conclusion is that the tax collector made only one offering and adjudication of each tract of land for the total amount of the taxes, interest, and costs supposed to be due for both years.

[7, 8] As to tract 1, on which the taxes for the year 1892 had been paid by its owner, the Mississippi Delta Land Company, there can be no doubt that the sale made for the taxes of 1892 and 1893 was and is absolutely null. To that nullity, the prescription of

three years, under article 233 of the Constitution, does not apply. That was decided precisely, in a case remarkably similar to the one before us. *Doullut v. Smith et al.*, 117 La. 491, 41 South. 913. In that case, a tax sale made in 1895 for the taxes of 1893 and 1894 was held to be null and void, not protected by the prescription of three years under article 233 of the Constitution, because the taxes for 1892 had been paid prior to the adjudication. In *Harris v. Deblieux*, 115 La. 147, 38 South. 946, a tax sale was declared null and void, not protected by the prescription of three years under article 233 of the Constitution, because there was included in the assessment of the taxes for which the property was sold a poll tax of \$1, which had been paid. That case was cited with approval in *Page v. Kidd*, 121 La. 6, 46 South. 35, where it was said:

"Moreover, viewed from every point, the owner paid some taxes on this property. If it should not be on the whole property, it is payment, at least, on part of it; and in that case it has been held as a payment that would defeat the prescriptive period of article 233 of the Constitution. *Harris v. Deblieux*, 115 La. 154, 38 South. 946."

We adhere to the doctrine of the decisions cited above, that a sale for taxes, a part of which have been paid, is null, and is not protected by the prescription of three years provided in article 233 of the Constitution. Hence the judgment of the district court, in so far as it rejects the plaintiff's claim to tract 1, and recognizes the defendant to be the owner of it, must be affirmed.

The defect in the tax sale of tracts 6 and 7, however, is quite different. As stated above, these tracts were not assessed at all for taxes in or for the year 1892; hence no taxes were paid on those tracts by any one, in or for the year 1892. The tax collector had no authority to sell tracts 6 and 7 for the collection of taxes for 1892, because no taxes for that year had been assessed. If he had made the sale for those taxes alone, it would be null. See *Morton v. Xeter Realty Co.*, 129 La. 775, 56 South. 883, citing *Rougelot v. Quick*, 34 La. Ann. 123, and *Booksh v. Wilbert's Sons*, 115 La. 358, 39 South. 9. And such an invalidity could not be made valid by the prescription of three years. See *Guillory v. Elms*, 126 La. 560, 52 South. 767. But the tax collector had authority to make the sale for the taxes of 1893, which were regularly assessed and not paid. The sale was made for those taxes, as well as for taxes for 1892. The inclusion of the amount claimed for taxes for 1892, with the taxes for 1893, for which the property could be legally sold, was, of course, wrong; and the tax debtor could have prevented the sale by paying, or offering to pay, only the taxes of 1893. But the tax debtor made no such offer or protest, and did not contest the validity of the sale until long after the time allowed by the Constitution for demanding that the sale be annulled

had expired. The invalidity resulting from the inclusion of an amount for taxes that were not assessed, with the taxes that were assessed and for which the sale could be legally made, was nothing more than if the tax collector had, by some other mistake, augmented the amount of the taxes that were assessed. It might be argued with much force—to a constitutional convention—that a sale of property for taxes that have been paid is no better than a sale for taxes that have not been assessed or that the owner of the property does not, for any other reason, owe. But we have this reason for recognizing a distinction between a sale for taxes that have been, even in part, paid, and a sale for taxes a portion of which have not been assessed, or are not due for some other reason: That the Constitution of this state provides that no sale of property for taxes shall be set aside for any cause, except on proof of dual assessment or of payment of the taxes for which the property was sold prior to the date of the sale, unless the proceeding to annul is instituted within six months from service of notice of sale, which notice shall not be served until the time for redemption has expired, and within three years from the date of recordation of the tax deed, if no notice is given.

The invalidity resulting from the inclusion of an amount for taxes that were not assessed, with those that were assessed and for which a tax sale is made, is not excepted from the causes of nullity for which a tax sale cannot be set aside after three years from the date of registry of the tax deed. Hence the judgment of the district court, in so far as it rejects the plaintiff's claim to tracts 6 and 7 and decrees that the defendant is the owner of them, must be reversed.

The plaintiff's title to tracts 2 and 3 is based upon two tax sales of them, one made for the taxes of 1893 assessed in the name of Mrs. G. H. Greenleaf, and the other for the taxes of 1896, assessed in the name of W. H. Payne. The defendant contends that the assessment for 1893 did not contain a description sufficient to identify any particular property. The assessment was as follows, viz.:

"Greenleaf, Mrs. G. H.—Schwartz—Ward 9—1,260 acres, formerly owned by Wallace & Greenleaf."

[9] In the answer to this suit, the defendant alleged that the description was not sufficient to identify the Schwartz tract claimed in the plaintiff's petition, because Schwartz owned another tract of land in close proximity to the land claimed, also known as the Schwartz tract. The evidence does not bear out that contention. The proof is that a man named Schwartz sold to Wallace & Greenleaf, in 1881, a tract of land containing 1,419.59 acres, which was afterwards acquired by Mrs. Greenleaf. It is situated in the Ninth ward of the parish of Concordia and was generally known

as the Schwartz tract. Mrs. Greenleaf sold to W. H. Payne 160 acres of the land in 1889. The remaining area of the Schwartz tract was therefore, at the time of the assessment in the name of Mrs. Greenleaf, 1,259.59 acres. Hence the area stated in the assessment was not quite half an acre more than the tract actually contained. Our opinion is that, for the purpose of a valid assessment and sale for taxes, the description of the land, stating the name of its owner, the name by which the tract was generally known, the names of its former owners, the ward in which it was situated, and its area, within a fraction of an acre, was a sufficient description to identify the land belonging to the party in whose name it was assessed.

It is contended by the learned counsel for the defendant that the 160 acres sold by Mrs. Greenleaf to W. H. Payne, in 1889, has not been accurately located, and that therefore the remaining portion of the Schwartz tract that was sold for taxes assessed in the name of Mrs. Greenleaf cannot be definitely located. We find no merit in that contention. The land sold by Mrs. Greenleaf to W. H. Payne is described in the deed by a survey; that is, by the bearings and distances encompassing 160 acres. The starting point is given at an iron pin on the west

bank of Bayou Cocodra, due east from a large cottonwood tree on the bluff of the bayou, and the boundary line runs thence S. W.  $\frac{1}{2}$  mile, thence S. E.  $\frac{1}{2}$  mile, thence N. E.  $\frac{1}{2}$  mile to Bayou Cocodra, thence up the bayou to the starting point. We do not doubt that a surveyor could locate the property described in that manner. But it appears to us that the question of location of the Payne tract is a matter to be settled between its owner and the owner of the remaining portion of the Schwartz tract, out of which it was or is to be carved. The fact that the sale of that tract of 160 acres by Mrs. Greenleaf to W. H. Payne left in the original Schwartz tract approximately the area stated in the assessment in question is the only matter of importance here with reference to the Payne tract.

For the reasons assigned, the judgment appealed from, in so far as it recognizes and decrees that the defendant is the owner of the property designated as tract 1, is affirmed, and, in so far as it recognizes the defendant to be the owner of the tracts designated as 2, 3, 6, and 7, is annulled and reversed; and it is now ordered, adjudged, and decreed that the defendant is the owner of the property designated as tract 1, and that the plaintiff is the owner of the property designated as tracts 2, 3, 6, and 7.

(199 Ala. 436)

TERRELL v. NELSON et al. (6 Div. 481.)  
(Supreme Court of Alabama. April 12, 1917.)1. JUDGMENT  $\Leftrightarrow$  728—CONCLUSIVENESS—MATTERS CONCLUDED.

A judgment is conclusive between the parties on all material matters which might have been litigated, but not as to matters incidentally brought into the controversy.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1258.]

2. EVIDENCE  $\Leftrightarrow$  43(1)—JUDICIAL NOTICE—RECORDS OF COURT.

The Supreme Court takes judicial notice of its own records.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 62.]

3. JUDGMENT  $\Leftrightarrow$  572(2)—CONCLUSIVENESS—RULING ON DEMURRER.

A judgment affirmed upon appeal, sustaining a demurrer because a complaint for alleged breach of contract failed to state that plaintiff was ready to perform, or that defendant's alleged breach occurred within the contract period, is a final judgment barring another action between the same parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1041, 1048.]

4. JUDGMENT  $\Leftrightarrow$  587—CONCLUSIVENESS—IDENTITY OF PLEADING.

A judgment, affirmed upon appeal, sustaining a demurrer to a complaint for breach of contract, bars a subsequent action between the same parties on the same subject-matter, although the second complaint declares on the common counts as well as for breach of contract.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1069.]

Appeal from City Court of Birmingham; John H. Miller, Judge.

Action by A. J. Terrell against Frank Nelson and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Harsh, Harsh & Harsh, of Birmingham, for appellant. Leader & Ewing and Z. T. Rudolph, all of Birmingham, for appellees.

THOMAS, J. On the 29th day of October, 1910, A. J. Terrell, appellant, filed his summons and complaint in the circuit court of Jefferson county against Frank Nelson, Jr., and Leo K. Steiner, appellees, as sole defendants. The complaint contained four counts, each averring a special contract and seeking recovery for a breach thereof. As amended, the original complaint was held subject to demurrer. This judgment on demurrer was affirmed by this court. Thus was terminated the first suit. Terrell v. Nelson et al., 177 Ala. 596, 58 South. 989. Said plaintiff, on the 25th day of January, 1913, filed suit in the city court of Birmingham against said Nelson and Steiner, as sole defendants. The complaint contained five counts: The first two were the common counts, and three were upon a special contract. The complaint (except the common counts) discloses the fact that recovery was sought in each of said suits for the breach of a contract as to certain stone to be used in the completion of lock 3, on the Tombigbee river, during the year 1910. The com-

mon counts and the special counts in the last complaint were for a like sum, claimed for and on account of a liability incurred or accruing during the year 1910. From an adverse judgment on demurrers to the pleas of res adjudicata, plaintiff appeals; here assigning error to the giving of the affirmative charge at defendants' request, as well as to the overruling of plaintiff's demurrers to defendants' pleas.

[1] The principle upon which judgments are held conclusive upon the parties requires that the ruling should apply only to matters directly in issue—things material and traversable—and not to everything which was incidentally brought into the controversy during the trial. The general rule on this subject was declared in the Case of the Duchess of Kingston, 20 Howell's State Tr. 355, 538, 2 Smith's Lead. Cas. 609 (573). Lord Chief Justice De Grey said:

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which comes collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment."

This rule has been repeatedly affirmed and followed without qualification. 2 Kent, Com. 119-121; Arnold v. Arnold, 17 Pick. 7. In Chamberlain v. Gaillard, 26 Ala. 504, Mr. Justice Goldthwaite writing, the rule is declared to be that judgments are final and conclusive between the parties when rendered on a verdict on the merits, not only as to the facts actually litigated and decided, but as to all facts necessarily involved in the issue; and that although the particular matter is not necessarily involved in the issue, yet if the issue is broad enough to cover it, and it actually arose and was determined, it may then be connected with the record by evidence aliunde. Hall & Farley v. Alabama T. & I. Co., 173 Ala. 398, 56 South. 235; Gilbreath v. Jones, 66 Ala. 129; Hanchey v. Coskrey, 81 Ala. 149, 1 South. 259; Haas v. Taylor, 80 Ala. 459, 2 South. 633. In Tankersly v. Pettis, 71 Ala. 179, it was held that where there is no question as to the jurisdiction of the court, nor as to the identity of the parties, the inquiry whether the subject-matter of the controversy has been drawn in question and is concluded by a former adjudication "is determined, when it is ascertained that the matters of the two suits are the same, and the issues in the former suit were

broad enough to have comprehended all that is involved in the issues in the second suit. The inquiry is not what the parties actually litigated, but what they might and ought to have litigated in the former suit." This application of the ancient rule of *res adjudicata* has been reaffirmed in *McCall v. Jones*, 72 Ala. 368; *Lehman v. Clark*, 85 Ala. 109, 4 South. 651; *Glasser v. Meyrovitz*, 119 Ala. 152, 24 South. 514; *Wood v. Wood*, 134 Ala. 557, 33 South. 347; *Montgomery Iron Works v. Roman*, 147 Ala. 434, 41 South. 811; *Orausby v. Crausby*, 164 Ala. 471, 51 South. 529. To support a plea of *res adjudicata*, not only must the parties and the subject-matter be the same, but the judgment in the first case must have been on the merits of the case, and must be that sought to be pleaded in bar in the second suit. *Jones v. Adler*, 183 Ala. 435, 62 South. 777; *McCall v. Jones*, supra; *Ryan v. Young*, 147 Ala. 660, 41 South. 954; *Gilbreath v. Jones*, supra; *Crausby's Case*, supra; *Hall & Farley's Case*, supra. A judgment was declared to be conclusive against every defense that might have been made against the suit, whether pleaded or not, in *Montgomery Iron Works v. Roman*, supra, 147 Ala. 440, 41 South. 811.

What issues will be considered to involve a decision on the merits is not always easy of determination. In *McCall v. Jones*, supra, the court held that where a suit was defeated for nonjoinder or misjoinder of parties, a judgment rendered on such issue alone was not on the merits. The same is true of a judgment on a mere defect in the pleadings, or on any technical ground not going to the merits (*Hanchey v. Coskrey*, supra; *Williams v. Woods*, 121 Ala. 536, 25 South. 619; *Strang v. Moog*, 72 Ala. 460), or where the parties to the suit are shown not to have been the same (*Fid. & Dep. Co., etc., v. Robertson*, 136 Ala. 379, 34 South. 933; *Jones v. Adler*, supra), or where the question of ownership did not enter into the issue of the former suit (*Gilbreath v. Jones*, supra; *Hanchey v. Coskrey*, supra; *Hall & Farley's Case*, supra). In *McClarlin v. Anderson*, 104 Ala. 201, 210, 16 South. 639, 641, the court said:

"It is well understood that when a demurrer is sustained for some defect in the pleadings, and judgment is not pronounced on the merits of the case, then there has been no judgment on the facts or merits, and consequently the demurrer, which was sustained because of defects in the pleadings, can form no bar to a subsequent action; but a demurrer, which admits all the facts which are well pleaded, demands the judgment of law arising out of or on those facts; and when the judgment is pronounced it is conclusive on the parties to determine the litigation between them, as if judgment had been rendered on verdict." *Perkins v. Moore*, 16 Ala. 13; *Hanchey v. Coskrey*, 81 Ala. 149, 1 South. 259; 1 Chit. Pl. 198; *McClarlin's Case*, 109 Ala. 571, 19 South. 982.

The demurrer to the contest of a claim of exemptions, and judgment thereon held to be a final judgment, went to the right of contestant to proceed with the contest of exemptions so claimed, as decided in the last-quoted case.

In the case at bar the defendant Nelson filed plea numbered 1 separately; and defendants Nelson and Steiner filed pleas 1-A, and 1-B, each of which was of *res adjudicata*. Plea 1, by Nelson, to which demurrers were overruled, does not set out the summons and complaint in the original suit, but alleges that on the 29th day of October, 1910, the plaintiff filed his suit against defendants in the circuit court of Jefferson county, claiming damages for "the identical breach of contract herein sued on"; that the cause was duly tried by said court and was determined "in favor of the defendants herein"; that plaintiff appealed from this decision to the Supreme Court of Alabama, where the judgment was affirmed on the 30th day of May, 1912, and that "thereby said action was fully determined and adjudicated against the plaintiff herein"; "that the said cause of action is the same suit as in the said suit heretofore tried and referred to, that the plaintiff is the identical person, and that each of the counts are the same counts in said cause, and that the cause of action is the identical cause of action in each suit, and defendant prays that this suit be abated as having been heretofore tried and determined, and that this defendant be not further harassed and annoyed by costly and troublesome litigation."

Pleas 1-A and 1-B both set out the summons and complaint in the original record filed in the circuit court by plaintiff against defendants, and aver that the cause was duly tried by said court; that it was determined in favor of the defendants; and that it was on appeal affirmed by the Supreme Court, reference being made to the official report of the case styled *Terrell v. Nelson et al.*, 177 Ala. 596, 58 South. 989; and further aver that said action was fully determined and adjudicated against the plaintiff. In these two pleas the said defendants further aver that:

"The cause of action in this suit is the same cause of action as is set forth in the complaint hereto attached in the suit previously filed by said plaintiff against said defendants, and which was affirmed against the said plaintiff herein, and the defendants and the plaintiff herein are the identical persons, and the same plaintiff and defendants, as is set forth in the previous suit, and that this cause of action is the identical cause of action as is set forth in the previous suit, growing out of the same alleged subject-matter, and the defendants therefore pray that this suit be barred as having been heretofore tried and determined in favor of said defendants, and that the defendants herein be discharged from further defense in said suit." Plea 1-A.

The maxim "*Interest reipublice ut sit finis litium*" (It concerns the state that there be an end of lawsuits) is the foundation for the rule that all that could have been heard in the former suit is presumed to have been heard; that the splitting of causes of action is not permissible. *Williams Co. v. Model Electric Co.*, 134 Iowa, 665, 112 N. W. 181, 13 L. R. A. (N. S.) 529; *Pakas v. Holling-*

shead, 184 N. Y. 211, 77 N. E. 40, 3 L. R. A. (N. S.) 1042, 112 Am. St. Rep. 601, 6 Ann. Cas. 60; Miller v. Covert, 1 Wend. (N. Y.) 487; Bendoragle v. Cocks, 19 Wend. (N. Y.) 207; Colburn v. Woodworth, 31 Barb. (N. Y.) 381.

[2, 3] This court takes judicial knowledge of the contents of its own records. N., C. & St. L. Ry. v. Crosby, 184 Ala. 338, 70 South. 7. In the instant case, the demurrer sustained on the former appeal was to the effect that plaintiff, who sought to recover for an alleged breach of contract, failed to aver in his complaint that he was ready, willing, and able to furnish said stone, as he had contracted to do or that the notification relied upon by plaintiff as a breach on the part of the defendants was given within the time that plaintiff had, under the contract, in which to furnish the stone. The lack of such averment was fatal to the plaintiff's right of recovery in the first suit. That final judgment was on the right of recovery under the averred facts, and it was affirmed on appeal to the Supreme Court. It may now be pleaded as a bar to plaintiff's effort to recover in the instant suit.

[4] It is apparent that the plaintiff has sought to avoid the bar of the rule by declaring on the common counts as well as (in several counts) for breach of the contract. The facts remain, however, that the parties plaintiff and defendant in the two suits were and are the same, that the subject-matter was the same, that the right of plaintiff to recover in the first suit (which was in the circuit court) was adjudicated against the plaintiff, and that an appeal from such judgment was affirmed by this court.

The judgment of the city court is affirmed. Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(199 Ala. 463)

**BISHOP v. BIG SANDY LUMBER CO.**  
(6 Div. 366.)

(Supreme Court of Alabama. April 5, 1917.)

**1. GUARDIAN AND WARD — COMPROMISING "CLAIM."**

"Claim" in Code 1907, § 4391, empowering the probate court to authorize a guardian to compromise any claim or debt due, or claimed to be due, the ward, which is of doubtful collection, includes a demand arising out of tort.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 142-161.

For other definitions, see Words and Phrases, First and Second Series, Claim.]

**2. JUDGMENT — COLLATERAL ATTACK.**

Decree of probate, confirming settlement by a guardian of the ward's claim, duly authorized in a statutory proceeding, cannot be attacked collaterally.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 910.]

Appeal from Tuscaloosa County Court; Henry B. Foster, Judge.

Action by Tena Bishop, by next friend, against the Big Sandy Lumber Company, for injuries sustained while in its employment. Judgment for defendant, and plaintiff appeals. Affirmed.

The facts sufficiently appear. The fourth plea sets up the appointment of the guardian for Tena Bishop by the judge of probate of Tuscaloosa county, and a full settlement under orders of the probate court, on petition by the guardian of the matters complained of, and a full release and settlement for the sum of \$100 paid to said guardian, and approved by the probate court, and that the injury herein sued for is the same injury for which the settlement is made, and the petition and order of the probate court authorizing the settlement, and the decree confirming the settlement, are made an exhibit to plea 4. The replications to this plea are: False and fraudulent representations, entering into the petition, as to the injury which induced the order in the decree, and collusion between defendant and plaintiff's alleged guardian, and no legal consent on the part of plaintiff that the application be filed in said court falsely and fraudulently representing the injury.

Smith & Morrow, of Birmingham, for appellant. Moody & Moody and Foster, Verner & Rice, all of Tuscaloosa, for appellee.

THOMAS, J. The several assignments of error challenge the overruling of plaintiff's demurrer to defendant's special plea, and the sustaining of defendant's demurrer to plaintiff's replications from 1 to 10, inclusive.

The facts averred in the pleadings are that on or about October 25, 1911, the plaintiff, Bishop, a minor, while working for the defendant, Big Sandy Lumber Company, sustained a personal injury; that on November 21, 1911, one Mills was by the probate court of Tuscaloosa county duly appointed guardian for said minor; that said guardian effected a compromise of the ward's claim against the lumber company, whereby the company paid over the sum of \$100 and, in consideration thereof, the guardian executed to the company a receipt, in full release and discharge of all claim and liability against the company for said injury, and that, on November 27, 1911, said probate court made an order in the matter of said guardianship duly confirming said compromise. About two years thereafter, on January 19, 1914, said minor, by his next friend, Annie Bishop, brought suit against the Big Sandy Lumber Company for the said injuries. Demurrers to the complaint being overruled, defendant filed a special plea of satisfaction or full settlement of said claim with plaintiff's guardian, made pursuant to appropriate order of the probate court confirming the compromise; such court at that time having jurisdiction

in matters such as said ward's estate, and under express statutory provision.

[1] No assignment of error other than that presented by said rulings on the respective demurrers is insisted on by counsel for appellant. *Harper v. Ralsin Fertilizer Co.*, 148 Ala. 360, 42 South. 550; *Fitts v. Phoenix Auction Co.*, 153 Ala. 635, 45 South. 150; *Georgia Cotton Co. v. Lee*, 72 South. 158. May, then, a guardian obtain authority from the probate court to compromise all the claims of his ward? By the Code of 1907, and section 4391 thereof, it is provided:

"The court of probate may authorize a guardian to compromise any claim or debt due, or claimed to be due, the ward, which is of doubtful collection (either by reason of the doubtful solvency of the debtor, or of the doubtful validity at law or in equity of the said claim or debt), and has not become so by reason of the negligence of the guardian."

This is a codification of the act of February 19, 1907 (Gen. Acts, p. 114, § 1), which amended section 2301 of the Code of 1896, reading:

"The court of probate may authorize a guardian to compromise any claim or debt due \* \* \* the ward, which is doubtful of collection, \* \* \* and has not become so by reason of the negligence of the guardian."

The addition to the statute of the words, "or claimed to be due," and of the expression, "either by reason of the doubtful solvency of the debtor, or of the doubtful validity at law or in equity of the said claim or debt," after the word, "collection," is to effectuate the declared legislative intent to extend the statute, to the end of authorizing and facilitating a prompt and just administration of the ward's estate in a court having general jurisdiction of the same.

What, then, is the meaning of the words of the statute, "any claim or debt due, or claimed to be due, the ward"? In *Barrett v. City of Mobile*, 129 Ala. 179, 30 South. 36, 87 Am. St. Rep. 54, the court held that the word "claim," as used in the charter of the city, comprehends or includes "charges" against the city arising in tort as well as ex contractu. *City of Birmingham v. Chestnutt*, 161 Ala. 253, 49 South. 813. The expression, "claim against a city," has been given a like general meaning in New York. In *re Dasent* (Sup.) 2 N. Y. Supp. 609; *Pultzer v. City of New York*, 48 App. Div. 6, 62 N. Y. Supp. 588. So by the construction given the statute, authorizing a personal representative to compromise doubtful claims of the decedent's estate, such representative's authority has been held to extend to all choses in action (*Butler v. Gazzam*, 81 Ala. 491, 1 South. 16; *Waring v. Lewis*, 53 Ala. 616; *Miller v. Irby*, 63 Ala. 477; *Carr v. Illinois Central R. R. Co.*, 180 Ala. 159, 60 South. 277, 43 L. R. A. [N. S.] 634), and also to a claim for damages for the negligent killing of the plaintiff's intestate, settlement of which may be made without the authority of the probate court. Code, § 2602 et seq.;

*Logan v. Cent. I. & O. Co.*, 139 Ala. 548, 36 South. 729; *Loveman v. B. R. L. & P. Co.*, 149 Ala. 515, 43 South. 411; *Sterling v. Sims*, 72 Ga. 51, 53.

A chose in action includes all rights to personal property not in possession which may be enforced by action, and demands arising out of torts as well as out of contracts. The term is sometimes used in the sense of a right to bring an action. *Ramsey v. Gould*, 57 Barb. (N. Y.) 408; *People v. Tloga*, 19 Wend. (N. Y.) 75; *Gibson v. Gibson*, 43 Wis. 32, 28 Am. Rep. 527; *Gillet v. Fairchild*, 4 Denio (N. Y.) 82; *Sterling v. Sims*, supra; 2 Black. Com. 338, 396, 397.

In *Echols et al. v. Speake*, 185 Ala. 149, 64 South. 306, Ann. Cas. 1916C, 332, it was held that the guardian of a minor has the same jurisdiction over the choses in action belonging to his ward that the executor has over the personal property of his testator. *Mason v. Buchanan*, 62 Ala. 110; *Woodward v. Donally*, 27 Ala. 198; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 154, 11 Am. Dec. 441; 2 Kent's Com. 293; *Ellis v. Essex M. Bridge*, 2 Pick. (Mass.) 243; *Inwood v. Twyne*, Amb. 419.

[2] The court of probate having duly authorized the guardian to compromise the claim of his ward for the personal injury, in a statutory proceeding for the requisite authority, the decree of the court cannot be questioned collaterally and operated as a bar to the prosecution of the suit in the instant case, being in that behalf properly pleaded.

The demurrer was properly sustained to plaintiff's replications to defendant's plea No. 4.

The judgment of the lower court is affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(199 Ala. 387)

LOUISVILLE & N. R. CO. et al. v. MAUTER.  
(6 Div. 464.)

(Supreme Court of Alabama. April 5, 1917.)

1. MUNICIPAL CORPORATIONS § 697(1)—OBSTRUCTION OF STREET—ABATEMENT.

A bill seeking abatement of a street obstruction is not demurrable because it seeks damages for a period barred by the statute of limitations, since it is maintainable to abate the nuisance and recover damages within the statutory period.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1502.]

2. ESTOPPEL § 93(1) — ABATEMENT OF NUISANCE.

A complainant's silent acquiescence in the construction by a railroad of a cut across a street does not estop him from enjoining its future maintenance because constituting a nuisance.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 264, 272.]

Appeal from Chancery Court, Cullman County; James E. Horton, Jr., Chancellor.



Bill by Theobald Mauser against the Louisville & Nashville Railroad Company and others. From a decree overruling a demurrer to the bill, defendants appeal. Affirmed.

Geo. H. Parker, of Cullman, and Eyster & Eyster, of Albany, for appellants. Emil Ahlrichs, of Cullman, for appellee.

**SOMERVILLE, J.** The bill of complaint is filed to abate a public nuisance, viz. the obstruction of a public street in the town of Cullman, by the respondent companies. The bill is substantially the same as the bill exhibited in the case of *S. & N. A. R. Co. v. Schaffner*, 189 Ala. 58, 66 South. 502, relating to the same obstruction of the same street; and, on the authority of that case, we hold that this bill contains equity, and sufficiently shows the right of complainant to maintain the suit.

[1] It is true that this bill is filed 3 years later than the Schaffner bill, and that damage occurring more than a year before its filing is barred by the statute of limitations of one year. But the mere allegation of damage not incidentally recoverable for in this suit does not affect the equity of the bill, nor render it demurrable, since it is nevertheless maintainable to abate a continuing nuisance, and incidentally to recover such damages—even nominal damages—as here accrued within 12 months preceding. *McCary v. McLendon*, 195 Ala. 497, 70 South. 715.

[2] Nor did complainant's silent acquiescence in the construction of the cut across the street work an estoppel with respect to its future maintenance by respondents. *A. G. S. R. R. Co. v. Barclay*, 178 Ala. 124, 59 South. 169; *McCary v. McLendon*, supra.

The demurrer to the bill was properly overruled, and the decree appealed from will be affirmed.

Affirmed.

**ANDERSON, O. J., and MAYFIELD and THOMAS, JJ., concur.**

(199 Ala. 482)

**WOODWARD IRON CO. v. KELLER.**  
(6 Div. 538.)

(Supreme Court of Alabama. April 5, 1917.)

**1. COURTS ⇐121(6)—JURISDICTION—AMOUNT INVOLVED.**

Code 1907, § 5355, providing that the judgment must be set aside and suit dismissed where plaintiff recovers an amount below the court's jurisdiction, except in certain cases, applies to contract, but not to tort actions.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 421.]

**2. COURTS ⇐121(6)—JURISDICTION—AMOUNT INVOLVED.**

A \$40 judgment for failure to furnish medical attention pursuant to a contract of employment secured in the Bessemer city court should be set aside and suit dismissed under Code 1907, § 5355, requiring such action, with certain ex-

ceptions, where plaintiff recovers less than the court's jurisdictional amount.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 421.]

Appeal from City Court of Bessemer; J. C. B. Gwin, Judge.

Action by J. G. Keller against the Woodward Iron Company. Judgment for plaintiff, and defendant appeals. Transferred from the Court of Appeals under section 6, Acts 1911, p. 449. Reversed and rendered.

Whitaker & Nesbit, of Birmingham, for appellant. Goodwyn & Ross, of Bessemer, for appellee.

**ANDERSON, O. J.** [1, 2] Section 5355 of the Code of 1907 plainly provides for setting aside the judgment and dismissing the cause where the suit is for a moneyed demand for an amount within the jurisdiction of the court if the judgment rendered is below the jurisdiction of the court, unless the amount was reduced by set-off successfully pleaded or unless the plaintiff makes the prescribed affidavit. This statute applies to all actions ex contractu, but not to torts. *First National Bank of Gadsden v. Pinson*, 105 Ala. 588, 17 South. 182, and cases there cited; *Smith v. Allen*, 142 Ala. 148, 37 South. 933. The present action is ex contractu, and the trial court erred in not setting aside the judgment and dismissing the suit. The case of *Sharpe v. Barney*, 114 Ala. 361, 21 South. 490, relied upon by appellee, was a tort action.

The judgment of the city court is reversed, and one is here rendered setting aside the judgment and dismissing the cause.

Reversed and rendered.

**MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur.**

(199 Ala. 450)

**SHAW v. LACY.** (6 Div. 363.)

(Supreme Court of Alabama. April 5, 1917.)

**1. MORTGAGES ⇐294—RIGHTS OF MORTGAGEE—PURCHASE OF EQUITY.**

While the mortgagee has the right to purchase the mortgagor's equity of redemption, equity looks with suspicion on such transactions, and they will be sustained only when supported by sufficient consideration, and when there is no fraud, oppression, or undue advantage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 806-814.]

**2. MORTGAGES ⇐36—PURCHASE OF EQUITY BY MORTGAGEE—BURDEN OF PROOF—GOOD FAITH.**

In a suit to have an absolute deed conveying the equity of redemption to the mortgagee declared a mortgage, the burden of proof is on the mortgagee to show that his purchase of the equity was free from fraud, oppression, or undue influence; the rules governing the impeachment of original transactions, absolute in form, by parol proof that they were intended to be mortgages not applying in such a case.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 95, 96.]

3. LANDLORD AND TENANT — 62(2) — ESTOPPEL OF TENANT — FRAUDULENT TITLE OF LANDLORD.

Where the mortgagee fraudulently purchased the equity of redemption, and returned the property to the mortgagor, the latter is not prevented by his tenancy from attacking his landlord's title, since the tenancy itself is a fruit of the fraud.

Appeal from Chancery Court, Lamar County; James E. Horton, Jr., Chancellor.

Suit by B. R. Shaw against W. B. Lacy to have a deed absolute in form declared a mortgage and to redeem therefrom. Decree for respondent, and complainant appeals. Reversed, rendered, and remanded.

The bill alleges an indebtedness due from Shaw to Lacy, and the execution by Shaw to Lacy of a mortgage upon certain lands therein described of date December 2, 1911, for the consideration of \$1,000. That on November 26, 1912, Lacy came to Shaw, where he resided on the described real estate, and stated to him that he desired him to give him a deed to the real estate described, so that he could use the deed as collateral to borrow money on, and that he would let orator have more money, and that it would be just considered as security for the debt, and that when orator paid off the debt he would deed the land back to orator, and the deed was executed under circumstances as above stated, with the knowledge of both, and of the justice of the peace who prepared the deed, that it was intended as such. The deed was acknowledged and recorded. The answer denies the allegations of the bill, and sets up that the deed was executed in satisfaction of the debt, and that at the time of its execution complainant delivered the possession of real estate to the respondent, and that the respondent thereupon rented the premises for the years 1913 and 1914; that all payments made were made as payments for rent and advances, and on this respondent based an estoppel against complainant.

Kelley & Young, of Vernon, and W. A. Gunter, of Montgomery, for appellant. Milner & Thompson and Walter Nesmith, all of Vernon, for appellee.

SOMERVILLE, J. [1] The right of the mortgagee to acquire by purchase the mortgagor's equity of redemption in the mortgaged property is everywhere recognized by the courts. But equity looks with a jealous and distrustful eye upon such transactions. *Hitchcock v. U. S. Bank*, 7 Ala. 386, 443; *Locke v. Palmer*, 26 Ala. 312, 324; *Farmer v. Farmer*, 74 Ala. 285, 288; *Stoutz v. Rouse*, 84 Ala. 309, 311, 4 South. 170; *Peagler v. Stabler*, 91 Ala. 308, 311, 9 South. 157; *Pearsall v. Hyde*, 189 Ala. 86, 66 South. 665. And they will be sustained only when "supported by a sufficient consideration, and there is an absence of fraud, oppression, and

undue advantage." *McMillan v. Jewett*, 85 Ala. 476, 5 South. 145; *Peagler v. Stabler*, supra; *Stoutz v. Rouse*, supra; *Goree v. Clements*, 94 Ala. 337, 10 South. 906; *Thornton v. Pinckard*, 157 Ala. 206, 47 South. 289; *Pearsall v. Hyde*, supra; *Cassem v. Heustis*, 201 Ill. 208, 66 N. E. 283, 94 Am. St. Rep. 160; *Bradbury v. Davenport*, 55 Am. St. Rep. 110, 111, note. In *Pearsall v. Hyde*, supra, the authorities are collected and reviewed by Gardner, J., and it is declared that in such transactions equity "will not permit a mortgagee to use his position of superiority to oppress the debtor, or drive an unconscionable bargain, or take any undue advantage." See, also, *Compton v. Collins*, 190 Ala. 499, 67 South. 395. In *Villa v. Rodriguez*, 12 Wall. 323, 339, 20 L. Ed. 406, Mr. Justice Swayne, for the court, states the law in language that is worthy of repetition:

"The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a cestui que trust to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law."

[2] In these cases the burden of proof is on the mortgagee to show that the transaction was fair and honest—free from the infection of fraud, oppression, or any form of undue influence. *Locke v. Palmer*, 26 Ala. 312, 324; *Villa v. Rodriguez*, 12 Wall. 339, 20 L. Ed. 406; *Holridge v. Gillespie*, 2 Johns. Ch. (N. Y.) 34; 9 Am. & Eng. Dec. in Equity, note, 686; 27 Cyc. 1373, 1374. In *Locke v. Palmer*, supra, it is declared that the release must "be established by the clearest and most convincing proof." This rule as to the burden of proof results logically and necessarily from the attitude of "jealous suspicion" adopted by courts of equity.

We have examined all the evidence in this case with critical care, and, in view of the principles stated, we are constrained to the conclusion that the respondent has not met the burden of proof in vindication of his purchase of complainant's equity of redemp-

tion in the mortgaged property, and that complainant is entitled to the relief prayed. The contrary conclusion of the chancellor is evidently founded on a misapplication to this case of the rules of law that govern the impeachment of original transactions which are absolute in form, by parol proof that they were intended to be mortgages only. But that is a different case, and is ruled by different principles.

[3] The rule that a "landlord can only be required to litigate title with his tenant, upon the vantage ground of possession" (*Barlow v. Dahm*, 97 Ala. 414, 416, 12 South. 293, 294 [38 Am. St. Rep. 192]), is manifestly inapplicable to a proceeding like this, where the landlord has by actual or constructive fraud acquired the mortgagor's title and thereafter reduced him to the position of a tenant, and redemption is sought as against the fraudulent purchase. In such a case the tenancy itself is a fruit of the fraud, and cannot survive its annihilation.

The decree of the chancery court will be reversed, and a decree will be here rendered setting aside the release executed by complainant to respondent on November 26, 1912, and granting to complainant the right of redemption from the mortgage exhibited by the bill of complaint. The cause will be remanded for a reference to ascertain the amount of the mortgage indebtedness, and for further appropriate action by the trial court in the premises for the effectuation of the relief here ordained.

Reversed, rendered, and remanded.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

(199 Ala. 468)

STANDARD COAL CO. v. WEISEL et al.  
(6 Div. 338.)

(Supreme Court of Alabama. April 5, 1917.)  
JUDGMENT ~~439~~ — EQUITABLE RELIEF —  
FRAUD IN OBTAINING—SET-OFF.

Where purchasers of all the stock of a corporation had full notice and knowledge of the conditions under which one of their vendors bought her stock, through a copy of the contract between her and her associates, showing that she had not paid for the stock, and that its subscription price was to be paid by her, if at all, out of the company's earnings, such knowledge required the new management to take advantage of such stockholder's indebtedness as a set-off in her action against the company, and it had no standing to enjoin the collection of such former stockholder's judgment on the ground that its set-off rendered the judgment unconscionable.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 830-835.]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by the Standard Coal Company against Annie K. Weisel and others. From a decree for defendants, complainant appeals. Affirmed.

Douglas & Ray, of Birmingham, and Ernest Lacy, of Jasper, for appellant. Nathan L. Miller and Needham A. Graham, Jr., both of Birmingham, for appellees.

SOMERVILLE, J. The bill is filed by the Standard Coal Company, a corporation, against Annie K. Weisel et al. to enjoin the collection of a judgment recovered by Mrs. Weisel against the company, and to be allowed to set off against the judgment an alleged indebtedness due to complainant from said respondent for certain shares of complainant's corporate stock issued to her, and for which it is alleged she has never paid.

The bill shows that the present stockholders bought the entire capital stock from Mrs. Weisel and her then associates, and the gravamen of the bill is that they had no knowledge of her indebtedness to the company for said stock; that that fact was concealed from them by the fraudulent collusion of Mrs. Weisel and her associate stockholders, some of whom were then the officers and directors of the company—in that her associates refused to deliver to the new corporate management the books and records of the company, which they concealed and withheld, and hence the new management was unable to avail itself of said indebtedness as a set-off against Mrs. Weisel in her suit against the company, as it could and would have successfully done—whereby she obtained an unconscionable judgment. Conceding, for the argument, that the evidence shows that Mrs. Weisel was indebted to the company, as alleged, yet we think the conclusion is unavoidable that the new management had full notice and knowledge of the conditions under which Mrs. Weisel bought the stock in question, and understood perfectly her relation and obligations to the company in that regard; this, because the new management were originally furnished with a copy of the contract between Mrs. Weisel and her associate stockholders showing that she had not paid for the stock, and that its subscription price was to be paid by her, if at all, out of the earnings of the company. Complainant's knowledge was therefore ample to enable it to take advantage of Mrs. Weisel's indebtedness as a set-off against the claim which she was allowed to reduce to judgment in a court of law, and its management cannot justly claim the benefit of fraud, surprise, or accident, unmixed with its own fault or negligence. If the books had been produced they could not have informed complainant of the true situation with more fullness and precision than did the written contract referred to. It does not appear that complainant's management made any effort to develop the facts in the law action, either directly, by subpoenas duces tecum to any of those who necessarily must have had the custody or control of the corporate books and records,

or by interrogatories, or by a separate bill for discovery.

The omission of these measures, which it seems would have discovered all the facts—if, indeed, the written contract was not itself discovery enough—is, under the circumstances, fatal to the standing of complainant in this proceeding. *Hill v. McNeill*, 8 Port. 482; *Stinnett v. Br. Bank*, 9 Ala. 120; *Powell v. Stewart*, 17 Ala. 719; *Pearce v. Winter Iron Works*, 32 Ala. 68; 23 Cyc. 1912. The action of the trial court in sustaining a demurrer to the original bill is assigned for error, but is not argued in brief, and it must therefore be disregarded.

For the reasons stated, the decree of the chancery court will be affirmed.

Affirmed.

ANDERSON, O. J., and MAYFIELD and THOMAS, JJ., concur.

(199 Ala. 374)

BANK OF TALLASSEE et al. v. JORDAN.  
(5 Div. 654.)

(Supreme Court of Alabama. April 5, 1917.)

1. CORPORATIONS §402—MORTGAGES—EXECUTION BY PRESIDENT—LIABILITY.

A mortgage reciting that bank had caused instrument to be executed in its own name by H., its president, signed, "People's Savings Bank, H., President," and properly acknowledged as mortgage of bank, was that of the bank, and not of H. individually; the fact that name of H. was not preceded by word "by" and followed by "as president" not showing that mortgage was executed by H. individually.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1739.]

2. CORPORATIONS §402—INSTRUMENTS EXECUTED BY INDIVIDUAL—CONSTRUCTION.

Signatures affixed to an instrument do not always control in determining whether it is that of the corporation indicated or that of person signing names; so courts will look to the whole instrument in determining the same.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1739.]

Appeal from Circuit Court, Elmore County; Leon McCord, Judge.

Bill by Mrs. M. R. Jordan against the Bank of Tallassee and the People's Savings Bank of Tallassee. Decree for plaintiff, and defendants appeal. Affirmed.

Frank W. Lull, of Wetumpka, and T. G. Hilyer, of Tallassee, for appellants. W. A. Jordan and Ball & Samford, all of Montgomery, for appellee.

MAYFIELD, J. Appellee filed her bill to foreclose a mortgage executed by the People's Savings Bank of Tallassee. Before the bill was filed the property mortgaged was conveyed by the mortgagor bank to another bank, the Bank of Tallassee, the grantee assuming liability to pay the debt of complainant secured by the mortgage. The principal

secured by the mortgage was not to mature until June, 1917, but the mortgage contract contained many covenants on the part of the mortgagor, such as to keep the property insured for the benefit of the mortgagee as her interest might appear, to assess the mortgaged property for taxes, and pay the taxes, promptly, and to pay the interest on the principal debt in monthly installments. A breach of any of these conditions, or of some others with certain qualifications, not necessary to mention should at the election of the mortgagee mature the whole debt, and therefore warrant a foreclosure as for the principal and other charges and indebtedness secured by the mortgage.

The bill alleged a breach of conditions in the failure to properly insure the property in accordance with the covenants, and declared the whole of the indebtedness secured to be due and payable, and sought to have the mortgage foreclosed, making the assignee or grantee of the mortgaged property a party to the bill.

The defendants each demurred to the bill, assigning various grounds of demurrer. The demurrer being overruled, each defendant answered, admitting most all of the averments of the bill, except those averments alleging a breach of the covenants or conditions of the mortgage in such sort as to mature the entire indebtedness. These allegations were denied, and the answer also attempted to set up facts to show a waiver on the part of the mortgagee of the right to enforce such covenants or conditions of the mortgage.

A hearing was had on the bill, answer, and proof; and complainant was awarded the relief prayed, after a decree for an accounting to ascertain the amount of the mortgage debt due. From the decree respondents appeal, assigning various grounds.

[1,2] The bill was well drawn, and the breaches of the conditions and covenants of the mortgage were well alleged. The bill was not subject to any of the grounds of demurrer assigned or argued. The bill, together with its exhibits, showed that the mortgage was properly executed by the corporation. The instrument did not show on its face, as claimed, that it was executed by Holloway individually, but that it was executed by him as president of the corporation and bank. The mere fact that the name "H. S. Holloway" was not preceded by the word "by" and followed by the phrase "as president" did not show that the mortgage was executed by Holloway individually. Courts do not look solely to the name of the corporation, nor to that of the officer or agent writing the name and his own, in determining whether a given instrument was executed by the corporation, or by the person signing his name or that of the corporation to such document, but look to the whole

instrument, its body, its recitals, its other indicia of execution, as the acknowledgment, if such it has—as well as to the signatures to the instrument. The signatures or names affixed to an instrument do not always control in determining whether the instrument is that of the corporation indicated, or that of the person who signed the names. Neither do the words “by” and “as” preceding or following the name of the corporation, or that of the individual or officer signing or writing such name, always control in determining by whom the given instrument is executed and who is bound thereby.

Construing the mortgage in question, we have no hesitancy in saying that it was properly executed by the People's Saving Bank of Tallassee, a corporation, the executing being done by or through its president, H. S. Holloway.

The attesting clause, including the signatures and the acknowledgment, is as follows:

“In witness whereof the said People's Savings Bank has caused this instrument to be executed in its own name by H. S. Holloway, its president, under its corporate seal, this the 22d day of June, 1912.

“The People's Savings Bank of Tallassee, Ala.,  
“H. S. Holloway, Pres't.

“Attest:

“W. A. Jordan.

“T. G. Hilyer.

“The State of Alabama, Elmore County.

“I, T. G. Hilyer, a notary public in and for said county and state, hereby certify that H. S. Holloway, as president of the People's Savings Bank, a corporation, whose name is signed to the foregoing mortgage, and who is known to me, acknowledged before me on this day, that being informed of the contents of the mortgage, he, as such officer and with full authority, executed the same voluntarily, on the day the same bears date, for and as the act of said corporation.

“Given under my hand this 22d day of June, A. D. 1912. T. G. Hilyer, Notary Public.”

The authorities cited by appellants to show that this was not the mortgage of the bank, but of Holloway, are not apt or in point.

It thus appears to be so plain and certain that the instrument is the mortgage of the corporation and bank, and not that of Holloway, that it needs no citation of authority to support this holding. Moreover, when we come to the answer, it admits the execution as alleged in the bill.

We agree with the chancellor in his finding that the allegations as to breaches were supported by the proof, and that complainant was entitled to all the relief decreed; and we find no error of which the appellants can complain.

None of the questions argued have been overlooked, but we deem it unnecessary to discuss those not specifically dealt with, or to cite authorities in support of the decree.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

(199 Ala. 482)

McLENDON et al. v. EMPIRE MINING CO.  
(6 Div. 458.)

(Supreme Court of Alabama. April 5, 1917.)

1. APPEAL AND ERROR  $\S$  374(4) — BONDS — NECESSITY—COUNTY TAX OFFICERS.

Tax officers of a county against whom, as such, mandamus is granted, having no personal interest in the litigation, but being representatives of the state and the public, being clothed with powers and duties to be exercised in behalf of the state, need not give the bond required by Code 1907,  $\S$  2843, on appeal from judgment on a remedial writ, but are within the spirit of section 2440, providing that the state is entitled to all remedies for enforcement of rights between individuals without giving security.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig.  $\S$  2008-2010.]

2. TAXATION  $\S$  526 — ASSESSMENT — VALUATION BY SINGLE MEMBER OF BOARD.

Under Act Sept. 14, 1915 (Gen. Acts 1915, pp. 416, 420)  $\S$  78, 79, providing that the opinion of the majority of the county board of equalization shall govern in the valuation and equalization of values, valuation by a single member with no action thereon by the board or a majority of its members, does not bind it or the state, notwithstanding any custom or agreement among the members.

[Ed. Note.—For other cases, see Taxation, Cent. Dig.  $\S$  989.]

Appeal from Circuit Court, Jefferson County; E. O. Crow, Judge.

Mandamus by the Empire Mining Company against D. E. McLendon and others. From an adverse judgment, defendants appeal. Reversed and rendered.

W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for appellants. E. J. Smyer, of Birmingham, for appellee.

SOMERVILLE, J. The appeal is from an order of the circuit court granting to the petitioner a peremptory writ of mandamus commanding the respondents—who are respectively the tax assessor, the tax collector, and the three members of the board of equalization, of Jefferson county—to enter as the valuation of its property for assessment a certain valuation thereof made by respondent Klyce, a member of said board, on July 12, 1916, in lieu of a valuation made and entered by the board on September 22, 1916.

Two questions are presented by the appeal:

[1] (1) Are the respondents required to give security for the costs of appeal under the general provisions of section 2843 of the Code; or are they excused therefrom by reason of the exemption accorded to the state in that regard by section 2440?

While there is for many purposes a distinction between state and county officers (Ex parte Wiley, 54 Ala. 226, 228), yet many county officers are clothed with powers and duties to be exercised in behalf of the state, albeit their functions are restricted to the territorial limits of the county, for which

they are elected or appointed. This is manifestly true of all officers who share in the valuation and assessment of property for taxation, there being but one assessment for both state and county purposes. In the present case these respondents have no personal interest in the subject of litigation, but are the representatives of the state and the public—the real and only party in interest. In *Reynolds, Auditor, v. Blue*, 47 Ala. 711, it was said, per Peck, C. J.:

"The motion to dismiss the appeal because security for the costs of the appeal was not given must be overruled. This proceeding is essentially, except as to the name of the party against whom it is instituted, a proceeding against the state. The appellant, as auditor, has no interest in the matter, except in so far as it is his duty, as a public state officer, to protect the interests of the state, and he ought to be permitted to do this without subjecting himself, individually, for the costs. \* \* \* If not within the letter, such cases are within the spirit of section 8487 of the Revised Code."

We approve the soundness of that decision, and its application here requires the overruling of appellee's motion to dismiss the appeal for want of security for costs.

[2] (2) Was the valuation of petitioner's property by a single member of the board of equalization, with no action thereon by the board, or by a majority of its members, binding upon the board and upon the state?

A county board of equalization, as created and regulated by the act of September 14, 1915 (Gen. Acts 1915, p. 413), is composed of three members, and it is expressly provided (section 73) that "the opinion of the majority of said board shall govern in the valuation and equalization of values of all property." This is repeated in section 79. When any objection is made to the returns certified by the board, or any two of them, to the tax assessor, "it shall be the duty of the board to examine under oath any complaining property owner and to examine any other witnesses under oath as to the reasonable cash value of the property of such owner, and if it is found from the evidence that the valuation placed by the board on the property was not 60 per cent. of the reasonable cash value of such property, then they shall correct the valuation or assessment so that it will show 60 per cent. of the reasonable cash value, and such corrected amount shall constitute the taxable value of said property; but if the board shall find from all evidence that the valuation placed on the property was 60 per cent. of the reasonable cash value thereof, then said valuation shall stand as the taxable value of said property."

The authorities are uniform to the conclusion that:

"Where an assessment is required to be made by a board composed of several officers, the law intends that it shall be the joint act of all the members of the board, and an assessment made by one or more members without the concurrence of the rest is invalid, unless it is adopted by the full board." 37 Cyc. 983, c, citing the cases.

"The exception to this rule is that the action of a majority of the board will be legally sufficient where joint or concurrent action has been attempted and has failed, either because some of the members refuse to act or because of an irreconcilable difference of opinion. 37 Cyc. 984, c.

Mr. Burroughs says:

"The weight of authority is that a majority of the assessors required by law, duly qualified, may act, and their acts are as valid as if done by all of the assessors. But the act must be that of the majority, and where it appears that it is only the act of one assessor, where the law requires several, it is void. Nor does it give any validity to the act, where there are five assessors, to show that it was the usage in the town to divide it into districts, and each assessor to act independently of the others in making the assessment. Such an assessment is the act of one assessor, and not of all or a majority. Their duties cannot be performed by deputy." *Burroughs on Taxation*, § 94; *Middleton v. Berlin*, 18 Conn. 189; *Granger v. Parsons*, 2 Pick. (Mass.) 392; *Stokes v. State*, 24 Miss. 621.

In any case the valuation or assessment must be the act of the board, directed by at least a majority of its members, whether it be based upon an original joint agreement, or upon the opinion of a minority adopted by the board. A county board of equalization is a body of limited statutory powers. When it acts it must proceed in accordance with the mandates of the law of its creation. To hold that the act of one member of the board of three is binding upon the state or the citizen would be subversive of law and policy alike. Nor can such a result be validated merely because the members of the board have so agreed, nor because the property owner has consented to that procedure. Neither custom nor agreement can set aside the mandates of public law involving the interests of the state. *State v. Hall*, 172 Ala. 316, 54 South. 560.

It has, indeed, been held that when two of the three judges of this court were disqualified to act, the parties might by written agreement, filed of record, qualify the single remaining judge, either alone or in conjunction with special judges agreed upon, to render the judgment of the court. *Bullard v. Lambert*, 40 Ala. 204; *Donnell v. Hamilton*, 77 Ala. 610. This was upheld because it was done under the solemnly recorded agreement of the parties, which estopped them from denying their own authorization. And it was merely a waiver of their right to judgment by the bench.

In the instant case, while acting as appraisers, and discharging a public judicial duty, the members of the board were without authority to make any agreement for the state in derogation of the express mandates of the law under which alone they were authorized to act. Had the board, as a board, adopted the act of Klyce, a different question would be presented. We have not overlooked the conditions and circumstances under which the board and its members were acting during the session at which this particular

valuation of petitioner's property was made by Klyce, nor the hardship to petitioner by reason of the repudiation by the board of a valuation agreed to by it, in good faith no doubt. But, as we view the case, none of these considerations can affect the result, and their discussion would be useless.

We hold that petitioner does not show itself entitled to the writ commanding the respondents to reinstate upon their respective books and records the valuation made by Klyce, as the judgment or finding of the board of equalization. We do not hold that the valuation made by the board on September 22, 1916, was valid and controlling; a decision of that question being unnecessary in this case.

The demurrers to the petition should have been sustained, and the judgment of the circuit court will be reversed, and a decree here rendered sustaining the demurrers, in accordance with the views above expressed.

Reversed, rendered, and remanded.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

(199 Ala. 427)

WRIGHT v. EMPIRE COAL CO. (6 Div. 452.)

(Supreme Court of Alabama. April 12, 1917.)

NEW TRIAL  $\S$  66—GROUNDS—VERDICT CONTRARY TO INSTRUCTIONS.

Where the court at defendant's request and with plaintiff's express consent gave charges which under the undisputed evidence were in effect the affirmative charge for defendant, an order of the court setting aside a verdict for the plaintiff will not be reversed on appeal, since such verdict was contrary to the instructions of the court.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 132-134.]

Appeal from Circuit Court, Walker County; J. J. Curtis, Judge.

Action by Ed Wright against the Empire Coal Company. A verdict for plaintiff was set aside and new trial awarded, and plaintiff appeals. Affirmed.

Leith & Gunn, of Jasper, for appellant. A. F. Fite, of Jasper, for appellee.

MAYFIELD, J. The only question presented on this appeal is whether or not the trial court erred in setting aside a verdict in favor of plaintiff (appellant here) and awarding a new trial.

The record has been carefully examined, and we are not prepared to say that the trial court erred in awarding a new trial. While the trial court did not in terms give the affirmative charge for the defendant on every issue submitted to the jury, it did in effect so charge the jury; and many of the charges, which, under the undisputed evidence, were in effect the affirmative charge for the defendant, were given, not at plaintiff's request,

but at defendant's request, and with the express consent of plaintiff that they be given. So there is no doubt that the verdict of the jury was therefore contrary to the instructions of the court; and for this reason, if for no other, we would not reverse the order and judgment of the trial court awarding a new trial. We do not, however, mean to intimate that there were not other reasons justifying the action of the trial court.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

(199 Ala. 444)

STATE ex rel. BRANDON et al. v. PRINCE et al. (6 Div. 563.)

(Supreme Court of Alabama. April 12, 1917.)

1. STATUTES  $\S$  76(4) — VALIDITY — LOCAL LAWS—SELECTION OF JURY.

Loc. Laws 1915, p. 470, abolishing the jury commission for a certain county and conferring its powers on the board of revenue thereby created, does not violate Const. § 105, providing that no special or local law shall be enacted in any case which is provided for by general law, though there was a general law providing for the selecting and drawing of jurors by other boards, since it is part of the judicial history of the state before and since the adoption of that Constitution that the methods and agencies for selecting jurors have been provided for by both local and general statutes, and it cannot be presumed that the framers of the Constitution intended to prohibit such practice.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 78½.]

2. STATUTES  $\S$  76(1) — VALIDITY — LOCAL LAWS—GENERAL LAW ON SAME SUBJECT.

Mere changes in the terms or wording between the local and general law or other unessential change will not save the local law from being declared void under Const. § 105, prohibiting local laws in cases provided for by general laws.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 77½.]

3. STATUTES  $\S$  124(3) — TITLE — SCOPE IN CLAIMS OF BOARD OF REVENUE.

The title of Loc. Laws 1915, p. 470, which is an act to establish a board of revenue to prescribe its powers and duties and to abolish the jury commission, is broad enough to include the provisions of the act abolishing the jury commission and conferring the authority to select jurors on the board of revenue.

4. STATUTES  $\S$  107(11)—SUBJECT—CREATION OF NEW BOARD—ABOLITION OF JURY COMMISSION.

Loc. Laws 1915, p. 470, abolishing the jury commission for a certain county and conferring its powers on the board of revenue thereby created, does not contain more than one subject contrary to Const. § 45.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 134.]

5. STATUTES  $\S$  141(1) — REPEAL — GENERAL CLAUSE.

Loc. Laws 1915, p. 470, creating a board of revenue for a certain county and abolishing the jury commission, and repealing all acts inconsistent therewith, is not invalid under Const. § 45, as amending or repealing other laws without setting them out in full.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 48, 198, 200.]

6. STATUTES  $\Leftrightarrow$ 8½(1)—LOCAL LAW—AMENDING GENERAL LAW.

Loc. Laws 1915, p. 470, creating a board of revenue and abolishing jury commission within a named county, which is complete within itself and merely refers to a general act after the execution of the local act, is not the enactment of a local law by the amending of a general law in evasion of the constitutional provision against the passage of local laws without notice thereof.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 6.]

7. STATUTES  $\Leftrightarrow$ 102(1)—INCREASE OF FEES—LOCAL LAW—NEW DUTIES.

A local law imposing new duties upon certain officers and providing compensation for the performance of those duties does not violate Const. § 104, subd. 24, prohibiting increasing the fees of officers by local laws.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 114.]

8. OFFICERS  $\Leftrightarrow$ 100(1) — INCREASING FEES — TERM OF OFFICE.

Loc. Laws 1915, p. 470, creating a board of revenue and abolishing a jury commission and providing that it shall take effect immediately so far as necessary for electing at the next election the members of the board of revenue, but that the jury commission shall not be abolished until the expiration of the term of its members, does not violate Const. § 281, prohibiting the increase of fees during the term of office of the incumbent.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152, 153, 155-157.]

9. STATUTES  $\Leftrightarrow$ 8½(2)—LOCAL LAWS—NOTICE—SUFFICIENCY.

A notice of intention to pass a local law which was a fair compendium of the act introduced and passed and would give almost as much information as to the object and effect of the intended law as would the act itself is sufficient.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 6.]

10. CONSTITUTIONAL LAW  $\Leftrightarrow$ 46(1)—DETERMINATION OF CONSTITUTIONAL QUESTION — QUESTIONS NOT RAISED.

The Supreme Court will never search for constitutional infirmities in statutes, but will consider only those questions raised and insisted upon.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 43.]

Appeal from Circuit Court, Tuscaloosa County; Henry B. Foster, Judge.

Petition by the State of Alabama, on the relation of W. W. Brandon, and others, for quo warranto to determine if A. F. Prince and others constitute the Jury Commissioners of Tuscaloosa County, and to inquire by what authority they hold said office. From a decree refusing to grant said writ, relators appeal. Reversed and rendered.

The title to the act (Local Laws 1915, No. 729, p. 470) is as follows:

"An act to establish a board of revenue of Tuscaloosa county, Alabama, to prescribe its powers and duties, to fix the compensation of its members, to provide for the election of its members and fix their terms of office, to provide for a clerk and engineer, and to abolish the court of county commissioners, the board of public works, and the jury commission of said county."

The following notice was published once a week for four consecutive weeks in the West Alabama Breeze, a newspaper published in Tuscaloosa county, Ala., said publications being on the 6th day of January, 1915, viz.:

"Notice is hereby given that at the 1915 session of the Legislature of Alabama there will be introduced a bill seeking the enactment of a law, providing for the establishment of a board of revenue for Tuscaloosa county, Ala., and abolishing the court of county commissioners, board of public works, and jury commission of said county, giving to such board of revenue any and all powers, rights, responsibilities, and duties as are now possessed by the court of county commissioners, board of public works, and jury commission, providing for a clerk of said board, fixing his compensation, and prescribing his duties, fixing the compensation of the members of said board of revenue, authorizing said board of revenue to employ an engineer when in its opinion necessary, providing when said board shall hold its sessions, providing that no member of said board shall directly or indirectly be interested in any contract for the repair or improvement of roads or bridges in Tuscaloosa county, and providing for the punishment of any violation thereof, providing for the selection of the members of said board of revenue, and providing for the time that said bill, if enacted shall become a law." Volume 2, p. 3836, House Journal 1915.

Foster, Verner & Rice and J. P. Vande Voort, all of Tuscaloosa, for appellants. Clarkson & Morrisette, of Tuscaloosa, for appellees.

MAYFIELD, J. This is a statutory quo warranto proceeding to oust the jury commissioners of Tuscaloosa county. The decision of this case involves the constitutionality of a local act of the Legislature, which, if valid, virtually abolishes the office of jury commissioners for Tuscaloosa county, and imposes the duties and confers the powers thereof upon a board of revenue created or provided by the same act. The trial court held the act invalid. The reporter will set out the title of the act, and the notice of the proposed passage of the bill.

[1] It is first insisted that so much of the act as conferred the powers and imposed the duties of the jury commission upon the board of revenue, violated section 105 of the present state Constitution (that of 1901). That section reads as follows:

"No special, private, or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, or when the relief sought can be given by any court of this state; and the courts, and not the Legislature, shall judge as to whether the matter of said law is provided for by a general law, and as to whether the relief sought can be given by any court; nor shall the Legislature indirectly enact any such special, private, or local law by the partial repeal of a general law."

The insistence is that the only effect of sections 9, 10, and 19, which relate to the matter of selecting and drawing the jurors and juries for Tuscaloosa county, is now, and was before the local act was passed, pro-



vided for by a general law, and that the local act therefore violates section 105 of the Constitution.

We cannot agree to or concur in this insistence. There is not now, and was not, at the date of the passage of the local statute, any law which authorized boards of revenue or courts of county commissioners to draw or select the juries and jurors for Tuscaloosa county. The fact that there was a general law by which the juries for that county could be drawn by other boards or officers did not prevent the Legislature from providing, by a local enactment, that the juries shall be drawn by other boards, officers, or persons than those provided for in the general law. There is no constitutional provision requiring that the laws as to drawing and selecting juries shall be uniform in all the counties or in all of the courts of the state. The purpose and effect of the sections of the local act in question was to confer the powers and impose the duties incident to the selecting and drawing of juries for that county upon a board, or officers, or persons, who could not theretofore exercise such powers, after withdrawing these powers and duties from another board, officers, or persons who had theretofore exercised the same. Herein we see that the object and effect of the local law was to work a radical change in the law applicable to Tuscaloosa county as to selecting and drawing the jurors and juries for that county.

If we should hold that, merely because there is a general law providing for the selecting and drawing of juries for the several counties, none of its provisions can be changed by a local law, it would be tantamount to holding that a local law cannot be passed upon that subject. We do not think that this is the meaning of section 105 of the Constitution, nor that such was the intent of the Constitution framers in ordaining it.

It is a part of the judicial history of this state before and since the adoption of the Constitution of 1901 that the methods and agencies for the selecting and drawing of jurors, etc., have been provided for by both local and general statutes. As before stated, there being no constitutional provision requiring the laws on this subject to be uniform in all the counties or all the courts, the Legislature may provide different laws for different counties; and it is difficult to conceive how a more radical difference could be given effect than to provide by one law that the juries shall be selected and drawn by a jury commission to be appointed by the Governor, and by another that such duty and function shall be performed by a board of revenue or court of county commissioners the members of which are elected by the voters of a particular county.

The mere fact that the things to be done by each board, or all the members thereof, are the same, does not make the laws which

authorize the doing of the same things by different boards or different officers the same laws; they are different laws though they relate to the same subjects or subject-matters. This is well illustrated by many local laws, relating to boards of revenue or courts of county commissioners, repeatedly upheld by this court notwithstanding there are general laws—an entire chapter of the Code—relating to this subject. See report of case of *Dunn v. Dean*, 71 South. 709, where many cases of this kind are cited and reviewed to the effect that such laws are not void under section 105 of the Constitution. Again, the mere fact that there are general laws relating to circuit and chancery courts does not prevent the Legislature from providing, by local laws, for other courts to do the same work and discharge the same functions and powers as by such general provisions authorized. The general laws and the local laws in this respect are different, and not the same.

[2] Of course, it has been held that mere changes in terms or wording between the local law and the general law, or any other unessential change showing an attempt to evade or avoid the constitutional provisions, will not save such local laws from being declared void; but in the case before us, as we have shown, there is a vital and material difference between the general and the local law in question.

[3-6] The title of the local act in question is sufficiently broad and comprehensive to embrace the sections and provisions of the act of which complaint is here made. Nor is there more than one subject in the title or in the body of the act, in the sense or meaning of section 45 of the Constitution. Nor does the act or the title offend this section of the Constitution by amending or repealing other laws without setting out in full the law so amended, etc. The act in question is not an amending or a repealing act, within these provisions of the Constitution. Nor is it at all objectionable, in that it is the enactment of a local law by the amending of a general law, and therefore attempts to evade the constitutional provision as to the passage of local bills without notice thereof. The act is complete within itself; merely refers to a general act as to the execution of the local act. It does not purport to amend or revive or repeal any act or law, except in so far as prior acts are in conflict with its provisions: and this it would do without any reference to such laws so amended, revived, or repealed. Such statutes are not within the purview of section 45 of the Constitution. *State v. Rogers*, 107 Ala. 444, 19 South. 909, 32 L. R. A. 520.

[7] Imposing new and additional duties upon certain officers, and providing compensation to them for performing the same, does not offend the Constitution (subdivision 24 of section 104) as against increasing the fees of officers by local laws. *Dunn v. Dean*, su-

pra; State ex rel. Vandiver v. Burke, 175 Ala. 561, 57 South. 870.

[8] The act in question does not offend section 281 of the Constitution, as to the increase of fees, etc., during the term of office of the incumbent; because it was not made to take effect during the term of any incumbent, within the meaning of this provision. Brandon v. Askew, 172 Ala. 160, 54 South. 606.

[9] The notice of the intention to pass the local act in question was sufficient to advise the local public of the substance of the proposed law and of its essential features. In fact, it was a fair compendium of the act introduced and passed. The notice would give almost as much information as to the object and effect of the intended law as would the act itself. Certainly so as to the provisions in question. Thomas v. Gunter, 170 Ala. 165, 54 South. 283; Christian v. State, 171 Ala. 52, 54 South. 1001.

[10] We have treated all the objections to the constitutionality of the act, which are insisted upon or called to our attention, and we find no merit in any of them. This court will never go out of its way to search for constitutional infirmities in statutes; it will consider those questions only which are raised and insisted upon.

It results from what we have said that the local act in question is not unconstitutional, and that the trial court erred in its ruling to the contrary effect, and that the judgment appealed from is reversed. A judgment will be here rendered ousting appellees from the office of jury commissioners, and directing the appellants to exercise the powers and perform the duties of jury commissioners for Tuscaloosa county.

Reversed and rendered.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

(199 Ala. 385)

STATE v. MONTGOMERY SAV. BANK.  
(3 Div. 249.)

(Supreme Court of Alabama. Feb. 3, 1917.  
Rehearing Denied March 26, 1917.)

1. APPEAL AND ERROR ⇨1027 — HARMLESS ERROR—EFFECT OF RECOVERY.

Where the judgment is in favor of plaintiff, who appeals, the Supreme Court will not consider as reversible error any ruling of the primary court bearing merely on the naked question of defendant's liability, and not affecting the amount of the damages recovered, however erroneous it may be in fact, because any such ruling, if error, was harmless to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4033.]

2. DEPOSITARIES ⇨10 — PUBLIC MONIES — DISCHARGE OF BANK—PAYMENT.

Where a bank, having on deposit about \$100,000 to the credit of the president of the board of convict inspectors of the state, in good faith delivered to such president or his authorized agent, the chief clerk in the convict department, funds or values to the amount of the de-

posit on the order of the president, the bank was discharged from liability to account to the state for the funds or values thus restored by it to the state's duly authorized and empowered head of the convict department, who was the proper lawfully designated receptor and custodian of funds coming to the state through the operation and activity of the convict department.

[Ed. Note.—For other cases, see Depositaries, Cent. Dig. §§ 23-26.]

3. STATES ⇨122—FUNDS OF CONVICT BOARD —STATUTE.

The net balance of funds emanating from the convict department of the state is governed, in respect of its custody by the president of board of convict inspectors and their payment to the treasurer of the state, by the method defined by Code 1907, § 6499, constituting the president the collector of accounts due the state in the convict department, and requiring quarterly settlements by him with the state auditor, whose act in certifying alone authorizes the president to pay to the state treasurer, and the state treasurer to receive, funds derived from the activity of the convict department; the provisions of the section, in connection with section 6515, providing that the state convicts shall be hired at such labor, etc., as may be determined by the board of inspectors, having in view the end of making the system self-sustaining as far as consistent with humane treatment, precluding the application of section 644, authorizing state officials to deposit to the credit of the state treasurer, subject to his order, public funds in their custody.

[Ed. Note.—For other cases, see States, Cent. Dig. § 121.]

4. STATES ⇨75 — OFFICERS — PRESIDENT OF BOARD OF CONVICT INSPECTORS—DELEGATION OF AUTHORITY.

The president of the board of convict inspectors could delegate to the chief clerk in the convict department authority to receive from a bank in which they were deposited to the president's credit funds and values belonging to the convict department.

[Ed. Note.—For other cases, see States, Cent. Dig. § 76.]

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Action by the State of Alabama against the Montgomery Savings Bank. From a judgment for plaintiff, it appeals. Transferred from Court of Appeals under section 6, Acts 1911, p. 449. Affirmed.

W. L. Martin, Atty. Gen., R. B. Evins, of Greensboro, and Steiner, Crum & Well, of Montgomery, for appellant. Ball & Samford, of Montgomery, and Logan & Logan, of Centerville, for the State.

MCCLELLAN, J. [1] This action was instituted by the state of Alabama against the Montgomery Savings Bank (appellee) to recover the sum of \$100,000. The complaint contains the common counts as well as counts declaring upon a conversion by the bank of funds belonging to the state. Following a verdict for the plaintiff assessing the damages at one cent and judgment entered in accordance therewith, the plaintiff moved for a new trial. This motion was overruled. Where the judgment appealed from is in favor of the plaintiff, and plaintiff appeals,

this court "will not consider as reversible error any ruling of the primary court bearing merely on the naked question of the defendant's liability, and not affecting the amount of the damages recovered, however erroneous it may be in fact, because, if error, such ruling is error without injury to the plaintiff." *Randle v. B. R. L. & P. Co.*, 169 Ala. 314, 318, 53 South. 918, 919, and cases there cited.

J. G. Oakley was president of the board of convict inspectors during the year 1912, and up to, wit, March 12, 1913. Theo Lacy was chief clerk in the convict department. On March 8, 1913, Oakley, as president, had to his credit on general deposit with the appellee a balance of approximately \$40,000. On that day Lacy took to the bank checks and drafts from various parties payable to Oakley, as president, aggregating \$103,868.92. These checks and drafts were listed on a deposit slip form on which this appeared: "Deposited with Montgomery Saving Bank, Montgomery, Ala., March 8, 1913. Credit of J. G. Oakley, Pres. \* \* \* Deposited by Theo Lacy." Aside from the date and names quoted, the face of the form was stereotyped. On the back of each of the checks and drafts, the aggregate amount of which constituted the sum last stated, through the use of a rubber stamp, these words were impressed: "For deposit only, James G. Oakley, President." And on the back of each checks or draft, Oakley, in his own hand, had made this indorsement: "J. G. Oakley, Pres." Subsequent to a specific agreement between the representative of the appellee and Oakley with respect to the collection of these checks and drafts to be stated the total amount represented by them was credited in order upon the existing general deposit account of Oakley as president; the described deposit slip being accepted by the bank without change. On March 11, 1913, in accordance with the agreement just referred to, the check of Oakley as president on the appellee for \$110,000 was paid to Lacy, largely in cash, along with exchange for the difference. Lacy absconded therewith, was later tried, and is now serving sentences imposed for his embezzlement. The agreement alluded to, together with the reasons inducing it, was this: Oakley's accounts with the state were in course of examination by a state examiner of accounts, and Oakley desired to have in cash all the funds belonging to the state chargeable against him. Oakley wanted these checks and drafts collected at the earliest moment, and the proceeds in cash delivered for use in settling his accounts with the state. After conference between Oakley and the bank's officer it was specifically agreed that the bank should undertake to serve his purpose by Tuesday, March 11, 1913, though it was also agreed that Oakley would take exchange for the amount the bank could not collect by March 11, 1913, supplementary of the amount in cash that

was collected. According to this testimony the bank was created the agent of Oakley to collect the checks and drafts delivered to it on March 8, 1913, and pay the same to Oakley; the agreement as made operating to prevent, as to these checks and drafts, the creation of a general deposit by Oakley with the bank. The state insists that, when the statements and indorsements on the deposit slip and on the checks and drafts and the bank's act of crediting the aggregate amount of these checks and drafts on the general deposit account of Oakley as president and the crediting of the payment of the \$110,000 check on that account are considered, at the very least, an issue for the jury to decide was made by these matters of evidence, viz. whether there was a deposit of the amount represented by these checks. In the brief for appellee it is, in effect, admitted that the issue indicated was a matter determinable alone by the jury. Because of the view prevailing in this court, it is not now important to consider the ultimate effect of the issue and of its solution upon the fate of this appeal. Whether the funds or values delivered to Lacy in consequence of Oakley's check for \$110,000 were the result of an order against a general deposit account in Oakley's favor or not is not now regarded as an influential or controlling factor in the present review of the judgment on which this appeal is based.

[2] Our conclusion is that, since Oakley, as president of the board of convict inspectors, was at that time the proper, lawfully designated receiptor and custodian of funds coming to the state through the operation and activity of the convict department, including the collection of demands of the state against debtors to it in consequence of the conduct of its convict department, the delivery in good faith to Oakley or to his authorized agent, Lacy, the chief clerk in the department, by this bank, of funds or values, was a delivery or payment wherefrom resulted the discharge of the bank from liability to account to the state for funds or values thus restored by it to the state's duly authorized and empowered head of the convict department. There is no evidence of mala fides on the part of the bank in making or when making this delivery to Lacy. The evidence is conclusive to the point that the entire basis of this action was and is funds and values delivered to the chief clerk on the order of the president of the board of convict inspectors. Hence, if our stated conclusion is correct, the bank was due the general affirmative charge; and errors, if any, intervening were without prejudice to this appellant. It is provided in Code, § 6515, as follows:

"The state convicts shall be hired or employed at such labor and in such places and under such regulations within the state as may be determined by the board of inspectors, with the approval of the Governor, having in view the end of making the system self-sustaining as far

as consistent with the humane treatment of the convicts."

Code, § 6480, provides:

"The president of the board of inspectors shall superintend the management of the convicts, and all subordinate officers, persons, or guards. It shall be his duty to see that the laws in relation to convicts and the rules of the board of inspectors are enforced; and his orders shall be obeyed by all contractors, officers, guards, and convicts. He has the general oversight of all the officers and convicts and of the land and other property belonging to the several prisons; he may sell by order of the board any personal property not needed at any prison and cover the proceeds into the state treasury to the credit of the convict fund, and may order any convict transferred from one prison to another as he may think expedient."

[3] By Code, § 6499, the president of the board of convict inspectors was constituted the collector of accounts due the state in that department; and quarterly settlements were required by him with the state auditor, whose act in certifying alone authorized the president to pay to the state treasurer, and the state treasurer to receive, funds derived from the activity of that department. The provisions of this statute, in connection with that numbered 6515, and the method and practice prescribed by section 6499, precluded the application of the provisions of Code, § 644, whereby state officials were authorized, not required, to deposit, to the credit of the treasurer and subject to his order, public funds in the custody of such officer; the net balance of funds emanating from the convict department being governed, in respect to their custody by the president and their payment to the treasurer, by the exclusive method defined by Code, § 6499.

There is another insistence on the part of the state predicated of the ruling of this court in *Alston v. State*, 92 Ala. 124, 9 South. 732, 13 L. R. A. 659, wherein it was ruled that the general deposit by an officer of a check made payable to him in discharge (when paid) of money due from the drawer to the state or county for a license to carry on a certain business was a conversion of the funds thus, in consequence of the check's payment, passing to the general credit account of the officer on the books of the bank to which it was delivered for collection and credit, the action being against the officer to recover the sum, the bank having failed after the general deposit had become effective. The doctrine of that decision is not applicable to the case under consideration. If the bank involved in the *Alston* Case had actually paid the funds there in question to, or back to, the officer, and the bank had been sued for the money, this court would then have been invited to express its judgment upon the legal effect of circumstances that are present on this appeal, but which were not involved in the *Alston* appeal. That decision is without bearing on the questions determinative of the case at bar. There is also argument rested upon considerations that are suggested by in-

quiries necessarily arising where it is sought to bind the state by acceptances of checks or drafts by officers in attempted full discharge of demands in favor of the state. The determination of this appeal does not, in our opinion, involve, in any influential or controlling sense, those considerations, since the funds and values delivered on Oakley's order to Lacy represented and were the values or funds with respect to which the entire claim of the state in this action is concerned.

As we have indicated, the determinative question on this appeal is whether the delivery of the funds and values to the chief clerk, on the order of the president of the board of convict inspectors, was a lawful restoration, a valid delivery, exonerating the bank from liability to account therefor to the state? A negative response to this question would require, necessarily, the affirmation that in the circumstances surrounding the possession of these funds or checks thus resulting from the conduct of the business of the convict department imposed on the bank the imperative, unavoidable obligation to pay or to deliver them to the state treasurer; that official being, if the president of the convict board was not, the only authorized receptor or custodian of the funds or values belonging to the state. No positive law to which reference has been made, or which has been discovered, imposed that restrictive duty upon the bank, as the sole means whereby it could acquit itself of liability to account to the state. So far as we are advised, there was no law requiring payment or delivery of funds derived from the operations of the convict department to the state treasurer except through the process defined in Code, § 6499, and none that would have authorized the state treasurer to receive funds from the service here in question otherwise than through the method prescribed in Code, § 6499. If, as appears, there was no authority whereto the bank could refer a payment or delivery of these state funds to the state treasurer or to which the state treasurer could refer as warranting his receipt of these funds, derived from the operations of the convict department, it would seem to be quite clear that the process for surrendering these funds, and thereby acquitting the bank of accountability therefor, was to pay or deliver such property of the state to the official from whom it was received by the bank, or to whom the bank's possession thereof was attributable; the act of so paying or delivering being free from mala fides. But the stated inquiry is not, in our opinion, alone answerable through this method of eliminative deduction. The convict department is in a large sense a commercial enterprise. By Code, § 6515, a wide discretion is committed to its directors in the hiring or employment of convicts subject to its appropriate control. All of the activities of the board are referable to the government, care, use, and preservation of those suffering

the penalties of offended law. A clerical force to serve its manifest purposes is provided by law. By Code, § 6499, the payment of demands in favor of the department is directed to be made to the president of the board of inspectors; and he, with others concerned in service of that department, is now required to be bonded (Gen. Acts 1915, p. 116). By the law's direction the president of the board was the collector of the demands which went to constitute the approximately \$143,000 (including the \$103,868.92 represented by the check and drafts delivered to this bank on March 8, 1913, in accordance with Oakley's order) of credit's on the books of this bank on account of Oakley as president. In effecting collections he was authorized to effect, and which were in this instance indubitably made through the actually paid and anticipated payment of orders for money payable to him as president, no fault could be ascribed to him or to the bank or banks affording agencies for collecting, at his request, such orders (checks or drafts) for money serving, when paid, to discharge the demands of the department against its debtor. Whether the official would assume the risk (if such there in fact was) in accepting such orders for money in his favor, subject to their ultimate honor and satisfaction, was a question for him to determine on his own responsibility as an official, charged as he was in the premises. He could not discharge the demand by accepting anything other than money; but that he might use the ordinary agencies for the transmission of money or for the reduction to money of an order in his favor is not to be doubted in this day of the practically universal employment of banking facilities to effect the prompt discharge of demands, especially of large commercial enterprises of the type to which our convict department may be likened. In the present case the orders for money delivered on March 8, 1913, to appellee were either honored, or the bank, anticipating their honor, advanced the sum that their honor would have produced. This did not, of course, operate to the prejudice of any one. The delivery by this bank of the funds and exchange which the chief clerk embezzled was on the president's order. Section 100 of the Constitution of 1901 is without bearing upon the issue under consideration. As shown, the laws constituted the president of the board of convict inspectors the proper receptor of funds devoted to the payment of demands accruing to the state through the operations of the convict department; and payment of demands thereby created to the president of that board was payment to the state, discharging the debtor's obligation to the state through the operations of the convict department. The decision in *Wolfe v. State*, 70 Ala. 201, 58 Am. Rep. 590, only consists with, is not at all opposed to, the conclusions attained here. It was therein held that Wolfe's liability to the state was due to the

fact that he, with full knowledge, collaborated with Vincent, the state treasurer, in misapplying the state's money to Vincent's private account; and this legal result followed from the premises thus stated in 79 Ala. on page 207, 58 Am. Rep. 590:

"The illegality is found, not in the receipt of the money by Vincent; *he was entitled to it*; not in the purchase of exchange; he had authority to purchase it. It consisted *alone* in the application of the funds of the state, having the earmark of its ownership, to Vincent's individual uses. In this both Vincent and Wolfe participated, actively and knowingly." (Italics supplied.)

[4] Unless it can be affirmed that such delivery could only be made to Oakley himself, it is manifest that this delivery to the chief clerk was a delivery to the president of the board of convict inspectors. The inquiry involves the matter of the delegability vel non of the president's stated power, authority, and duty with respect to the collection of demands and the handling of funds derived from the operations of the convict department. The following response of our Court of Appeals in *Lacy's Case*, 13 Ala. App. 229, 230, 68 South. 706. Judge Brown writing, to the same inquiry, though necessarily differently there related, impresses the court as being presently applicable, manifestly sound, and conclusive to the effect that the president of the board could validly delegate to the chief clerk the authority he exercised in receiving the values in question from the bank:

"It is insisted that the matter of handling the funds of the convict department, in view of the provisions of the statute requiring all accounts to be paid to the president of the board, and requiring him to make quarterly settlement, is a personal trust committed to the president which he must perform in person. The general rule of law is that, when duties of a judicial nature, such as involve the exercise of judgment or discretion, are conferred upon a public officer, the right to perform such duties cannot be delegated to another, in the absence of an express grant of authority. *Mechem on Public Officers*, § 566; 36 Cyc. 559. But mechanical or ministerial duties may be delegated to deputies, clerks, or assistants. *Mechem on Public Officers*, § 568; 36 Cyc. 559; *Throop on Public Officers*, §§ 569, 570. Where the law provides a clerical force to perform the ministerial duties of a department prescribing their duties in general terms, as in the case of the convict department, any duty of a ministerial or mechanical nature such as receiving, accounting, paying into the proper channels, and keeping a record of the funds of the department, in the absence of an express provision prohibiting it, is within the range of the authority of the clerical force.

"The law clearly contemplates that money belonging to the state will be brought into the state treasury through the convict department, and while it requires all moneys due the department to be paid to the president of the board of inspectors, and requires him to make quarterly settlement with the state auditor, it clearly contemplates that a complete record and strict account of all such funds shall be kept by the clerical force in the office of the president, and to that end necessitates counting and handling of cash by that force under the supervision and 'direction' of the president. Code, §§ 6480, 6485, 6498-6500."

It results from the foregoing considerations that no error prejudicial to the appellant underlies the amount of the judgment here under review. Since the defendant (appellee) should have prevailed in the court below, and since the damages awarded the plaintiff (appellant) are nominal only, the judgment will not be reversed. It is hence affirmed.

Affirmed.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

(199 Ala. 441)

WESTERN UNION TELEGRAPH CO. v.  
LOUISVILLE & N. R. CO.  
(2 Div. 632.)

(Supreme Court of Alabama. June 30, 1916.  
On Application for Rehearing,  
Feb. 15, 1917.)

EMINENT DOMAIN §—191(8)—CONDEMNATION  
OF LAND DEVOTED TO PUBLIC USE—PLEAD-  
ING—STATUTE.

In a telegraph company's petition to condemn land, under Code 1907, § 3867, relative to the condemnation of property already devoted to public use, where the amended petition failed to allege any fact tending to bring the case within the section, which, as construed, requires a real necessity for the condemnation, demurrer to the petition was properly sustained.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 512.]

Appeal from Circuit Court, Dallas County; B. M. Miller, Judge.

Action to condemn an easement for a telegraph line by the Western Union Telegraph Company against the Louisville & Nashville Railroad Company. From a judgment denying the petition, plaintiff appeals. Affirmed.

Rushton, Williams & Crenshaw, of Montgomery, Forney Johnston, of Birmingham, and Albert T. Benedict and Francis R. Stark, both of New York City, for appellant. Mallory & Mallory, of Selma, Dortch, Martin & Allen, of Gadsden, and Jones, Thomas & Field, of Montgomery, for appellee.

PER CURIAM. Affirmed, upon the authority of W. U. Tel. Co. v. L. & N. R. R. Co., 71 South. 118. All the Justices concur.

On Application for Rehearing.

Upon the reversal of the cause on the former appeal the petition was amended, and demurrer to the petition as amended was sustained by the court below. The petitioner declined to plead further, or to further amend its petition, judgment was entered denying the petition, and from this judgment the appeal is prosecuted.

In rendering the judgment, the court below also rendered an opinion (which is found

in the record) specifically pointing out the assignment of demurrer, which assignment was considered well taken, as disclosed by the following language:

"The petition as amended fails to aver that the specific land, or portion thereof, or interest therein, sought to be condemned by petitioner for its public use, is actually necessary, and no facts are alleged showing the actual necessity for the specific land, or portion thereof, or interest therein, to be subjected to public use of the petitioner."

It clearly appears that the question of vital importance in this litigation turns upon the proper construction of section 3867 of the Code of 1907. On the last appeal this court departed from the construction given the statute in the case of W. U. Tel. Co. v. L. & N. R. R. Co., 184 Ala. 673, 62 South. 797, and, speaking of what we construed to be the proper meaning of the words "actual necessity," said:

"The necessity is defined by the act as 'actual,' meaning 'real,' and we are of the opinion that by such language is meant such actual necessity as arises from either physical or overpowering economical conditions; the question of practical ability to be, of course, kept constantly in view."

The amended petition failed to allege a single fact tending to bring the case within the provisions of said section 3867 as construed by this court on former appeal. This defect was distinctly pointed out by the demurrer, and specifically passed upon by the court below, as above shown. Petitioner declining to further amend the petition, or to further plead, judgment was, of course, rendered denying the petition.

It is earnestly insisted by learned counsel for appellant, on this appeal, that the opinion in this case on the last appeal was not rested upon a question of pleading, but on one of proof, and that this court was not justified in the affirmance of the case upon the mere citation of the above authority. We are unable to see the force of this reasoning, as the provisions of said section 3867, not only require that such actual necessity shall be proven, but, in specific language, demand that it be alleged in the petition. We are therefore of the view that the opinion of this court on former appeal is ample authority upon which to rest this affirmance, without further comment; but, out of due deference to the ability and industry of counsel for appellant, we have deemed it appropriate to make this response to the application for rehearing.

That section 3867 of the Code is applicable here we consider a proposition so clear as to call for no further discussion. We are also clear to the view that no federal statute nor provision of the federal Constitution is infringed upon by the conclusion here reached.

(199 Ala. 487)

**McDANIEL v. McDANIEL.** (8 Div. 3.)

(Supreme Court of Alabama. April 12, 1917.)

**HOMESTEAD** §150(1)—**ALLOTMENT TO WIDOW**—**APPEAL—TIME FOR TAKING.**

An appeal from a decree of the probate court setting aside and allotting to the widow a homestead out of the estate of her deceased husband, as authorized by Code 1907, §§ 4205-4230, which was not taken within 20 days, as required by section 4216, will be dismissed.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 294-301.]

Appeal from Probate Court, Lauderdale County; J. F. Koonce, Judge.

Proceeding between N. A. McDaniel and Thomas W. McDaniel. From the decree, Thomas W. McDaniel appeals. Appeal dismissed.

Williams & Roberts, of Florence, for appellant. Mitchell & Hughston, of Florence, for appellee.

**MAYFIELD, J.** This is an appeal from a decree of the probate court of Lauderdale county, confirming the report of the commissioners who set aside and allotted a homestead to the widow, out of the estate of her deceased husband, as is authorized by statute. Code, §§ 4205-4230. The statute authorizing appeals from such decrees (section 4216 of the Code) requires the appeal to be taken within 20 days. The appeal in this case was not taken within the prescribed time. The decree appealed from was of date April 25, 1916, and the appeal was not taken until May 22, 1916.

It may not be out of place to say that the record and the briefs were examined before we noticed that the appeal was not taken within time, and that nothing was therein found which would justify or authorize a reversal of the judgment.

Appeal dismissed.

**ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.**

(199 Ala. 480)

**BLAIR v. BLAIR.** (8 Div. 980.)

(Supreme Court of Alabama. April 12, 1917.)

**1. EJECTMENT** §9(3)—**TITLE—POSSESSION.**

In a statutory real action, possession of land is *prima facie* evidence of title, and is sufficient to support recovery against all who do not show prior possession or better title.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 18, 20-24, 27.]

**2. EJECTMENT** §9(1) — **LEGAL TITLE—DEFENSES.**

In statutory real action, as the legal title only is involved, plaintiff can recover only on a superior legal title, and defendant can defeat a recovery only by legal defenses, and the equities of the parties cannot be asserted or regarded.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. § 16.]

**3. EJECTMENT** §9(3)—**TITLE—POSSESSION.**

In a statutory real action the showing by plaintiff of possession in her grantors at the time of conveyance was sufficient to support the action in the absence of showing by defendant of possession of the land in himself prior to the deed to plaintiff, in which event plaintiff would have been required to show that her grantors had the legal title, and that it therefore passed to her by the deed.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 18, 20-24, 27.]

**4. EVIDENCE** §471(26)—**OPINION EVIDENCE—POSSESSION.**

Possession is a fact to which a witness may testify or upon which he may give an opinion or conclusion, though this is not true as to title to land.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2171.]

Appeal from Circuit Court, Colbert County; C. P. Almon, Judge.

Statutory action in the nature of ejectment by Fannie R. Blair against H. W. Blair. Judgment for plaintiff, and defendant appeals. Affirmed.

A. H. Carmichael, of Tuscumbia, and A. J. Roulhac, of Sheffield, for appellant. Mitchell & Hughston, of Florence, for appellee.

**MAYFIELD, J.** This was a statutory action, in the nature of ejectment, brought by the wife against the husband. It was tried on the general issue of not guilty.

The plaintiff introduced in evidence a warranty deed from third parties, conveying the land to her, with proof of the fact that her grantors were in the possession of the land at the time of the execution of the conveyance, and were in such possession by and through this plaintiff and defendant as tenant; and that plaintiff continued in possession thereof until April, 1916. The defendant introduced no witnesses or proof of possession, except a cross-examination of plaintiff, but did not by this means contradict the direct testimony of plaintiff. At the conclusion of the evidence, and upon the request of plaintiff in writing, the court instructed the jury as follows:

"If the jury are reasonably satisfied from the evidence that H. A. Blair and Maggie Blair were in possession of the lot sued for at and before they executed their deed to plaintiff, and that they did execute such deed for the lot sued for, then the jury will find for the plaintiff."

The giving of this charge is the only assignment of error. There was no error in the giving of this charge; if the facts hypothesized therein were true, the plaintiff was entitled to recover, and these facts were by the charge fairly submitted to the determination of the jury. And they evidently found them to be true, as they could do.

[1] The possession of land is *prima facie* evidence of title, and is sufficient to support a recovery against all who do not show prior possession or a better title. *Mickle v. Montgomery*, 111 Ala. 421, 20 South. 441; *Hendon*

v. White, 52 Ala. 597; McCall v. Pryor, 17 Ala. 533; Badger v. Lyon, 7 Ala. 564.

[2] In an action of ejectment, or in the corresponding statutory real action, the legal title only is involved. The plaintiff can recover only on a superior legal title. The defendant can defeat a recovery only by legal defenses. The equities of the parties cannot be asserted or regarded. *Mitchell v. Robertson*, 15 Ala. 412; *Nickles v. Haskins*, 15 Ala. 619, 50 Am. Dec. 154; *McPherson v. Walters*, 16 Ala. 714, 50 Am. Dec. 200; *You v. Flinn*, 34 Ala. 409; *Lomb v. Pioneer Savings & Loan Co.*, 106 Ala. 591, 17 South. 670.

[3] If the defendant had shown a possession of the land in himself prior to the deed to his wife, then the plaintiff would have been required to show that her grantors had the legal title, and that it therefore passed to her by the deed; but in the absence of such proof, the possession of the grantors at the time of the conveyance was a fact sufficient to support an action by the grantee against all who show no better title—one of whom was the defendant in this action.

[4] It is argued by appellant that plaintiff showed no facts which proved that her grantors were in possession. Counsel are in error in this contention. But even if that were true, it would not compel the refusal of the charge in question, the only error assigned, because possession is a fact to which a witness may testify or upon which he may give an opinion or conclusion, though this is not true as to title to land.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

(199 Ala. 477)

WOODRUFF v. SATTERFIELD et al.  
(8 Div. 999.)

(Supreme Court of Alabama. April 5, 1917.)  
SUBROGATION — JUNIOR MORTGAGEES.

As against claim of wife to cancellation of mortgage given by her and her husband on land jointly acquired by them, the mortgagee will be subrogated to rights under prior canceled purchase-money mortgage, paid off with proceeds of mortgage sought to be canceled.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 44-46, 59, 91.]

Appeal from Chancery Court, Marshall County; James E. Horton, Jr., Chancellor.

Suit by Lizzie B. Woodruff against J. R. Satterfield and others. From an adverse decree, complainant appeals. Affirmed.

A. E. Hawkins, of Albertville, and John A. Lusk & Son, of Guntersville, for appellant. D. Isbell, of Guntersville, for appellees.

THOMAS, J. In the instant case the bill is filed by the wife to cancel a mortgage on an undivided half interest of the wife, with the husband, in the lands described in the bill. It is clear from the pleadings and the

proof that the husband and wife jointly acquired the estate by conveyance of date December 29, 1909, from E. W. Haynes and wife, the recited consideration of which was \$950. A vendor's lien was retained in Haynes for the balance of the purchase money due by said Woodruffs, and he thereafter transferred to Hooper the mortgage evidencing the same. Thereafter this Haynes-Hooper vendor's lien mortgage was paid from the proceeds of the Satterfield mortgage, cancellation of which is sought. The release of Hooper, of the vendor's lien mortgage, recited the application on the part of W. C. Woodruff, the husband of complainant, for a loan, to be secured by mortgage on said lands, with the further statement that:

"Whereas, I, J. F. Hooper, have a lien on said lands as mortgage; and whereas, said W. R. Nelson has succeeded in negotiating a loan of \$650 for said W. C. Woodruff on his land with James Kenan: Now, therefore, in consideration of the payment of \$600 to me, which I hereby acknowledge, I hereby release and discharge my said lien as mortgage for \$650 on said lands; and agree that W. R. Nelson may also have a prior lien thereon for his fee in the matter."

This release was of date February, 1910. Pursuant to an agreement of record of counsel, it was admitted that the mortgage in question, taken in Mr. James Kenan's name, was sent to Mr. Nelson, and that Mr. Kenan transferred it to Satterfield, as shown by transfer thereon, for a valuable consideration, he furnishing the amount for the loan and mortgage, that it belongs to him and not to Kenan, and that "Mr. Satterfield paid off the Hooper mortgage." Mr. Hooper, as a witness for Satterfield, testified that the husband of complainant made an application to the bank for a loan with which to pay Haynes, and, in discussing it, the bank agreed that, if he would execute to E. W. Haynes (meaning complainant's vendor of said land) a mortgage and note for \$650, the bank or Hooper would purchase the same on due transfer thereof by said Haynes. This witness further stated that he prepared the mortgage given by complainant and husband to Haynes, and the transfer thereof to Hooper, and that the same was discharged by the payment to him (Hooper) and to Woodruff of the amount agreed on. It is further without conflict in the evidence that Hooper, on the payment of this Haynes mortgage from the proceeds of the Satterfield loan, did not transfer the same to any one; that he "did not cancel it on the record," and had "no recollection of ever authorizing any one to cancel it"; that there was correspondence on the part of Hooper with the attorney who negotiated the loan; and that the paper, of date February, 1910, a part of which is heretofore set out, releasing said Haynes' mortgage, was delivered to the agent through whom the Satterfield loan was negotiated. It is clear that the money with which the Haynes-Hooper mortgage was discharged



was supplied out of the proceeds of the mortgage sought to be canceled. It is well established in this state that a party paying off prior liens or mortgages on real estate is entitled, by subrogation, to the rights of such prior lienholder. *Scott v. Land Mortgage, etc., Co.*, 127 Ala. 161, 28 South. 709; *Bigelow v. Scott*, 135 Ala. 236, 33 South. 546; *Faulk v. Calloway*, 123 Ala. 325, 26 South. 504; *Motes v. Robertson*, 133 Ala. 630, 32 South. 225; *Bolman v. Lohman*, 74 Ala. 507; *Chapman v. Abrahams*, 61 Ala. 108; *Marlowe v. Benagh*, 52 Ala. 112. In *First Avenue Coal & Lumber Co. v. King*, 193 Ala. 438, 441, 69 South. 549, it was held that one who advances money for the discharge of a prior lien, under circumstances analogous to those here involved, though without previous interest in the subject of the lien, is not a stranger, and that to such an one the benefit of the doctrine of subrogation will be extended, where that course will best serve the substantial purposes of justice and the true intention of the parties. In such cases equity will keep alive the prior incumbrance as against strangers and third parties, even though such incumbrance "has been actually canceled and satisfied of record, where this can be done without injury to them." *Fouche v. Swain*, 80 Ala. 151; *Sheldon on Sub.* § 57; 3 Pom. Eq. Jur. §§ 1200, 1212; 24 Am. & Eng. Ency. Law (1st Ed.) 2517.

Suretyship nor coverture is a defense as against subrogated liens. *Bogan v. Hamilton*, 90 Ala. 454, 8 South. 186; *Carver v. Eads*, 65 Ala. 190; *Pylant v. Reeves*, 53 Ala. 132, 25 Am. Rep. 605. The result is an affirmation of the decree of the chancellor.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(199 Ala. 511)

WARREN v. CAMERON et al. (8 Div. 959.)  
(Supreme Court of Alabama. April 5, 1917.)

1. ANIMALS §30—QUARANTINE—RIGHT TO ENTER PREMISES—STATUTE.

The state live stock inspector and quarantine officer for a county, and his assistants, if not lawful officers duly appointed, have no authority to enter on a cattle owner's premises for inspection or enforcement of the tick eradication laws, as authorized by Code 1907, § 764, providing that the state veterinarian or assistant may enter premises to execute the quarantine laws.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. § 80.]

2. INJUNCTION §74—ADEQUATE REMEDY AT LAW.

The owner of cattle filed a bill against the state live stock cattle inspector and quarantine officer for a county, and others, seeking temporary injunction restraining respondent from further dipping the cattle to enforce the tick eradication laws. The bill alleged that respondents had not been appointed assistant veterinarians or inspectors as provided by law. *Held*,

that the allegations did not bring the case within any recognized field of preventive equity jurisdiction, since complainant was under no compulsion to obey the commands of respondents, and if any one of them should institute a criminal prosecution against him for refusing to bring his cattle to be dipped, complainant would have a complete defense.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 142, 150.]

3. INJUNCTION §74—EXHAUSTION OF OTHER REMEDIES.

A court of chancery would not in any case interfere by injunction with the live stock cattle inspector and quarantine officer for a county and his assistants to prevent irreparable injury to a cattle owner in the enforcement of the tick eradication laws, unless it were made to appear that the owner had first applied to the state live stock sanitary board, which, with notice of alleged abuses, refused or failed to intervene.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 142, 150.]

Appeal from Chancery Court, Morgan County; James E. Horton, Jr., Chancellor.

Bill by Thomas H. Warren against W. W. Cameron, individually and as State Live Stock Cattle Inspector and Quarantine Officer for Morgan County, and others, seeking a temporary injunction, restraining respondent individually and as such officer from the further dipping of orator's cattle or interfering with him in the disposition of said cattle, until a hearing of the cause, and that on a final hearing the injunction be made permanent. The chancellor denied the application for a temporary injunction, and complainant appeals. Affirmed.

The bill alleges that the respondents are assuming authority to enforce the tick eradication laws, as prescribed by the state live stock sanitary board in Morgan county, by requiring cattle owners to bring their cattle to certain specified dipping vats, and dip same therein on dates named, and every two weeks thereafter until relieved by the particular respondent in charge at each vat. It is alleged that these respondents are acting only under authority claimed under appointment by the court of county commissioners of Morgan county, that they are acting without authority at law, and that their appointment is void. The bill describes the process of dipping, and that the dipping solution in the various vats has become, by the negligence and mismanagement of inspectors, excessively poisonous and dangerous and destructive to cattle; that complainant has about 20 head of cattle, including 12 milk cows, from which he derives his living, and which, for several years, have been free from ticks, or any exposure thereto, as have also the stalls, lots, and pastures in which they are kept. Under the requisition of respondent Blackmon, complainant produced his cattle in April, 1916, and they were subjected to dipping then, and at intervals three or four times thereafter, whereby they have suffered serious and increasing injuries, and have

fallen off 50 per cent. in their milk. The bill then alleges:

"That the injuries received by said cattle are due proximately to the negligence, and the gross and wanton carelessness of the said W. T. Blackmon in and about the manner in which he executed the process of dipping, and in preparing the solution for the dipping of said cattle, and his said cattle were poisoned by taking into their stomachs the poisonous matter of which said solution was composed."

The gravamen of the bill is:

"That your orator has reasonable apprehension that his said cattle will be further injured and probably fatally injured should he be further required to have them dipped under the supervision of the said Blackmon, or any one of the said respondent inspectors."

It is also alleged that complainant protested against the dipping of his said cattle after the injuries resulting from the first said dipping, but the said Blackmon, under threats of arrest and imprisonment, compelled him to bring his said cattle to be dipped. The allegation is also made in the bill that each and all of said respondents are insolvent, and unable to respond in damages for any injuries that might occur.

H. V. Oashin, of Decatur, for appellant.  
D. C. Almon, of Albany, for appellees.

SOMERVILLE, J. Section 759 of the Code provides that:

"The state veterinarian shall, by and with the advice and consent of the state live stock sanitary board, nominate as many assistant state veterinarians and state live stock inspectors as they may deem necessary," etc.

Section 766 provides that federal veterinarians and live stock inspectors doing work in Alabama may be appointed as state assistants in the same way.

[1] If it is a fact, as alleged in the bill of complaint, that these respondents have not been appointed assistant veterinarians or inspectors in the manner provided by law, then they are without authority in the premises, and complainant is under no compulsion to obey their commands. And if, for his lawful disobedience, any one of them should institute a criminal prosecution against complainant, complainant's legal defense therein would be simple and adequate, and he does not need the aid of a court of chancery. The bill of complaint, as we read it, shows merely the threat of arrest by criminal proceedings, for disobedience to unlawful requirements—in short, coercion by criminal prosecution. Respondents, if not lawful officers, have no authority to enter upon complainant's premises for inspection or law enforcement (as authorized by section 764 of the Code), nor does the bill charge that they threaten to do so.

[2] The allegations of the bill do not bring the case within any recognized field of preventive equity jurisdiction. *Brown v. Birmingham*, 140 Ala. 590, 37 South. 173; *Old Dom. Telegraph Co. v. Powers*, 140 Ala. 220,

37 South. 195, 1 Ann. Cas. 119; *Board v. Orr*, 181 Ala. 308, 61 South. 920, 45 L. R. A. (N. S.) 575; *Port of Mobile v. L. & H. R. R. Co.*, 84 Ala. 115, 4 South. 103, 5 Am. St. Rep. 342; *Montgomery, etc., R. R. Co. v. Walton*, 14 Ala. 207. We hold, therefore, that the chancellor did not err in his denial of the application for a temporary injunction.

[3] If, on the other hand, it were sought to rest the prayer for relief upon injurious abuses committed by the respondents on complainant's cattle, by their negligent and incompetent administration of the laws and regulations for the eradication of the cattle tick in Morgan county—conceding, without deciding, that in such a case a court of chancery might interfere to prevent irreparable injury—we think it would not in any case do so unless it were made to appear that complainant had first applied to the state live stock sanitary board, and that that board, with notice of the alleged abuses, had refused or failed to intervene.

The order and decree appealed from will be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

(199 Ala. 535)

SHELTON v. HACELIP. (8 Div. 925.)

(Supreme Court of Alabama. April 5, 1917.)

APPEAL AND ERROR §—999(2)—REVIEW—SUFFICIENCY OF EVIDENCE.

Verdict for plaintiff will not, on appeal, be allowed to stand, where the exculpation of defendant is so overwhelming and complete, that the verdict could be grounded only on gross prejudice or palpable misunderstanding or ignorance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3918.]

Appeal from Circuit Court, Morgan County; R. C. Brickell, Judge.

Action by Velma Hacelip against John B. Shelton. From an adverse order, defendant appeals. Reversed and remanded.

W. T. Lowe, of Decatur, and Tennis Tidwell, of Albany, for appellant. Callahan & Harris, of Decatur, for appellee.

SOMERVILLE, J. There was verdict and judgment against the defendant for negligence or want of skill in the treatment of the plaintiff's eye. The appeal is from an order overruling defendant's motion for a new trial.

On a former appeal by defendant the evidence was stated and discussed, and we held that the verdict was without the requisite support in the evidence, and that the trial court erred in overruling defendant's motion for a new trial. *Shelton v. Hacelip*, 167 Ala. 217, 51 South. 937. The evidence is here substantially the same. We shall add nothing to what was said before, except to merely

observe that the exculpation of defendant is so overwhelming and so complete that a verdict for plaintiff could be grounded only upon gross prejudice or palpable misunderstanding or ignorance. We would violate the manifest duty if we allowed it to stand.

Let the judgment be reversed and the cause remanded.

Reversed and remanded.

ANDERSON, O. J., and MAYFIELD and THOMAS, JJ., concur.

(199 Ala. 423)

STATE ex rel. DALY v. HENDERSON,  
Governor. (3 Div. 27L.)

(Supreme Court of Alabama. Feb. 2, 1917.  
Rehearing Denied March 28, 1917.)

STATES §—173—EXPENSES OF ATTORNEY GENERAL—“APPROVED BY THE GOVERNOR”—STATUTE.

Under Acts 1915, p. 719, § 6, providing that the Attorney General is authorized to incur such expenses as may be necessary in the investigation of violations of the criminal law, the prosecution of crime, and in the conduct, investigation, and prosecution of any civil action in which the state is interested or its revenues involved, etc., and that all such expenses shall be paid by warrant drawn by the state auditor upon the certificate of the Attorney General of accounts properly itemized and sworn to and approved by the Governor, the Governor has the right to exercise his judgment and discretion in approving the expenditures so submitted to him; the phrase “approved by the Governor” having the meaning which it carries to the common understanding, i. e., that it was intended, as a condition precedent to payment, to evoke the Governor's official sanction of the expenditures, his commendation, and judgment that it was for the public good.

[Ed. Note.—For other cases, see States, Cent. Dig. § 163.]

Appeal from Circuit Court, Montgomery County; Leon McCord, Judge.

Petition by the State of Alabama, on the relation of James R. Daly, against Charles Henderson, Governor. From a judgment sustaining demurrer to the petition, petitioner appeals. Affirmed.

William L. Martin, Atty. Gen., P. W. Turner, Lawrence E. Brown, and Harwell G. Davis, Asst. Attys. Gen., for appellant. Ball & Samford and Rushton, Williams & Orenshaw, all of Montgomery, for appellee.

SAYRE, J. This appeal was submitted for decision according to rule 46 (178 Ala. xix, 65 South. vii), and has been considered by the court under that rule.

The record, besides some questions which have been disposed of in the case of State ex rel. Turner v. Henderson, 74 South. 344, raises an issue as to the proper interpretation of section 6 of the act entitled an act “To further prescribe the authority and duties of the Attorney General,” etc., approved September 22, 1915 (Gen. Acts 1915, p. 719 et seq.), which reads as follows:

“Sec. 6. The Attorney General is authorized to incur such expenses as may be necessary in the investigation of violations of the criminal law, in the prosecution of crime, and in the conduct, investigation and prosecution of any civil cause in which the state is interested or the state's revenues involved. Authority is herein contained for the Attorney General and his assistants to incur such traveling expenses in the performance of their duties as may be necessary; and the like expenses of solicitors traveling in obedience to the direction of the Attorney General as herein prescribed shall be paid; and such other incidental expenses of the office as may be necessary. All such expenses shall be paid by warrant drawn by the state auditor upon the certificate of the Attorney General of accounts properly itemized and sworn to, such certificate to be approved by the Governor.”

By the petition it is made to appear that petitioner had been employed by the Attorney General to make certain investigations in the conduct and prosecution of a cause in the Supreme Court in which the state was the plaintiff and Pal M. Daniel, as sheriff of Russell county, was the respondent, that he had performed the duties required of him by the terms of his employment, and that an itemized account of the same and of expenses incurred in and about the performance of the same had been approved by the Attorney General. The account, itemized and sworn to, was attached as an exhibit to the petition. In the circuit court a demurrer was sustained to the petition, after which this appeal.

The only question we need to consider at this time is whether the Governor has discretion to approve or disapprove accounts of this character, or whether the approval required of him by the statute is merely ministerial.

To state the court's conclusion and the reason for it very briefly:

In the case of United States ex rel. Parrish v. MacVeagh, 214 U. S. 124, 29 Sup. Ct. 556, 53 L. Ed. 936, cited by appellant and stated at some length in the brief, where Congress referred it to the secretary of the treasury to ascertain and pay to the relator the full amount which should have been paid to him on account of a contract for the purchase by the government of 30,000 tons of ice “in accordance with the evidence in the case collected by the United States Court of Claims,” the court saying that “the duty enjoined required a reference in a sense to evidence, it may be, but it was to evidence whose probative force had been estimated and declared,” that “it [the evidence] concluded to but one conclusion,” held that the respondent had not the power, claimed by him, to review the evidence taken in the Court of Claims and “make such findings” as might “seem right and proper to him”—which claim, the court said, raised the ultimate question to be decided—but, in effect, that his duty was merely one of calculation from ascertained data, and that its perform-

ance might be compelled by the writ of mandamus. This statement of that case will suffice to differentiate it from the case at bar and deprive it of all authority in the premises.

It does not seem probable that the Legislature after adopting other safeguards concerning the mere correctness of such accounts, viz. that they should be itemized and verified by the oath presumably of some person having a knowledge of the facts, and certified by the Attorney General, who may be presumed to know best what the expenses of his department have been, intended that the Governor, to whom no facilities for investigation are extended, should institute an inquiry as to the correctness or honesty of items of service or expenditure after the service shall have been rendered or the liability incurred. And so, too, the Legislature might have required the Governor to countersign the Attorney General's certificate as a matter of mere form, signifying nothing in fact, but until that meaning shall have the support of some argument drawn from extrinsic circumstances or conditions in view of which the act may have been passed, the court deems it best to assign to the phrase "approved by the Governor" that meaning which it carries to the common understanding, viz. that it was intended, as a condition precedent to payment, to evoke the Governor's official sanction of the expenditure, his commendation and judgment that it was for the public good. The court does not see its way clear to a definition of the phrase which would exclude the right of the Governor to exercise judgment and discretion in approving or disapproving the expenditures submitted to him. On the contrary, looking to the face of the act and such general and familiar considerations of propriety and policy as may be supposed to enter into every such enactment, we should judge that the reason for the requirement that the Attorney General's certificate should be approved by the Governor was, not to give the Attorney General a power in excess of that which could be exercised by the chief executive, not to make the chief executive, upon whom the Constitution with emphasis lays the burden of seeing that the laws be faithfully executed, a marionette to be moved by a string in the hand of another, but to arrange a proper balance of power between the two by giving the Governor the power and imposing upon him the duty of approving or disapproving the extraordinary expenditures which this section of the act authorizes, and this interpretation of the statute finds support in the legislative history of the enactment, the first shape of this legislation, its veto by the Governor, and the changes thereafter introduced, all which, as shown by the journals of the two houses, we have consulted. The court is therefore of the opinion that the judgment of the circuit court

sustaining the demurrer to the petition was right.

**Affirmed.**

ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., concur.

(199 Ala. 701)

STATE ex rel. MARTIN v. HENDERSON, Governor. (3 Div. 272.)

(Supreme Court of Alabama. Feb. 2, 1917.)

Appeal from Circuit Court, Montgomery County; Leon McCord, Judge.

Petition for mandamus by the State of Alabama, on the relation of William L. Martin, against Charles Henderson, as Governor. From a judgment sustaining demurrer to the petition, petitioner appeals. **Affirmed.**

W. L. Martin, Atty. Gen., and Perry W. Turner, Lawrence E. Brown, and Harwell G. Davis, Asst. Attys. Gen., for appellant. Ball & Samford and Rushton, Williams & Crenshaw, all of Montgomery, for appellee.

SAYRE, J. **Affirmed** on the authority of State ex rel. Daly v. Henderson, Governor, 74 South. 951.

(199 Ala. 491)

PEARCE v. PEARCE et al. (6 Div. 457.)

(Supreme Court of Alabama. April 12, 1917.)

1. WILLS §471—CONSTRUCTION—INTENT OF TESTATOR.

Intent being the primary rule of construction, testator's manifest scheme must be gathered from whole instrument; conflicting clauses being reconciled so as to make each operative.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 969.]

2. ESTATES §1—WORDS AND PHRASES.

"Estate" is a word capable of the greatest extension, and comprehends every species of property describing both the corpus and extent of the interest.

[Ed. Note.—For other cases, see Estates, Cent. Dig. § 1.]

For other definitions, see Words and Phrases, First and Second Series, Estate.]

3. WILLS §1—DISPOSITION OF PROPERTY—RESTRICTIONS—POWERS OF TESTATOR.

A testator has the right to dispose of his entire estate with such restrictions and limitations, not repugnant to established law, as he sees fit.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1.]

4. WILLS §629—CONSTRUCTION—VESTED AND CONTINGENT ESTATES.

The law favors the construction by which the estate is regarded as vested rather than contingent, or by which it will become vested at the earliest moment, and this is usually at death of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1461, 1462.]

5. WILLS §629—CONSTRUCTION—INTENTION OF TESTATOR.

Where intention of testator to create contingent legacy or devise is clear, the rule that all estates, except estates in the devise of which a condition precedent is so clearly expressed that courts cannot treat them as vested, will be held vested, has no application.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1461, 1462.]

**6. TRUSTS §177—USE OF TRUST FUND—SUPPORT OF INFANT—POWERS OF COURT.**

Where a will makes no provision for support of infant beneficiaries or for enjoyment of any part of estate given them until they reach majority, the chancery court will grant permission to use income where a necessitous condition of infants warrants.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 230, 231.]

**7. WILLS §811—INCONSISTENT PROVISIONS.**

To effectuate intention of testator, a general residuary clause will be made to yield to a specific inconsistent provision found elsewhere.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2107.]

**8. WILLS §587(1)—CONSTRUCTION—"REMAINDER OF MY ESTATE"—INTENT.**

Under a will providing for (1) payment of all just debts; (2) bequests to a son of \$5,000; (3) bequest to a grandson of a special fund for his education; (4) disposing of the "remainder of my estate," etc.—intention of testator was to dispose of residue of estate after payment of items 1 and 2, and making provision for item 3.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1279, 1285-1287.]

**9. WILLS §602(3)—CONSTRUCTION—QUALIFIED ESTATE.**

Under will providing that in event of death of testator's grandson without issue before settlement of testator's estate his interest shall go to another, the estate is qualified, being subject to defeat by happening of contingency.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1354.]

**10. WILLS §471—ESTATE IN SPECIFIC TERMS—SUBSEQUENT CLAUSE OR WORDS—EFFECT.**

Where an estate is given in one clause by clear and specific terms, it cannot be taken away or diminished by raising a doubt upon the extent and meaning of a subsequent clause, nor by subsequent words less clear and decisive.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 989.]

**11. WILLS §630(12)—ESTATES—TIME OF VESTING—"SETTLEMENT."**

Residuary clause of will provided that M. was to have one-half of remainder, O. one-fourth after payment of bequests herein made, which may be paid him by executor upon his reaching age of 21 or 25, and J. one-fourth. The following item provided that in event of deaths of O. and J. before "settlement" of estate interest should vest as therein indicated. A subsequent item provided that the executor, after bequests as hereinbefore stated have been made, should keep estates of O. and J. together until they were 25. Twelve months after granting letters testamentary, at which time O. was 17 and J. 10 years old, the liabilities of the estate were \$59,000, specific legacies not over \$10,000, while the assets were \$145,000. *Held*, that as debts of testator had been ascertained and settled and payment of specific legacies provided for, the time of "settlement" had been reached, and that estates of M., O., and J. became vested and absolute at this time, settlement not referring to final distribution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1479.]

For other definitions, see Words and Phrases, First and Second Series, Settle—Settlement.]

**12. PERPETUITIES §6(5)—NATURE AND EXTENT OF LIMITATIONS.**

Residuary clause of will provided that M. was to have one-half of remainder, and O. and J., grandsons, each one-fourth. A subsequent clause provided that the executor should keep estates of O. and J. together until they were 25.

*Held*, that as J. was less than 10 years old at death of testator, and the lives being in being at date of conveyance, the estate of J. in real estate vested absolutely on death of testator in view of Code 1907, § 3417, providing that conveyances to other than wife and children, or children only, cannot extend beyond three lives in being at date of conveyances, and 10 years thereafter.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 83, 50.]

**13. PERPETUITIES §9(3)—ACCUMULATIONS—TRUSTS IN PERSONALTY.**

Under Code 1907, § 3410, providing that no trust for purpose of accumulation only can have any effect for a longer term than 10 years, except when for the benefit of a minor when it may continue till majority, a will creating a trust in personality for a minor for more than 10 years and until he is 25 years old is valid only until he reaches majority.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. § 69.]

**14. TRUSTS §271½—WILLS—SUIT FOR CONSTRUCTION—EQUITY JURISDICTION—REGULATION BY COURT.**

When jurisdiction of court of equity attaches on filing of bill for construction of will, infants become wards of court, and trustee acting for such wards is likewise, notwithstanding discretionary powers given by will, subject to orders of court.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 382.]

**15. WILLS §681(2)—CONSTRUCTION—POWERS OF TRUSTEE.**

Courts of equity will not favor construction which confers upon testamentary trustee absolute and uncontrollable powers.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1612, 1613.]

**16. EXECUTORS AND ADMINISTRATORS §93(2)—POWER TO CONTINUE BUSINESS OF TESTATOR.**

Discretionary powers vested in executor under will to sell and exchange property did not confer authority to continue a general mercantile business as testator had done.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 407, 408.]

**17. EXECUTORS AND ADMINISTRATORS §93(2)—TRUSTS—POWER OF EXECUTOR.**

A trust is not transmitted to an executor so as to enable him to carry on a business, unless he has express authority under will, or is so empowered to act by a court of chancery.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 407, 408.]

Appeal from Chancery Court, Marion County; James E. Horton, Jr., Chancellor.

Bill by Marvin Pearce, as executor, against Clovis Pearce and others to construe a will. From a decree of the chancellor, this appeal is prosecuted by the proponent. Affirmed.

The will is as follows:

Item 1. Payment of all just debts.

Item 2. Bequest to Jim Pearce, Jr., of \$5,000 to be made when he is 21 years old.

Item 3. I will and bequeath to my grandson Clovis Pearce \$5,000 as a special fund for his education. If I complete his education before my death, this sum is not to be paid to him. I will hereafter keep an account against my grandson Clovis, charging to him such items as I may deem proper, to be charged against his educational fund, and if I should die before his education is completed, my executor is authorized and directed to spend any balance of

said sum upon the education of my grandson Clovis. No part of this sum is to be charged against my grandson Clovis as a part of his distributive share in my estate. If, for any reason, my grandson Clovis does not exhaust said sum, the balance so unexpended shall be converted to my general estate. My executor is directed to pay either directly to my grandson Clovis or to such person as he may determine such reasonable amount for each year's expenses, as he deems fit, provided said payment shall not, in the aggregate, exceed the amount of \$5,000, inclusive of the amount charged by me against his educational fund, prior to my death.

Item 4. I will and bequeath to my son Marvin Pearce one-half of the remainder of my estate, both personal and real. I will and bequeath to my grandson Clovis one-fourth of my estate, left after paying the bequest herein made to my grandson Jim, Jr., and the educational fund provided for my grandson Clovis, and in addition to said one-fourth, I will and bequeath to my grandson Clovis \$5,000 to be charged against the interest of my grandson Joe, as herein provided. My executor may pay this \$5,000 to Clovis upon his reaching the age of 21 years, if, in his judgment, his habits are good, and his judgment sufficient to handle said sum of money. If he thinks it is best for the said Clovis, on account of his habits, to retain said money until he is 25 years of age, he is authorized to do so. I will and bequeath to my grandson Joe one-fourth of my estate left after deducting the special bequests made to my grandson Jim, Jr., and Clovis Pearce's educational fund. There is also to be deducted from the one-fourth interest of my grandson Joe the sum of \$5,000 which is hereinafter bequeathed to my grandson Clovis. It is the purpose and intention of this item that my grandson Clovis, in addition to the educational sum herein provided, shall have \$5,000 more, to be deducted from the share of my grandson Joe.

Item 5. In the event of the death of my grandson Joe, without issue born to him, before the settlement of my estate, I will and bequeath the interest in my estate hereby willed to him, to my grandson Clovis. In the event of the death of my grandson Clovis, without issue born to him before the settlement of my estate, I will and bequeath the interest willed and bequeathed to him herein to my son Marvin.

Item 6. I will and direct that my executors hereinafter named and appointed take charge of my entire estate, real, personal and of whatever nature, and reduce the same to cash in such a way, and in such quantity, and on such terms, and at such a time or times, as he in his sound discretion may think to be to the best interest of my estate.

Item 7. Authorizing the sale and exchange of land and the purchase of other land, in the sound discretion of the executor.

8. Authorizing the executor to sell any property in any way as seems to him best, and to execute deeds and other contracts.

Item 9. Exempting the executor from making reports to courts, and to do the things herein willed, without the order or direction of any court.

10. Exempting from bond.

11. My executor is hereby directed and required to keep the part of the estate of my grandson Clovis together, until he is 25 years old, and my grandson Joe's part of the estate together until he is 25 years old. After such bequests as hereinbefore stated in this, my last will and testament, have been made.

12. Directing the executor to handle Clovis and Joe Pearce's part of the estate mentioned at the age of 25, should either Clovis or Joe become incompetent from insanity, or any other cause, and that they have such a part of their estate from time to time as may be necessary, for their comfortable sustenance.

13. Appointing Marvin Pearce executor, and

in case of his incompetency, appointing Largus M. Pearce to act as executor for my grandsons Clovis and Joe.

14. Fixing compensation of executor on all receipts and all disbursements.

E. B. & K. V. Fite, of Hamilton, and A. F. Fite and W. C. Davis, both of Jasper, for appellant. Cabaniss & Bowie and Geo. E. Bush, all of Birmingham, for appellees.

THOMAS, J. The appellant, Marvin Pearce, as executor and as a legatee and devisee under the will of James P. Pearce, deceased, asks a construction of this will.

The averments of the bill as to the ages of the minor grandsons of the testator, who are made beneficiaries, are: That Jim Pearce, Jr., was over the age of 14 and under the age of 21; that Clovis Pearce was 17 years of age; and that Joe Pearce was 10 years of age on March 7, 1916, when the amendment to the bill was filed. The date of the will was February 11, 1913. Letters testamentary to plaintiff thereunder were issued March 30, 1915, said will having been theretofore, to wit, on March 29, 1915, duly proved in the probate court of Marion county. The estate is large and complicated. A construction of the will is necessary, not only for the guidance of the personal representative, but to determine the respective beneficiaries.

[1] The manifest scheme of the testator must be gathered from the whole instrument, his intent being the primary rule of its interpretation. *Dickson v. Dickson*, 178 Ala. 117, 59 South. 58; *O'Connell v. O'Connell*, 72 South. 81. Any apparently conflicting clauses should be reconciled so as to make each operative. We have recently collected the authorities and reaffirmed some of the cardinal rules of testamentary construction, in *Ralls, Adm'r, v. Johnson*, 75 South. 926. It will not be necessary to repeat them here. The intention of the testator was to make disposition of a large estate, consisting of personal, real, and mixed properties, between his son, Marvin, who was of full age, and his minor grandsons, Joe, Clovis and Jim Pearce, Jr.

[2-5] No question can arise in the course of legal inquiry, perhaps, that is more doubtful in its nature, or less referable to fixed rules, than whether the words of a devise or bequest constitute a vested or a contingent estate. Code 1907, §§ 3398-3401. "Estate" is a word capable of the greatest extension, and comprehends every species of property, real and personal. It describes both the corpus and the extent of the interest. *Deering v. Tucker*, 55 Me. 284; *Hunter v. Husted*, Busb. Eq. 141; *Godfrey v. Humphrey*, 18 Pick. (Mass.) 539, 29 Am. Dec. 621. A testator has the right to dispose of his entire estate with such restrictions and limitations, not repugnant to established law, as he sees fit. Code 1907, §§ 3416, 3417; *Broadway Nat. Bank v. Adams*, 183 Mass. 170, 43 Am. Rep. 504. The law favors the construction by which the es-

tate is regarded as vested rather than contingent, or by which it will become vested at the earliest moment; and this time is usually at the death of the testator. In *Duffield's Case*, 1 D. & C. 311, the Chief Justice states, as the rule for the guidance of that court, that:

"All estates are to be holden to be vested, except estates in the devise of which a condition precedent is so clearly expressed that the courts cannot treat them as vested without deciding in direct opposition to the terms of the will."

This ancient rule has been generally applied when the intention of the testator is obscure or doubtful, and has no application when the intention to create a contingent legacy or devise is clear. In *Phinizy v. Foster*, 90 Ala. 282, 7 South. 836, the pivotal question was whether the estate in remainder created by the will vested at the death of the testator or was contingent. The distinguishing characteristics of the two estates were thus defined:

"A remainder is said to be vested, when the estate passes out of the grantor at the creation of the particular estate, and vests in the grantee during its continuance, or eo instanti that it determines—when a present interest passes to a certain and definite person, to be enjoyed in futuro; and it is said to be contingent, when the estate is limited, either to a dubious and uncertain person, or upon the happening of a dubious or uncertain event—uncertainty of the right of enjoyment, as distinguished from the uncertainty of possession."

In *Duncan v. De Yampert*, 182 Ala. 528, 62 South. 673, it is declared that the intent to postpone the vesting of an estate must be clear, and not arise from mere inference or construction. *Crawford v. Engram*, 158 Ala. 420, 45 South. 584. This rule is based on that announced in *Doe v. Considine*, 6 Wall. 476, 18 L. Ed. 869, to the effect that:

"The law will not construe a limitation in a will into an executory devise when it can take effect as a remainder, nor a remainder to be contingent when it can be taken to be vested."

There is a class of cases in which remainders are regarded as vested, though all who may take are not ascertained, or in being, and cannot be, until the happening of some future event; as where there is a devise of a remainder to a class of which each member is equally the object of testator's bounty, as to the children of a person, some of whom are living at the testator's death. 2 Wash. Real Property (5th Ed.) § 1545; *Smaw v. Young*, 109 Ala. 528, 20 South. 370; *Acree v. Dabney*, 133 Ala. 437, 32 South. 127; *Reynolds v. Love*, 191 Ala. 218, 68 South. 27. It is further well established, and is consistent with the vesting of the estate at the death of the testator, that the class may open to let in after-born children. 2 Jar. Wills (8th Am. Ed.) p. 1011; *Inge v. Jones*, 109 Ala. 178, 19 South. 435; *Duncan v. De Yampert*, supra; *Blakeney v. Du Bose*, 167 Ala. 627, 52 South. 746.

There is no question that a testator may fix the time of the payment of a legacy in the future, as on the attaining of majority

on the part of the legatee (*Thomp. Wills*, §§ 253, 394; *Anderson v. Hendrickson*, 5 N. J. Eq. 106; *Mendel v. Levis*, 40 Misc. Rep. 271, 81 N. Y. Supp. 965), or on the date of a marriage (*Overton v. Davy*, 20 Mo. 273), or on the death of a designated person (*Griswold v. Heard*, 2 Gray [Mass.] 322), or at any other designated time, provided it is not beyond the period allowed by the statute (*Claffin v. Claffin*, 149 Mass. 19, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393; Code 1907, §§ 3416, 3417). In *Hawkins on Wills* (225) and *Thompson's Wills* (section 253) it is pointed out that when the gift and the time of its payment are distinct, the direction as to the time of payment does not postpone the vesting. Thus, a bequest to A. at 21 and a bequest payable to A. at 21 do not much differ in expression; yet the one is held to be a vested, and the other a contingent gift. For the bequest to A. at 21 is contingent on the fact that A. may not reach that age; and a bequest to A. payable at 21 or to be paid at 21, is vested. If A. dies under the age of 21, such vested gift would be subject to his testamentary disposition, or controlled by the statutes of descent and distribution, as the case may be. See authorities on this question collected by Mr. Williams, in his work on *Executors* (volume 2, 6th Am. Ed., p. 832 [1230]); also *Crawford v. Engram*, supra; *Wynne v. Walthall*, 37 Ala. 37; *Marr v. McCullough*, 6 Port. 507; *Gregg v. Bethea*, 6 Port. 9.

[6] Where no provision is made for the support of infant beneficiaries, or for their enjoyment of any portion of the estate given them by a testator or created by a trust, until they reach majority or a designated age, the chancery court, acting in loco parentis or occupying the place of the testator or creator of the trust, will do for the beneficiary what it conceives would have been done by the testator or creator of the trust had he foreseen the needs and necessities of the beneficiary. Such court will grant permission to use currently the income of the trust fund for the completion of the education or for the maintenance of such beneficiary, whose necessitous condition warrants. *Marsh v. Reed*, 184 Ill. 263, 56 N. E. 306; *Bennett v. Nashville Trust Co.*, 127 Tenn. 126, 153 S. W. 840, 46 L. R. A. (N. S.) 43, Ann. Cas. 1914A, 1045; *Denegre v. Walker*, 214 Ill. 113, 73 N. E. 409, 105 Am. St. Rep. 98, 2 Ann. Cas. 787; *Knorr v. Millard*, 52 Mich. 542, 18 N. W. 349; *In re Potts*, 1 Ashm. (Pa.) 340; *In re New*, 2 Chase (Eng.) 534.

[7, 8] Considering the will in this case both as a whole, and separately by clauses, for an understanding of the testator's intention, item 1 provided for the payment of just debts; item 2 bequeathed to Jim Pearce, Jr., a sum of money that vested in him absolutely on testator's death, except that the time of payment was postponed until he should become 21 years of age; item 3 provided a fund from which Clovis Pearce was

to be educated, no part of which might be charged to his distributive share; and the unexpended balance was to be converted into the testator's general estate. The residuary clause, in effect, is to be found in item 4, notwithstanding the relative position of that clause in the instrument. To effectuate the intention of the testator a general residuary clause will be made to yield to a specific inconsistent provision found elsewhere. 1 Schouler on Wills, 474; Ralls, Adm'r, v. Johnson, 75 South. 926. By the use of words disposing of the "remainder of my [testator's] estate, both personal and real," the intention of the testator is shown to have been to dispose of the residue of the estate after paying testator's just debts, and making the gift of \$5,000 to Jim Pearce, Jr., together with the provision for the education of Clovis Pearce.

If, then, there is no provision in the will changing the legal effect of the plain words of item 4, it was the intention of the testator to divide this "remainder" of his estate in such manner as to give (1) one-half to a son, Marvin Pearce, and vest it in him on testator's death; (2) one-fourth (minus \$5,000) to a grandson, Joe Pearce; and (3) one-fourth (plus \$5,000) to a grandson, Clovis Pearce. That is to say, of the one-half of the remainder of his estate, sought to be given to the two grandsons, it was the declared purpose that Clovis should receive \$5,000 more than Joe, and that Marvin's interest was not to be reduced by the \$5,000 so given to Clovis in excess of Joe's interest.

[9] The devises and bequest to Joe and Clovis, respectively, were of estates that may be defeated by the provisions of item 5. The provision is as follows:

"In the event of the death of my grandson, Joe Pearce, without issue born to him, before the settlement of my estate, I will and bequeath the interest in my estate hereby willed to him to my grandson, Clovis Pearce. In the event of the death of my grandson, Clovis Pearce, without issue born to him, before the settlement of my estate, I will and bequeath the interest willed and bequeathed to him herein, to my son, Marvin Pearce."

Under the foregoing authorities, the estates of Joe Pearce and Clovis Pearce in the residuum were qualified, in that they were subject to be defeated by the happening of the respective contingencies provided for in said item. It was sought to further subject said respective estates by item 11, fixing limitations which, if not offensive to the statute forbidding perpetuities, or to that providing for the creation of trusts for "accumulation only," would postpone the rights of enjoyment to the designated date. It is then necessary that we declare the effect of the provisions of item 11 on the said estates provided for Joe and for Clovis Pearce by items 4 and 5.

[10] In case of irreconcilable repugnancy between two clauses of a will, the latter will usually prevail over the former, as being

the last expression of the testator's will. This rule, however, never has application except upon the failure of every attempt to give the whole will such a construction as will render each and every part thereof effective. The result of this rule is that where an estate is given in one clause by clear and specific terms, such interest cannot be taken away or diminished by raising a doubt upon the extent and meaning of a subsequent clause, nor by inference therefrom, nor by subsequent words that are not as clear and decisive as the word of the clause giving the interest or estate in the first instance. Ralls, as Adm'r, v. Johnson, 75 South. 926. Item 11 does not seek to diminish or change the character of the estates given to Clovis and Joe, otherwise than to declare the dates of the respective payments, as follows:

"My executor is hereby directed and required to keep my grandson Clovis' estate together until he is twenty-five years old."

A like provision is made as to Joe Pearce's interest. This intent is further manifest in the provision made for maintenance of these grandsons, in case of disability, by item 12. Items 10 and 13 exempt the executor from liability to make bond, and provide for a successor in the administration of the trust. By item 6 the executor is given large powers in making the estate ready for distribution, as he may think to be "to the best interest" of the estate. In items 7, 8, and 9, a personal trust is reposed in Marvin Pearce, the executor, for the purposes of administration only. Under the trust he is empowered "to sell one tract of land, either surface, mineral or fee simple, and purchase another with the proceeds thereof; to exchange one tract of land, surface, mineral or fee simple, for another one, when in his opinion it will benefit the estate as a whole." Item 7. It is clear by this clause that the intention was to leave to the sound discretion and good sense of the executor named the matter of sales and exchanges of testator's real estate for the benefit of the whole estate. To the end that testator's estate may be "economically and cheaply administered and the best result obtained," said Marvin is fully authorized and empowered to sell any property, of whatever nature, coming into his hands as such executor, at either public or private sale, for cash or on time, or in such other way as may appear to him best, and to execute deeds and other contracts to carry out the same. Item 8. Thus it is evident that it was the testator's desire to clothe the executor with full power to administer the estate economically, and to the end that a time might be expeditiously reached in the process of administration, consistent with the nature and character of the estate, when all the testator's just debts, and the specific legacies in the will provided, should have been paid; and thus was fixed the time when the interests or estates of Joe and Clovis, given



under the residuary clause of the will, were to vest absolutely in them, respectively.

[11] Having taken a comprehensive view of the several provisions of the will, we are now prepared to discuss the meaning of the word "settlement," as it is used in item 5. The residuary clause having disposed of the "remainder" of the estate to testator's son and designated grandsons, it was then provided, by item 5, that in the event of the deaths of said grandsons without issue born to them, "before the settlement" of testator's estate, the particular interest given should finally vest as therein indicated.

We must here give application to the rule favoring the vesting of estates, or estates' becoming absolute, at the earliest moment, and that doubtful or obscure clauses will be so construed as to attain that result. *Montgomery v. Wilson*, 189 Ala. 209, 68 South. 503; *Campbell v. Weakley*, 121 Ala. 64, 25 South. 694. The policy of the statute favors such construction of a devise as will result in vesting the fee if the words of the conveyance be of doubtful import whether a less estate was intended. Code, § 3396. We are of opinion, and so declare, that it was the intention of the testator, as to the respective interests of Joe and Clovis in said remainder of his estate, that the same should become absolute at that period of the administration when the just debts contracted by testator, together with the specific legacies indicated, should have been paid or provided for. The chancellor fixed this period at 12 months from the grant of letters testamentary. The testimony on which the chancellor acted, now before us, shows the general liabilities of the estate at the trial of this cause to have been \$59,000; that the specific legacies provided are not over \$10,000; and that the assets were personal property of the appraised value of \$120,000, and real properties, fee, surface, and mineral rights, aggregating, approximately, 25,000 acres—a large part of said lands being owned in fee.

It is clear that the words in question "before the settlement," etc., could have referred to no other date than the expiration of 12 months after the appointment of the executor, or to the termination of a period of time allowed by law or the necessities of the case for getting in the assets, paying the debts, and making provision for the specific legacies. This date may long antedate an actual distribution of the whole estate.

In the opinion of the court in *Calkins v. Smith*, 41 Mich. 409, 1 N. W. 1048, delivered by Mr. Justice Cooley (a case much in point), it is said:

"It seems to us manifest that when the testator speaks of his wife's death before his estate is settled, as a contingency upon which the sum of \$1,000 given to or settled before marriage upon her is to pass to the residue, he means, not the settlement in the popular sense of the term, but the stage of proceedings when

the funeral expenses, debts and legacies are paid, and when nothing remains but to proceed with the steps for a division of the residue. That is put beyond doubt by the ninth clause of his will, in which this thousand dollars is named among the sums to be paid before the residue is distributed. At this stage of his proceedings the executor's duties may be said to be closed; nothing remaining to be done by him as such, except the rendering and adjustment of his own account. What further he was to do in respect of the estate was to be done not as executor, but as donee of a power in trust. What strengthens this view is that the testator could have had no good reason for postponing further the final and unconditional vesting of the right to this sum in his wife. The rights of all others were fixed; why should not hers be also? The other proceedings were merely for the partition of common interests, which might be delayed indefinitely at the option of the parties if it seemed desirable that this be done, and perhaps negligently or willfully delayed by the donee of the power. Conditions are not favored in law when they defeat estates, and they should not for a moment be subject to be continued at the option or through the misconduct or neglect of others, where any other conclusion is reasonable."

In *Allen, Trustee, v. Dean, Executor*, 148 Mass. 594, 20 N. E. 314, authority was given the executor "to sell real estate 'as the proper and convenient settlement of the estate may require.'" It was held that this was a limited authority to sell real estate for the payment of debts, legacies, and expenses of administration, and not for the purpose of making partition or distribution among devisees. The court said:

"The only question argued is whether by the words 'in the settlement of the estate' the testatrix meant not only the settlement of the administration account in the probate court, but also the partition or distribution of the estate among the devisees. The words 'settlement of the estate,' as commonly understood, and as used in the statute, \* \* \* refer to the settlement of the probate account. \* \* \* There is nothing in the will to show that the testatrix used the words in any other sense."

In the case of *In re Creighton, Adm'r, etc.*, 12 Neb. 280, 11 N. W. 313, the words "settlement of estates of deceased persons" were held to refer to the adjustment of the claims and demands in favor of or against an estate, and to not necessarily include the word "distribution," "which is the act of dividing or making an apportionment."

If appellant's contention was correct, James P. Pearce did not contemplate that there would be any settlement of his estate before the youngest of these two grandsons arrived at the age of 25 years. This could not have been true, for it will be borne in mind that Joe was under 10 years of age at the time the will was executed. The only son of testator, Marvin Pearce, was given one-half of the estate after payment of the debts and of certain legacies. Under appellant's contention the said Marvin Pearce would not be entitled to any portion of the estate until a settlement was had. It must be assumed that testator intended his son, Marvin Pearce, to come into the enjoyment of his portion—half of the estate—within a reasonable time

after the will was probated; otherwise Marvin, being more advanced in years than the infant beneficiaries, might not live long enough to enjoy the bounty the father had amply provided for him. It is not to be supposed that testator entertained any unnatural wish or intention, in dealing with the interests of this son, in whom he had great confidence, and of the two infant grandsons, who he knew must be maintained and educated, one of whom lived with testator. If he did not have reference to the expiration of the statutory period of 12 months, or at least to the expiration of a reasonable time for the personal representative to reduce the personal assets to money and pay the debts and legacies, in order to determine or vest the share or interest of each distributee of the estate, it is difficult to conclude from the will what the testator did mean. From the general scheme of the will he must have contemplated a settlement that would vest absolutely the respective estates in the several beneficiaries for whom they were intended, long before the time contended for by appellant.

From the evidence before us, we are of opinion that the chancellor correctly decreed that the time of "settlement," as that term is used in item 5, did not refer to the final distribution, but to the expiration of a reasonable time in which to ascertain and settle testator's debts and provide for the payment of the specific legacies; and that when these things were done, in law and in fact, the several estates provided for in items 4 and 5 became not only vested, but absolute, in Marvin, Clovis, and Joe Pearce, as to the residue so disposed of by the testator.

It must be remarked that the respective estates of Joe and Clovis, in this residue of estate of testator, consisted of interests in real and personal property; and that there was no express direction by testator for the adding of the interest or income to the principal, if the estate was to be kept together for a long time, as that indicated in the will. However, it was the testator's intention that the estate should be held for accumulation; this is deducible from the whole will, and from its several specific provisions. *Campbell v. Weakley*, 121 Ala. 64, 67, 69, 25 South. 694; Code, § 3410. This court has recently spoken of provisions in wills, offensive to the statutes against perpetuities, and to that creating trusts for accumulation only. In *Campbell v. Weakley*, supra, it was declared that it could not be supposed from the language employed that the testator intended to give his executors a larger estate than one for the period of ten years; that the estate was given them for accumulation for the benefit of his devisees and legatees, and that "beyond 10 years, under the statute, as he is presumed to have known, no estate created for such purposes could have any force or effect." In *Lyons v. Bradley*, 168 Ala. 505, 511, 512, 53 South. 244, 248, the common-law

rule is pointed to, with its modification by statute (section 3417 of the Code), as follows:

"While this statute in its provision for the case in which the successive donees are not the wife and children or children only of the donor lays down a rule more stringent than that formulated by the judges, in the case of a conveyance to wife and children, or children only, the power in the grantor of imposing future limitations may be exercised with greater freedom in respect to the remoteness of the limitations permitted, for it permits the alienation of estates to be suspended during a life or lives in being and during the minority of the issue of the surviving tenant for life, and, in default of issue coming of age during the minority of the devisee, over; but, so far as concerns the life or lives in being, it must be exercised in favor of a more restricted class of persons. It is to be noted that no period in gross of 21 years nor any number of years is provided to be added to the lives of wife and children. Strangely enough, we have in this state no statute controlling conveyances of personality in respect to the creation of perpetuities. As to such conveyances the common law is still in force."

The estate dealt with by this will (which will was made and probated since the adoption of the Code of 1907) was composed of personal and real property. Thus it is tested by two rules as to perpetuities—that of the Alabama statutes as to real property, and that of the common law, as to the personality. The rule against perpetuities is that contingent interests must become vested in a life or lives in being at the date of the conveyance and 21 years thereafter, and to which, in case of infant in ventre sa mere, is added a sufficient time to cover the ordinary period of gestation. *Pells v. Brown* (1620); *Smith, Executory Interests*, § 706; *Beard v. Westcott*, 5 Taun. 394; *Cadell v. Palmer*, 1 Clark & Finnelly's Cas. 372; *The Duke of Norfolk's Case*, 3 Ch. Cas. 1; *Low v. Burron*, 3 P. Wms. 262; *Thellusson v. Woodford*, 4 Ves. 227. The provision for minority was added to the rule, in a devise "to those of my grandchildren who reach 21," in *Stephens v. Stephens*, Cas. T. Talb. (Eng.) 228; and the time for gestation declared in *Long v. Blackall*, 7 T. R. (Eng.) 100. See report of *Pells v. Brown*, *Croke's Jones*, 590.

[12] Therefore as Joe Pearce was less than 10 years old at the death of testator, the estate devised to him in real property did offend the statutory provision as to perpetuities—the lives being in being at the date of the conveyance (the date of the execution of the will) and 10 years thereafter—and vested in him absolutely on the death of the testator and the probate of said will. Code 1907, § 3417; *Montgomery v. Willson*, 189 Ala. 209, 68 South. 503, *Ashurst v. Ashurst*, 181 Ala. 401, 61 South. 942. In *Lyons v. Bradley*, supra, 168 Ala. 514, 53 South. 244, applying the rule against perpetuities as to real estate, as fixed by the Alabama statute, our court laid it down that "all limitations" offensive thereto are to be regarded as "void ab initio"; and that a perpetuity will no more be tolerated when it is covered by a trust than when it displays it-

self, undisguised, in the settlement of a legal estate. *Perry on Trusts*, § 383; *Lyons v. Bradley*, supra, 168 Ala. 516, 53 South. 244; *Ashurst v. Ashurst*, supra, 181 Ala. 407, 61 South. 942; *Montgomery v. Willson*, supra. We have no statutory prohibition of perpetuities as to personal property, except only that regulating trusts for accumulation merely (Code, § 3410), and, aside from said statute, devises are tested by the rule of the common law.

[13] What effect, then, had the provision of item 11, as to the payment to Joe of his portion of the residue of said personal estate? It is obvious that the declared time of distribution or payment of Joe's said personal estate offended section 3410 of the Code, in that the trust sought to be created in said personalty extended beyond Joe Pearce's attaining majority. The *Lyons Case*, 168 Ala. 524, 53 South. 244, on the authority of Prof. Gray (*Perpetuities*, 247, 418, etc.), declares the rule in such case to be that where the trust was not solely for the purpose of the remote gift over, in fact, had nothing to do with the gift over, it will be sustained pro tanto. The trust thus created, as to Joe Pearce's personal estate, was valid to his attaining majority, and not beyond that date. *Lyons v. Bradley*, supra, 168 Ala. 525, 53 South. 244; *Ashurst v. Ashurst*, supra, 181 Ala. 407, 61 South. 942. No doubt this was the testator's intention.

[14, 15] When the jurisdiction of the court of equity attached, on the filing of the bill for the construction of the testamentary instrument in question and the removal of the administration into chancery (if such removal was effected), the infant defendants became wards of the court, and the protection and general welfare of their properties and persons passed under the court's supervision and direction. It follows that a trustee, acting for such wards of the court, is likewise subject to the orders of the court, notwithstanding the discretionary powers given under the instrument creating the trust. The court has supervision of the exercise of the discretionary powers by such trustee, to the end that the powers be honestly and reasonably, and not improvidently or arbitrarily, exercised, nor in disregard of the interests of such beneficiaries. To that end, a trustee or an executor, acting as such, may be required to report to the court, upon the exercise of his powers as affecting the personal control, or the property interests, of the ward. *McDonald v. McDonald*, 92 Ala. 537, 544, 9 South. 195. Standing in loco parentis, and in the place of the creator of the trust, a court of equity will ratify or disapprove such acts of the trustee as, in its judgment, the testator or creator of the trust would have done for the beneficiary, if in life and cognizant of the facts made known to the court. *Proctor v. Scharpf*, 80 Ala. 227; *Creamer v. Holbrook*, 99 Ala. 52, 11 South. 830; *Ward v. Ward*, 95

Ala. 331, 10 South. 832; *Dunham v. Milhous*, 70 Ala. 596; *McCarthy's Case*, 74 Ala. 546; *Lee v. Lee*, 55 Ala. 590; *Perkins v. Lewis*, 41 Ala. 649, 94 Am. Dec. 616; *Bennett v. Nashville Trust Co.*, 127 Tenn. 126, 185 S. W. 840, 46 L. R. A. (N. S.) 43, Ann. Cas. 1914A, 1045; 22 Cyc. 562 (2); 31 Cyc. 109 (2). Courts of equity will not favor a construction that confers upon or reposes in a trustee absolute and uncontrollable powers. *Randolph v. East Birmingham Land Co.*, 104 Ala. 355, 16 South. 126, 53 Am. St. Rep. 64; *McDonald v. McDonald*, supra. The question, what is a just and proper allowance to or for the beneficiary, from time to time, is therefore dependent on the circumstances and the necessary demands of the beneficiary, made known to the court of equity assuming jurisdiction of the estate and of the person of the ward or beneficiary.

[16] We are asked to declare whether the discretionary powers given the executor authorized him to continue to engage in the mercantile business as the testator had done. There is no clause in the will conferring this specific authority. If such authority exists, it must be by way of inference from the general authority to sell or exchange lands, given in item 7, or that to "sell any property coming into his hands" as may appear to the best interest of the estate, provided in item 8, or that to exercise "every power granted" without report to or direction of the court provided in item 9. The latter item, however, shows that testator had in mind sales and exchanges of property, collections, and settlements of debts, in the process of "administering" testator's estate, "as fully and completely as if he [executor] was the owner individually thereof."

[17] A trust is held not to be transmitted to an executor in such sort as to enable him to carry on a business, unless he has express authority by the will, or is so empowered to act by a court of chancery (*Steele v. Knox*, 10 Ala. 608); nor to conduct farming operations (*Hinson v. Williamson*, 74 Ala. 180, 196; *McAllister v. McAllister*, 37 Ala. 484); nor to continue to employ slaves of an estate "in the business in which they were engaged at the time of intestate's death when, in so doing, he incurs expenses" (*McCreeliss' Distributees v. Hinkle*, 17 Ala. 459, 465). Similarly, an administrator is without the right to engage in the business of a warehouseman. *Griffin v. Bland*, 43 Ala. 542. In *Foxworth v. White*, 72 Ala. 224, the will authorized the estate to be kept together for a designated term of years. The court said:

"The business or trade in which he may be employed is not, by operation of law, transmissible to his personal representative, except to a very narrow, limited extent; and a continuance of it by the representative is a breach of duty, from which only liability and loss to him can result. The testator may authorize its continuance; and if it is authorized, and the executor assumes to exercise the power, he renders himself personally liable for debts he may con-

tract in the continuance of the business. *Ex parte Garland*, 10 Vesey, 119; *Morrow v. Morrow*, 2 Tenn. Ch. 549. Those with whom he deals cannot proceed directly against the estate of the testator. The estate is bound, however, to the indemnity of the executor for all debts and expenses properly incurred in the continuance of the business, when the continuance is in the exercise of a power conferred by the will, or under the authority of a court of competent jurisdiction. If he is not in default—if he is not, on a just settlement of his accounts, indebted to the estate; if the debts incurred by him are in truth advances properly made by him in the prudent exercise of the power—the creditors dealing with him have an equity to be subrogated to his right of indemnity from the trust estate. *Steele v. Steele*, 64 Ala. 438 [38 Am. Rep. 15], and authorities cited."

In *Eufaula National Bank v. Manassas, Ex'r, etc.*, 124 Ala. 379, 27 South. 258, the testatrix at the time of her death was engaged in the mercantile business. The will created a trust the main object of which was the maintenance and education of testatrix's minor children and a division of the property between them. The discretionary power given the executor was thus defined:

"I hereby authorize and empower him if in the performance of his trust it becomes in his judgment necessary or expedient to sell at public or private sale in such manner as he shall deem best for the interest of my said two sons, any part or all of the estate which shall come to his hands and to invest and to reinvest the proceeds at his discretion."

The court said:

"The continuance of the mercantile business is nowhere mentioned in the will. Such a business it is true involves the sale of goods and the reinvestment in other goods, but it also involves obligations, expenditures, and a degree of attention beyond mere selling and reinvesting. Debts incurred in an authorized business of a trustee may become chargeable against the trust estate and so endanger its existence. No intention to subject the estate to the uncertain results of a mercantile business is either expressed or implied in this will."

The general rule of these cases is that neither an executor nor an administrator is justified in continuing the estate in the trade or business enterprise engaged in by the testator or the decedent at the time of his death, for the reason that such trades or enterprises are a hazardous use to permit of trust moneys, and that such trading or business lies outside of the general scope of administrative functions. This position is well fortified by authorities from other jurisdictions and by established text-writers. *Willis v. Sharp*, 113 N. Y. 586, 21 N. E. 705, 4 L. R. A. 493; *Lucht v. Behrens*, 28 Ohio St. 231, 22 Am. Rep. 378; *Campbell v. Faxon*, 73 Kan. 675, 85 Pac. 760, 5 L. R. A. (N. S.) 1002; *Williams on Ex'rs* (7th Ed.) 791; *Schouler's Ex'rs and Adm'rs*, § 325; 11 Am. & Eng. Ency. Law, 974. There may be cases where a personal representative will be permitted to carry out contracts made by the decedent or testator, or to complete the manufacture of articles commenced by him and left unfinished at his death, or, within a reasonable time limit, to

make purchases and incur liabilities, where such a course is deemed to the best interest of the estate. *Harding v. Evans*, 3 Port. 221, 29 Am. Dec. 255; *Cornwell v. Deck*, 2 Redf. (N. Y.) 88; *In re Benedict*, 13 Abb. N. C. (N. Y.) 67; *Gilman v. Wilbur*, 1 Dem. Sur. (N. Y.) 547; *In re Sharp*, 5 Dem. Sur. (N. Y.) 516; *Pitts v. Jameson*, 15 Barb. (N. Y.) 310; *Newton v. Poole*, 12 Leigh (Va.) 112; *Garrett v. Noble*, 6 Sim. 504; *Collinson v. Lister*, 20 Beav. 356; *Bowker's Estate*, 12 Phila. (Pa.) 88; *Id.* 35 Leg. Int. (Pa.) 192. That the discretionary power conferred by the will did not clothe testator's executor with the authority to continue a general mercantile business, such as testator was engaged in at his death, finds support in the provisions of the statute providing for keeping estates together, continuing plantations, employing laborers, etc. Code 1907, § 2743 et seq.

The right of an executor or administrator to compensation is declared by statute (section 2690 of the Code). It is through such commissions, on all receipts and all disbursements by him, as to the court having jurisdiction of the final settlement appear to be a fair compensation for his trouble, risk, and responsibility, "not to exceed 2½ per cent." thereon; and the court may allow "actual expenses," and for special or extra services "such compensation as is just." In the instant case the testator has fixed his executor's compensation at the highest rate allowed by the statute, to wit, 2½ per cent. on all receipts and all disbursements. The chancellor has correctly interpreted this item of the will.

It results from what we have said that the decree of the chancellor must be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(199 Ala. 521)

# LOUISVILLE & N. R. CO. v. BLANKENSHIP. (6 Div. 381.)

(Supreme Court of Alabama. April 12, 1917.)

## 1. COMMERCE §27(8)—FEDERAL EMPLOYERS' LIABILITY ACT—EVIDENCE—COMMERCE BETWEEN STATES.

In action under the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]) for injury sustained while clearing ditches along defendant railroad's tracks, plaintiff's testimony that there was no other way of draining surface water from the tracks is competent to establish that his work was necessary to render safe defendant's commerce between the states.

## 2. TRIAL §75—STRIKING OUT EVIDENCE—STOPPEL—CROSS-EXAMINATION.

A party cannot experiment with a witness on cross-examination and then have an unfavorable answer excluded on motion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 171-182, 252.]

### 3. TRIAL $\S$ 85 — STRIKING OUT EVIDENCE — EVIDENCE PARTLY COMPETENT.

Where a portion of an answer is clearly responsive, it is not the court's duty, on a general motion to exclude the whole answer, to separate the responsive and unresponsive portions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 222, 223-225.]

### 4. COMMERCE $\S$ 27(1) — EMPLOYERS' LIABILITY ACT—INTERSTATE COMMERCE.

To be liable under the federal Employers' Liability Act, the carrier must have been actually engaged in interstate commerce, and the employe must have been rendering services facilitating such commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25.]

### 5. COMMERCE $\S$ 27(8)—EMPLOYERS' LIABILITY ACT—INTERSTATE COMMERCE.

A railroad employe engaged in clearing out ditches along defendant railroad's main line which was used for interstate commerce was engaged in interstate commerce within the federal Employers' Liability Act.

### 6. MASTER AND SERVANT $\S$ 286(32)—EMPLOYERS' LIABILITY ACT—JURY QUESTION.

In action under federal Employers' Liability Act, defendant's negligence in causing the crane of a ditching machine to hit a telegraph pole jarring plaintiff employe from the flat car on which the ditching apparatus was carried held a jury question.

### 7. NEGLIGENCE $\S$ 136(31) — COMPARATIVE NEGLIGENCE.

Under the federal Employers' Liability Act, the question of comparative negligence, when both parties were negligent, is for the jury.

### 8. MASTER AND SERVANT $\S$ 228(2)—EMPLOYERS' LIABILITY ACT—CONTRIBUTORY NEGLIGENCE.

Under the federal Employers' Liability Act, the defense of contributory negligence is abolished if the railroad's failure to comply with any of the safety acts was the proximate or contributing cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 871.]

### 9. MASTER AND SERVANT $\S$ 289(32)—EMPLOYERS' LIABILITY ACT—JURY QUESTION.

In action under federal Employers' Liability Act, plaintiff employe's contributory negligence when jarred from a flat car by the crane of a ditching machine striking a telegraph pole held a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1124.]

### 10. APPEAL AND ERROR $\S$ 1005(2)—REVIEW—REFUSAL OF NEW TRIAL.

Refused to grant a new trial because the evidence was insufficient or the verdict contrary to the evidence will not be reversed unless the court is clearly convinced the verdict was erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876.]

### 11. APPEAL AND ERROR $\S$ 1078(1)—WAIVING ASSIGNMENTS BY FAILURE TO ARGUE.

Assignments of error not insisted upon in argument need not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256.]

Appeal from Circuit Court, Cullman County; R. C. Brickell, Judge.

Action by Homer Blankenship, by his next friend, against the Louisville & Nashville

Railroad Company, under the federal Employers' Liability Act, for damages for injuries while engaged in its employment. Judgment for plaintiff, and defendant appeals. Affirmed.

The facts sufficiently appear. The following charges were refused to defendant:

(A) Unless you believe from the evidence that both defendant and plaintiff were engaged in interstate commerce at the time the injury occurred, then your verdict should be for defendant.

(B) Both plaintiff and defendant must be engaged at the time of the injury in interstate commerce to bring this cause within the influence of the United States statutes under which this suit is brought.

(C) I charge you, gentlemen of the jury, as a matter of law, under the evidence in this case, that plaintiff is not entitled to recover because of the failure of the evidence to show that at the time the injury happened both plaintiff and defendant were engaged in interstate commerce.

(D) I charge you, gentlemen, that the character of the work in which plaintiff and defendant were engaged at the time of the occurrence of the injury does not come under the influence of the Employers' Liability Act of Congress.

(E) Under the evidence in this case, if you believe the same, I charge you that plaintiff's big toe was not amputated by reason of the injury as is charged in the complaint in this case.

(F) If you believe the evidence in this case, you must find a verdict in favor of defendant.

(G) Affirmative charge as to the sixth count.

(H) Same as to the seventh count.

(I) If you believe from the evidence that the injury to plaintiff was due to his failure to exercise proper caution and diligence in and about taking down the hose to get the water, and if you believe from the evidence that the boom of the ditcher engine struck a telegraph pole in this case, and that both of these causes combined, and caused his injury, then you cannot find for plaintiff as to counts 6 and 7.

Geo. H. Parker, of Cullman, and Eyster & Eyster, of Albany, for appellant. A. A. Griffith, of Cullman, and Callahan & Harris, of Decatur, for appellee.

THOMAS, J. The complaint originally contained seven counts. Plaintiff withdrew all but counts Nos. 6 and 7, which stated a cause of action under the federal Employers' Liability Act. To each the defendant pleaded the general issue.

The gist of these counts is that the defendant was engaged in interstate commerce, and at the time of plaintiff's injury was improving its main track, rendering it more safe or permanent by ditching and excavating along it, in Blount county, Ala.; that this work was done by means of a "ditching outfit," which was mounted on a set of tracks on a flat car, and on which tracks a diminutive steam engine was propelled back and forth; that one Durbin was in charge of this ditching engine; that plaintiff, while acting within the line and scope of his duties as an employe of defendant, was injured by reason of the negligence of said Durbin—count 6 alleging the negligent act to have

been the causing of the crane which was attached to the "ditcher" to swing around against a telegraph pole, thereby throwing plaintiff upon the track on said flat car, where he was injured; and count 7 alleging that Durbin negligently conducted himself in and about the management or operation of the ditching engine, thereby causing plaintiff to be thrown down to and upon the track of said flat car, and his foot to be mashed and bruised by said ditching engine; that is, the distinguishing features of these counts are that count 6 attributes plaintiff's injury to the negligence of Durbin in causing the crane to come in contact with a telegraph pole, and count 7 attributes said injury to the negligence of Durbin in the control or operation of the ditching engine, in that thereby plaintiff was thrown on the track and injured by the ditching engine as alleged.

Plaintiff's evidence tended to show that he was injured while discharging the duties of a fireman, and that the general character of the work being prosecuted by defendant and its said agents (including plaintiff) at that point on the main line was cleaning out its ditches, taking out a "slide" toward and along the main line that had obstructed the ditches and the flow of water therein.

[1] It was competent for the plaintiff to testify that there was no other way for the surface water to be drained off from the track of the main line than through the ditch that was being opened, when the injury occurred, as tending to show an act necessary in improving or rendering more safe the main line of defendant, along which its business as a common carrier of passengers and freight between the states was conducted, and in which work the defendant and the plaintiff were at the time engaged.

Plaintiff's account of his duties was thus detailed by him:

"It was the main line of the track where we were working. The passenger and freight trains run over it, including through passenger trains and through freight trains. \* \* \* I was injured about 11 o'clock, between 10 and 11, somewhere along there, in the daytime. My duty on the ditcher was to fire to dig two carloads of dirt, and then the other fellow, the pitman, he fired to dig two carloads.

"I was firing just before I was injured. Just before I was injured Durbin gave the signal, two blows for water, and that meant to get ready to take water into the tank of the ditcher from the tank connected with the locomotive engine. When the signal was given it was my duty to get ready to take water. Mr. Durbin instructed me in that duty. To get water I had to climb up and put a hose in the tank of the locomotive. The locomotive was on the track opposite to the ditcher. To take water we had to get the car over where the locomotive engine could get to the side of the ditcher.

"The ditcher was in place, and they went down to pull the locomotive in place, but it had not got in place, but was coming in place. I climbed up on the corner of the flat car of the ditcher. It was necessary to get up there. When I got there I stood just on the corner of the ditcher. The ends stuck out about 2½ inches, and I was standing on that. The car I was on was standing still. The ditcher at that time was moving around. When I got on the place

where I was standing the crane on the ditcher was swinging around and hit a telephone pole and jarred me down. \* \* \*

"When the crane struck the telegraph pole it knocked me down on the track, and then the ditcher engine run back over me and mashed my toes. The track I was knocked down on was the ditcher track on top of the car. I fell right straight down. The ditcher engine was running backward and forward on the track before I fell. After I fell it run back on the car. I cannot say how long I was on the track before I was struck; it was quick done. It was done by the time I got down there, just about."

[2, 3] On cross-examination defendant asked, "Blowing the whistle would not disclose your presence if he could not see you, would it?" and was answered, "Yes, sir; he blew the whistle for water and we knew to take down the hose and get ready to take water."

A party will not be permitted to experiment, in interrogating a witness, by calling out a certain answer and then (the answer proving unfavorable) having it excluded on motion. No error was committed in overruling defendant's motion to exclude this answer. *E. T. V. & G. R. Co. v. Turville*, 97 Ala. 122, 12 South. 63; *Amer. Oak Ex. Co. v. Ryan*, 112 Ala. 836, 20 South. 644; *Farrow v. N. O. & St. L. Ry.*, 109 Ala. 448, 20 South. 303; *Hunnicut v. Higginbotham*, 138 Ala. 472, 35 South. 469, 100 Am. St. Rep. 45. A part of the answer was clearly responsive, and it may be that the whole answer was responsive to defendant's question. It was not the duty of the court, on a general motion to exclude the whole answer, to separate the responsive and competent testimony from that which was not responsive and was illegal. *Ray v. State*, 126 Ala. 9, 28 South. 634; *Henry v. Hall*, 106 Ala. 84, 17 South. 187, 54 Am. St. Rep. 22; *Ala. Mid. R. Co. v. Darby*, 119 Ala. 531, 24 South. 713; *Davis v. State*, 131 Ala. 10, 31 South. 569; *Rarden v. Cunningham*, 136 Ala. 263, 34 South. 26; *Weaver v. State*, 189 Ala. 130, 36 South. 717.

Defendant requested several written charges that raised the question whether there was proof that at the time of the alleged injury both appellant and appellee were engaged in an act of interstate commerce, or assisting therein, within the meaning of the federal statutes. The true test was declared in *Western Railway of Alabama v. Mays*, 72 South. 641, 643, to be whether the work or act in question was "a part of the interstate commerce in which the carrier was engaged"; likewise (stated in different terms) in *Louisville & Nashville Railroad Co. v. Carter*, 195 Ala. 382, 385, 70 South. 655, 657, where it is said that the relation exists "not only when the injured employee's service was in or about the act of transporting persons or things, but also when his service was in or about the maintenance or repair of agencies already devoted to or immediately capable

of facilitating some essential feature of interstate commerce."

A track over which interstate commerce is being moved, or is to be moved, in the usual course of the carrier's business, is an instrumentality of such commerce; and an employé of an interstate carrier who is engaged, when injured, in a service "immediately productive of the maintenance or repair of intimately connected and essential, indispensable features of interstate commerce," is within, and his rights are protected and governed by, the federal statute. *Ex parte Atlantic Coast Line Ry. Co.*, 190 Ala. 132, 67 South. 256; *L. & N. R. R. Co. v. Carter*, *supra*; *Western Railway of Ala. v. Mays*, *supra*; *Mondou v. N. Y., N. H. & H. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Pedersen v. D., L. & W. R. R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; *N. C. R. R. Co. v. Zachary*, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; *Ill. Cent. R. Co. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; *Ruck v. C. M. & St. P. Ry. Co.*, 153 Wis. 158, 140 N. W. 1074.

The statute has been applied to trainmen. It has been applied to an employé working at a coal chute, coaling engines, on a railroad engaged in interstate traffic, though he was also required to serve engines engaged in intrastate service (*Southern Railway Co. v. Peters*, 194 Ala. 94, 69 South. 611); to a brakeman unloading a barrel of oil shipped from Ohio to a point within this state (*Western Railway of Ala. v. Mays*, *supra*); to an engineer hauling coal for use in interstate transportation (*Barlow v. Lehigh Valley Ry.*, 158 App. Div. 768, 143 N. Y. Supp. 1053); to one pumping water for engines in such service (*Horton v. Oregon, Washington R. & Nav. Co.*, 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8); to a clerk crossing the tracks in the yards to meet an incoming interstate train, and whose duty it was to take the numbers, the seals, and the labels of cars, some of which were engaged in intrastate traffic (*St. L., San F. & T. Ry. Co. v. Seale*, 229 U. S. 156, 161, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156). In the last-mentioned case the court said:

"The train from Oklahoma was not only an interstate train, but was engaged in the movement of interstate freight, and the duty which the deceased was performing was connected with that movement, not indirectly or remotely, but directly and immediately. The interstate transportation was not ended merely because that yard was a terminal for that train, nor even if the cars were not going to points beyond. Whether they were going further or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the state line."

A foreman was held to be protected by the statute when injured while keeping in repair the tracks and switches of his employer's freightyard used for "breaking up and making up" trains devoted to interstate as well as intrastate traffic. *Willever, Adm'x, v. D., L. & W. R. Co.*, 87 N. J. Law, 348, 94 Atl. 595. Similarly a section foreman who, after having repaired a broken rail, was returning on a hand car to his station, and was injured while helping to lift the hand car from the main line that a train might pass, was held to be protected by the act. *Texas & Pac. Ry. Co. v. White* (Tex. Civ. App.) 177 S. W. 1185. Again a foreman helping to replace rails on a road being used for both local and interstate freight, and so injured, was held to be within the terms of the statute. *Cherpeski v. G. N. R. Co.*, 128 Minn. 360, 150 N. W. 1091.

For illustration of the application of the statute to trackmen, these cases may be noted: An employé who had been engaged in repairing a trestle on an interstate railroad, and who was killed while returning to the "bunk car" furnished by defendant to such employés, was held to be within the protection of this statute (*L. & N. R. R. Co. v. Walker*, 162 Ky. 209, 172 S. W. 517); likewise a section hand engaged in the "upkeep" of such railroad track (*Truesdell v. Chesapeake & Ohio R. Co.*, 159 Ky. 718, 169 S. W. 471; *Zikos v. Oregon & N. Co.* [O. C.] 179 Fed. 893); a laborer assisting in the operation of a steam shovel employed in the repair and maintenance of defendant's tracks, such tracks being used to transport interstate commerce (*Tralich v. Chicago, etc., Co.* [D. C.] 217 Fed. 675); an employé helping to remove trash or drift, so that there might be erected a temporary trestle or bridge for the passage of trains bearing both interstate and intrastate traffic, the old bridge having been theretofore so used (*Columbia & P. S. Co. v. Sauter*, 223 Fed. 604, 139 O. C. A. 150); one engaged in sweeping snow from a track used for both inter and intra state traffic (*Hardwicke v. Wabash R. Co.*, 181 Mo. App. 156); and a switch repairer was also held to be within its protection (*Cent. R. Co. of New Jersey v. Colasurdo*, 192 Fed. 901, 113 C. C. A. 379).

The rule of the *Pedersen Case* was reaffirmed in *N. C. R. Co. v. Zachary*, 232 U. S. 248, 260, 34 Sup. Ct. 305, 309, 58 L. Ed. 591, Ann. Cas. 1914C, 159, where the plaintiff had prepared an engine for a trip to remove freight in interstate commerce, and was immediately injured in going across the main line in the yard, in the direction of his boarding house. Mr. Justice Pitney said:

"It is said that, because deceased had left his engine and was going to his boarding house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just pre-



pared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine."

In *Southern Railway Co. v. Lloyd*, 239 U. S. 496, 36 Sup. Ct. 210, 60 L. Ed. 402, the plaintiff was an engineer of an interstate road. He was proceeding from the repair shop, where his engine had been, and was injured on a side track as he examined his engine. The injury was held to be within the act, under the authority of *Zachary's Case*.

In *Pecos & Northern T. Railway Co. v. Rosenbloom*, 240 U. S. 439, 36 Sup. Ct. 390, 60 L. Ed. 780, the plaintiff was in the employ of the railway company as a ticket clerk, and he was required to be in the switchyard, to take and preserve a record of the numbers on outgoing cars and to seal the cars which needed sealing. A long freight train was leaving the yard, on its regular run, along switch track No. 4, and, as required by his duties, plaintiff was walking between tracks 4 and 5, and near the train, and observing and noting car numbers, and while so engaged a ballast car struck him and caused his injury. The court said that it conclusively appeared from the evidence that the freight train on track 4 consisted of 30 or more cars, which cars, with one exception, were moving in interstate commerce; that, "if M. A. Rosenbloom, at the time of his death, was engaged in examining seals and making record of seals on cars being transported interstate over the line of defendant and other lines of connecting carriers, and if such work was a necessary part and customary work, reasonably carried on by defendant as a part of its business, transporting freight interstate over its line," or if he had then just completed such inspection and not yet made his record, he was within the statute.

There has been no recession in the later decisions of the United States Supreme Court from the principle announced in the *Pedersen Case*.

[4] It is clear from these cases that the rule is that the carrier must be actually engaged in interstate commerce, and the employé must be rendering such service to the carrier as enables or facilitates it in the performance of interstate commerce. Such is the liberal construction given the federal Employers' Liability Act by the Supreme Court of the United States. In *Pedersen v. D., L. & W. R. Co.*, supra, Mr. Justice Van Devanter, speaking for the court, declared that tracks and bridges are as indispensable to interstate commerce by railroads as are engines and cars, and that sound economic reasons unite with settled rules of law in de-

manding that all of these instrumentalities be kept in repair; that the security, expedition, and efficiency of commerce depends in large measure upon this being done. Indeed, the statute proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct "any defect or insufficiency" in "cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment" used in interstate commerce. It is clear that interstate commerce by railroads and other transportation agencies cannot be separated into its several elements, and the nature of each determined, regardless of its relation to others or to the business as a whole.

[5] The evidence is clear that at the time of the injury the defendant common carrier was engaged in an act of interstate commerce, and that the services which plaintiff was rendering it in repairing and making safe defendant's tracks on its main line were facilitating such carrier in the doing of, and the engaging in, an act of interstate commerce; that is, that the services so rendered by plaintiff were a part of the interstate commerce engaged in by the defendant.

When the federal act was first construed by the Supreme Court of the United States, this liberal construction of the act was declared (*Mondon v. N. Y., N. H. & H. R. Co.*, supra) as follows:

"The second objection proceeds upon the theory that, even although Congress has power to regulate the liability of a carrier for injuries sustained by one employé through the negligence of another where all are engaged in interstate commerce, that power does not embrace instances where the negligent employé is engaged in intrastate commerce. But this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power. As was said in *Southern Railway Co. v. United States*, 222 U. S. 20, 27, 32 Sup. Ct. 2, 56 L. Ed. 72, that power is plenary, and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it. The present act, unlike the one condemned in *Employers' Liability Cases*, 207 U. S. 463 [28 Sup. Ct. 141, 52 L. Ed. 297], deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employés while engaged in such commerce. And, this being so, it is not a valid objection that the act embraces instances where the causal negligence is that of an employé engaged in intrastate commerce; for such negligence, when operating injuriously upon an employé engaged in interstate commerce, has the same effect upon that commerce as if the negligent employé were also engaged therein."

So also in *Illinois Central Railroad Co. v. Behrens*, supra, 233 U. S. 477, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163, on the authority of the *Mondon Case*, supra, and *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, and others, it was declared that, considering the status of the railroad as a highway for both interstate and intrastate commerce, the inter-



dependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution:

"We [the court] entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce."

Under this construction of the federal statute defendant's requested charges A, B, C, and D were properly refused as misleading.

[6] There was no error in the refusal of charges E and F and 6 and 7, since under the evidence such questions were for the jury as to both counts of the complaint. *L. & N. R. R. Co. v. Carter*, supra; *Alabama S. & W. Co. v. Tallant*, 165 Ala. 521, 51 South. 835. The seventh count was supported by statements of the plaintiff, as a witness in his own behalf, to the effect that just before he was injured Durbin gave the signal blow for water, which the witness stated meant to get ready to take water into the tank of the "ditcher" from the tank connected with the locomotive engine; that, when said signal was given, it was the duty of plaintiff "to get ready to take water"; that Mr. Durbin instructed him in that duty; that to get water witness had to climb up and put a hose in the tank of the locomotive.

From such testimony it appears that, when Durbin gave the signal for taking water, he knew it to be plaintiff's duty to come to that point to get the hose for such purpose, which hose was located as the witness explained. The jury were authorized to infer, from such knowledge of the status produced by the giving of such signals, that Durbin knew the probably serious consequences of striking the telegraph pole with the boom or crane while plaintiff was discharging his said duty in getting and putting the hose in said tank. Having given the signal to take water, and being then in the act of shifting the boom or crane or other machinery operated in the act of taking water, it was the duty of Durbin to so operate the engine and so manipulate or guide the boom or crane or other machinery as to prevent injury to those of defendant's agents engaged with him in the act.

[7, 8] Charge 8 incorrectly states the law under the federal statute. The question of comparative negligence, if both parties were guilty of negligence, is one for the jury. By the Employers' Liability Act the defense of contributory negligence is entirely abolished if the proximate or contributing cause of the injury was the failure of the railroad com-

pany to comply with the requirements of any of the safety acts of Congress. *Grand Trunk Ry. Co. v. Lindsay*, 233 U. S. 42, 34 Sup. Ct. 581, 58 L. Ed. 838, Ann. Cas. 1914C, 168; *Johnson v. Great Northern Railway Co.*, 178 Fed. 643, 102 C. C. A. 89; *Western Railway of Ala. v. Mays*, 72 South. 641; *Thornton's Federal Employers' Liability Act* (3d Ed.) 129, § 71. See, also, *Seaboard, etc., Co. v. Horton*, 162 N. C. 424, 78 S. E. 494; s. c., 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475.

[9] Under the evidence before us, as to the quo modo of the injury, and the evidence tending to impeach Durbin as to statements made by him after the injury that the boom or crane did strike the telegraph pole, the question was made one for the jury, whose finding the court will not overturn.

[10] Under the foregoing authorities, and the rule prevailing in this state since its enunciation in *Cobb v. Malone*, 92 Ala. 630, 9 South. 738, recently reaffirmed in *Nashville, Chattanooga & St. Louis Railway v. Crosby*, 194 Ala. 338, 70 South. 7, no reversible error was committed in the court's declining to grant defendant's motion for a new trial.

[11] The other assignments of error not being insisted upon in argument by counsel for appellant, it is unnecessary to consider the same. *Lee v. Georgia Cotton Co.*, 72 South. 162; *R. I. & S. Co. v. Quinton*, 194 Ala. 126, 69 South. 604.

Let the judgment of the circuit court be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(199 Ala. 555)

EDMUNDS v. STATE ex rel DEDGE.  
(5 Div. 640.)

(Supreme Court of Alabama. April 12, 1917.)

1. INTOXICATING LIQUORS ⇐244 — SEARCH AND SEIZURE—NATURE OF PROCEEDING.

A proceeding for search and seizure of intoxicating liquors under Temperance Act Jan. 23, 1915 (Acts 1915, p. 8), is quasi criminal in nature, since it is strictly penal in character, and the only practical difference between it and a criminal prosecution is that it acts in rem instead of in personam, and it cannot be classed among civil actions.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 364.]

2. INTOXICATING LIQUORS ⇐249 — SEARCH AND SEIZURE—VENUE.

Code 1907, § 4643, as amended by Acts 1915, p. 266, declaring that no person can be sued out of his precinct, does not apply to liquor search and seizure proceedings under Temperance Act Jan. 23, 1915, the venue statute being confined to suits commenced by summons, and not referring to proceedings in rem; for the purposes of venue and jurisdiction the proceeding being regarded as criminal, and by Code 1907, § 6783, a

justice's criminal process reaches everywhere within the county.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 376-385.]

**3. INTOXICATING LIQUORS**  $\Leftrightarrow$ 249 — **SEARCH AND SEIZURE—SERVICE OF WARRANT BY CONSTABLE.**

The search and seizure warrant for intoxicating liquors provided by Temperance Act Jan. 23, 1915, can be executed by "any constable of the county" to whom writ is directed, by section 22, subd. 4, and in view of Code 1907, § 3329, making it the constable's duty to execute all processes "directed by any lawful authority"; hence the fact that the constable serving the warrant did not reside in the beat where the liquor was seized was immaterial.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 376-385.]

**4. INTOXICATING LIQUORS**  $\Leftrightarrow$ 244 — **SEARCH AND SEIZURE—JURISDICTION OF JUSTICE.**

Jurisdiction of justice limited by Const. § 168, to \$100 in civil cases is not affected by value of liquors to be seized under the temperance acts; the proceeding being criminal in nature.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 364.]

**5. INTOXICATING LIQUORS**  $\Leftrightarrow$ 248 — **SEARCH AND SEIZURE—ISSUANCE OF WARRANT—STATUTORY REQUIREMENT.**

Requirements of Temperance Act Jan. 23, 1915, § 22, subd. 3, that justice shall examine complainant on oath and take written depositions before issuing liquor search and seizure warrants are not jurisdictional, and omission of these requirements will not vitiate the warrant when issued upon a sufficient affidavit.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 368-375.]

**6. INTOXICATING LIQUORS**  $\Leftrightarrow$ 249 — **SEARCH AND SEIZURE — ISSUANCE OF WARRANT — PROBABLE CAUSE.**

Weight of evidence to establish probable cause for issuing liquor search and seizure warrants under temperance acts cannot be reviewed upon the trial where statute was substantially complied with; the ascertainment of probable cause involving answers of the judicial functions.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 376-385.]

**7. INTOXICATING LIQUORS**  $\Leftrightarrow$ 253 — **SEARCH AND SEIZURE—REVIEW—NECESSITY OF OBJECTION BEFORE JUSTICE—ISSUANCE OF WARRANT.**

The objection that justice did not take sworn testimony of complainant as required by temperance acts before issuing liquor search and seizure warrant, being in abatement, should have been raised before the justice, and comes too late when made on appeal to circuit court.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 392.]

**8. INTOXICATING LIQUORS**  $\Leftrightarrow$ 245 — **SEARCH AND SEIZURE—CONSTRUCTION OF STATUTES.**

Temperance Acts Jan. 23, 1915, and Sept. 25, 1915, being parts of one system for search and seizure and restriction upon possession and ownership of intoxicating liquors, must be construed in pari materia, and since the later act provides for search and seizure "under the rules now prescribed by law," the grounds specified for issuance of the warrant in the earlier act are widened by addition of conditions under which liquors are declared contraband and forfeited under the later act.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 365.]

**9. INTOXICATING LIQUORS**  $\Leftrightarrow$ 253 — **SEARCH AND SEIZURE—REVIEW—NECESSITY OF OBJECTION BEFORE JUSTICE — EXECUTION OF WARRANT.**

Objection that officer seized liquors upon premises not covered by warrant issued under temperance acts should have been made before justice before appeal to circuit court in view of Acts 1915, p. 22, § 22, subd. 10, providing that appeals to circuit court are triable de novo "as in cases appealed from a justice," and it was immaterial that other objections not including this ground were made before the justice.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 392.]

**10. CRIMINAL LAW**  $\Leftrightarrow$ 260(10) — **REVIEW—NECESSITY OF OBJECTION BEFORE JUSTICE.**

Upon appeal from justice to circuit court for trial de novo, objections to proceedings including jurisdiction must be made before the justice, and cannot be made for the first time in circuit court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 569-571, 585.]

**11. CONSTITUTIONAL LAW**  $\Leftrightarrow$ 319 — **INTOXICATING LIQUORS**  $\Leftrightarrow$ 245 — **SEARCH AND SEIZURE — DUE PROCESS OF LAW.**

The temperance acts of 1915, relating to search and seizure and restricting possession of intoxicating liquors lawfully acquired before enactment, are not unconstitutional for taking property without due process of law.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 764; *Intoxicating Liquors*, Cent. Dig. § 365.]

Appeal from Circuit Court, Russell County; J. S. Williams, Judge.

Proceeding in justice court by the State of Alabama, on the relation of J. W. Dedge, against Ben Edmunds, for condemnation and destruction of intoxicating liquors. Judgment of forfeiture and order for destruction of liquors, and on appeal to circuit court judgment affirmed, and defendant appeals. Affirmed.

Glenn & De Graffenried and H. A. Ferrall, all of Seale, and T. H. Seay, of New York, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for appellee.

SOMERVILLE, J. This is a proceeding for the condemnation and destruction of contraband liquors held in violation of the act approved September 25, 1915 (Sess. Acts 1915, p. 553), known as the Bonner Bill. The undisputed evidence shows that the liquors in question were prohibited liquors, and were held in quantities immensely in excess of the legal allowance, and were stored on premises not the dwelling house of the claimant.

On the final hearing in the justice court, the appellant having appeared as claimant, there was a judgment of forfeiture, and an appropriate order for the public destruction of the liquors. On appeal to the circuit court there was the same judgment and order.

It is contended by the appellant that the judgment appealed from is erroneous for the following reasons:

(1) The justice who issued the warrant was officially resident in beat 10 of Russell

county, while the liquors seized under the warrant were in beat 1 in the city of Girard, not an adjoining beat, there being a qualified justice of the peace in beat 1, and hence this justice was without jurisdiction in the premises.

(2) The constable who executed the warrant and seized the liquors was officially resident in beat 10, there being a regular constable and sheriff in beat 1, where the liquors were seized.

(3) The liquors seized were of greater value than \$100, and were therefore constitutionally beyond the jurisdiction of a justice of the peace.

(4) The warrant under which the liquors were seized was issued solely upon the affidavit of one Dedge, without any examination on oath of the affiant or the witness, or any taking of depositions showing the facts and circumstances tending to establish the complaint, as required by subdivision 3 of section 22 of the temperance act approved January 23, 1915 (Sess. Acts 1915, p. 18).

(5) The said affidavit did not show any ground for issuing a search and seizure warrant as prescribed by paragraphs (a), (b), and (c) of subdivision 6, § 22, of the temperance act.

(6) The warrant directed a search for and seizure of liquors on certain described premises, and, search there being unsuccessful, the officer entered upon and seized these liquors on other premises not described in the affidavit or warrant.

(7) In so far as the temperance acts are applicable to liquors lawfully acquired in good faith before their enactment, confiscation thereunder would be unconstitutional as depriving the claimant of his property without due process of law.

These questions were raised by appropriate motions to quash, by pleas in abatement and by requested instructions. Their predicates are all supported by the facts adduced in evidence, and the questions raised are questions of law on the evidence. All of these were ruled adversely to the claimant, and on request in writing the general affirmative charge was given for the state.

[1] Before proceeding to a discussion of the several contentions of the claimant, it is desirable to observe the motive and status of this proceeding. Though a proceeding for search and seizure is not "in any exact sense a criminal prosecution," as observed in *Toole v. State*, 170 Ala. 41, 46, 54 South. 195, yet it is strictly penal in its character, and substantially resembles a criminal prosecution; the only practical differences being that it acts in rem instead of in personam, and is conclusive against the whole world. Like a bastardy proceeding (*Paulk v. State*, 52 Ala. 427; *Shows v. Solomon*, 91 Ala. 390, 8 South. 713), it is sui generis, and may be properly designated as quasi criminal (*Woollen & Thornt. Int. Liqueur*, § 600; *Black on Intox. Liqueur*,

§ 352). Certainly it is not a suit according to the course of the common law, and would not, either in ordinary or technical language, be classed among civil actions. *State v. One Bottle of Brandy*, 43 Vt. 297.

We now consider the claimant's contentions seriatim.

[2] 1. This contention is based on the theory that this proceeding is a civil suit, and is governed by section 4648 of the Code, as amended by the act of August 5, 1915 (Acts 1915, p. 266), which declares that:

"Unless otherwise provided, no person can be sued out of the precinct of his residence, or that in which the debt was created, or the cause of action arose."

For the purpose of venue and jurisdiction, this proceeding is unquestionably to be regarded as criminal. *Com. v. Intox. Liqueur*, 13 Allen (Mass.) 561. And in criminal matters a justice's process reaches everywhere within the county. *Ex parte Davis*, 95 Ala. 9, 13, 11 South. 308; Code, § 6733. But, if it were not a criminal proceeding, it was long ago settled that the venue statute referred to is confined to suits commenced by summons, and has no reference to a proceeding in rem. *Atkinson v. Wiggins*, 69 Ala. 190. The search and seizure act itself provides (Acts 1915, p. 18) that "the warrant may be issued by justices of the peace," without restriction as to venue. The warrant in question was properly issued by the justice of beat 10.

[3] 2. One of the duties of a constable is "to execute and return all summons, executions, and other process, to him directed by any lawful authority." Code, § 3329. The act (section 22, subd. 4) provides that the warrant shall be "directed to the sheriff or to any constable of the county." Its execution in this case by the constable of beat 10 was unquestionably lawfully authorized. If authority for this conclusion were needed, it can be found in *Noles v. State*, 24 Ala. 672, 695.

[4] 3. Since the proceeding is criminal in its nature, the jurisdiction of the justice, though limited to \$100 in ordinary civil cases (Const. § 168), is not affected by the value of the liquors to be seized and condemned (*Black on Intox. Liqueur*, § 365, citing *State v. Arlen*, 71 Iowa, 218, 32 N. W. 267).

[5, 6] 4. Although, following the provisions common to all search warrants and preliminary proceedings, the act requires that "the magistrate before issuing a warrant must examine the complainant on oath, and any other witnesses he may produce, \* \* \* and take their deposition in writing, and cause the same to be subscribed by the person or persons making them" (section 22, subd. 3), the omission of these requirements has never been regarded as vitative of the warrant when it is issued upon a sufficient affidavit.

"The ascertainment of probable cause for the issue of the writ involved the exercise of the judicial function. Having acquired and exercised jurisdiction in the premises by taking the

affidavit of a person, and having issued the warrant substantially as required by the statute, the weight of the evidence to establish probable cause could not be made the subject of inquiry, nor could the judgment in that regard of the issuing magistrate be made the subject of review on the trial of the cause." *Toole v. State*, 170 Ala. 41, 52, 54 South. 195, 198; *Cheek v. State*, 3 Ala. App. 648, 57 South. 108; *Salley v. State*, 9 Ala. App. 82, 64 South. 185.

[7] Moreover, an objection like this, being in abatement, should be made before the magistrate, and comes too late when made on appeal in the circuit court, as was done in this case. *Johnson v. State*, 105 Ala. 113, 17 South. 99; *Miles v. State*, 94 Ala. 106, 11 South. 403; *Williams v. State*, 88 Ala. 80, 7 South. 101.

[8] 5. The temperance act of January 23, 1915, and the temperance act of September 25, 1915 (the Bonner Bill), relating to the same subject, and being parts of one system, must be construed in pari materia. The "Bonner Bill" created new restrictions upon the possession and ownership of liquors, though it is in part essentially a reenactment of some of the restrictive provisions of the act of February 8, 1915 (Acts 1915, p. 44), known as the "Bonner Anti-Shippling Bill." Both of these acts forbade and penalized the receipt or possession at one time of more than specified small quantities severally of spirituous, or vinous, or malt liquors. We are not here concerned with the details.

The act of January 23, 1915 (section 22), provides the entire system for search, seizure, and trial for the condemnation of contraband liquors. The grounds for the issuance of the warrant are there specified, in accordance, of course, with the definitions of contraband liquors as then already fixed. The later act of September 25, 1915, specified new classes of contraband liquors, notably such as are "received, possessed, or stored at any forbidden place, or anywhere in a quantity forbidden by law." It further provides that:

"In all such cases the liquors are forfeited to the state of Alabama and may be searched for and seized, and ordered to be destroyed under the rules now prescribed by law concerning contraband liquors, or by order of the judge of court after a conviction when such liquors have been seized for use as evidence."

We have here an express adoption of the procedure prescribed by section 22 of the older act for cases arising under the later act. The practical result obviously is that in any proceeding under section 22 the grounds therein specified for the issuance of the warrant are widened by the addition of all of the conditions under which liquors are declared contraband and forfeited under the later act. The affidavit and warrant in this case unquestionably exhibit a valid and authorized ground for the issuance of the warrant. The case of *Coleman v. State*, 7 Ala. App. 424, 61 South. 20, relied upon by the claimant, was based on a deficiency of the affidavit under the specifications of the Act

of January 23, 1915, and is not pertinent here.

[9, 10] 6. The warrant in this case, following the affidavit, commanded the officer to search certain specified premises, and to bring before the court such prohibited liquors as were there found. When a search was made of these premises and nothing was found, the officer searched other and different premises, wherein he found the liquors here involved. His return shows that the liquors were taken from the premises described in the warrant and complaint. The evidence shows that they were in fact taken from other and different premises, as set up in several grounds of the claimant's motion to quash the affidavit, warrant, seizure, and return, and his several pleas to the jurisdiction. If objection to the jurisdiction on this ground had been seasonably made in the justice's court before the judgment and appeal therefrom to the circuit court, its validity would now be presented for our consideration. But the record shows that no such objection was made in the justice's court, either by motion to quash or by plea in abatement.

It was long ago settled in this state, and the rule has been sustained by a long line of decisions, that on appeal from a justice's court to the circuit court, where the cause must be tried de novo, all objections to the proceedings, including the jurisdiction of the court, must be made before the justice, and cannot be made for the first time in the court to which appeal is made. *Slaton v. Apperson*, 15 Ala. 721; *City of Selma v. Stewart*, 67 Ala. 338; *Burns v. Henry*, 67 Ala. 209; *Reynolds v. Simpkins*, 67 Ala. 378; *W. Ry. Co. v. Lazarus*, 88 Ala. 453, 6 South. 877; *L. & N. R. Co. v. Barker*, 96 Ala. 435, 11 South. 453; *Blair v. Williams*, 159 Ala. 655, 49 South. 71; *McKinstry v. City of Tuscaloosa*, 172 Ala. 344, 54 South. 629; *Turner v. Lineville*, 2 Ala. App. 454, 56 South. 603.

By the terms of the Act (section 22, subd. 10) appeals thereunder to the circuit court are triable de novo, "as in cases appealed from a justice of the peace or county court." The doctrine of waiver above stated must be applied in its full vigor to this case, and the result is that the circuit court properly overruled the motion to quash and the plea to jurisdiction based on the objection above considered.

In this connection, it is proper to observe that the application of the rule is not altered by the fact that objection was made to the proceedings and to the jurisdiction in the justice's court on other specified grounds which did not include this ground. The waiver as to this ground was none the less effective and complete.

[11] 7. The contention that this act is unconstitutional as forbidding and preventing claimant's possession and enjoyment of property lawfully acquired by him before its en-

actment, whether under the safeguards of the state or the federal Constitution, has been denied by the decisions of this court, to which we now adhere without further discussion. *So. Exp. Co. v. Whittle*, 194 Ala. 406, 69 South. 652, L. R. A. 1916C, 278; *O'Rear v. State* (App.) 72 South. 505; *Ex parte O'Rear* (Sup.) 73 South. 1001.

The rulings of the circuit court were in accordance with the rules and principles above declared, and, there being no error shown by the record, the judgment and order of the circuit court will be affirmed.

Affirmed. All the Justices concur.

(199 Ala. 563)

**THEATRICAL CLUB v. STATE ex rel. DEDGE.** (5 Div. 639.)

(Supreme Court of Alabama. April 12, 1917.)

COMMERCE §33 — SEIZURE AND FORFEITURE — PROPERTY SUBJECT — INTERSTATE TRANSPORTATION.

The seizure under temperance acts of intoxicating liquors consigned to defendant at Columbus, Ga., and removed by him to this state and stored temporarily until he could remove them to Florida under contract to "immediately ship said whisky from Columbus, Ga., to Jacksonville, Fla.," was not a seizure of property in interstate transit, and was proper, and such property was not protected by the laws of interstate commerce against the operation of the Alabama liquor laws.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 26, 81.]

Appeal from Circuit Court, Russell County; J. S. Williams, Judge.

Proceedings by the State of Alabama, on the relation of J. W. Dedge, under the temperance act, for the seizure and condemnation of contraband liquors stored in the city of Girard by one William Cogbill in a building not a warehouse, and owned by said Cogbill, with claim interposed thereto by the Theatrical Club, a corporation. From a decree of condemnation, the claimant appeals. Affirmed.

The ground for this proceeding, as in all the other Girard cases, originating about the same time, was that the liquors in question were prohibited liquors, and were kept or stored in illegal quantities in the building in which they were found. The trial judge overruled all objections to the validity of the proceedings, and sustained all the demurrers interposed by the state to the claimant's special plea. On the evidence adduced, which is substantially stated in the opinion, a verdict was directed for the state as requested in writing, and there was verdict and judgment accordingly.

W. W. Quarles, of Selma, and Glenn & De Graffenried, of Seale, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for appellee.

SOMERVILLE, J. In the case of *Ben Edmunds v. State*, 74 South. 965, all the objec-

tions here made to the validity of this proceeding were held to be without merit.

In that case it was also held, following the case of *Southern Express Co. v. Whittle*, 194 Ala. 406, 69 South. 652, L. R. A. 1916C, 278, that an act of the Legislature prohibiting and penalizing the possession of contraband liquors, except in small specified quantities, was a valid exercise of the police power of the state, and does not offend any of the various provisions of the state or federal Constitution here urged against it. In the instant case it is contended also that this lot of liquors is immune against seizure and condemnation, on the theory that it was an interstate shipment between Columbus, Ga., and Jacksonville, Fla., and was in transit between those points at the time of its discovery and seizure under this proceeding in the city of Girard.

The claimant is a Georgia corporation, and on April 29, 1916, entered into a written contract with one Cogbill, in the city of Columbus, to deliver to him on consignment, for sale by him on account of the owner in Jacksonville, some 550 barrels and some 1,500 cases of whisky, wine and beer. The agreement stipulated that Cogbill should "immediately ship said whisky from Columbus, Ga., to Jacksonville, Fla." Further provisions are that "he will ship the same to Jacksonville, Fla., or have the said property in transit by May 1, 1916," and that he shall "present to said corporation all bills for freight and all other charges incident to the removal and storage of said property in Jacksonville, Fla."

The evidence for the claimant is, as recited by the bill of exceptions:

"That in good faith the said William Cogbill took charge of said liquors and removed the same from Columbus, Ga., to the premises of William Cogbill in Girard, Russell county, Ala., for the sole purpose of carrying said liquors to Jacksonville, Fla., as he had contracted to do, that he did not use, sell, or otherwise dispose of any of said liquors while they so remained on his said premises, but that before he completed his preparation to remove both himself and said liquors to said Jacksonville, Fla., on, to wit, the 19th day of May, 1916, said liquors were seized," etc.

On these facts it must be declared, as matter of law, that these liquors were not in transit between Columbus and Jacksonville, and were not protected by the laws of interstate commerce against the operation of the contraband liquor laws of Alabama at the time of their seizure in Girard. The contention is not even plausible. Far from there being any shipment from Columbus to Jacksonville, the liquors were privately "removed" by Cogbill to Girard, for the purpose of carrying them from Girard to Jacksonville. In Girard they were stored on the private premises of Cogbill, to there remain for some indefinite period of time, while Cogbill was "preparing" himself and the liquors for their future removal to Jackson-

ville. The contract stipulated that Cogbill should immediately ship the liquors from Columbus to Jacksonville. What occasion there was for such a stop-over and storage in Girard, and how long the period of Cogbill's preparation for removal to Jacksonville was to be protracted is not made to appear. To summarize: (1) There was no shipment of these liquors from Columbus; (2) conceding that there was such a shipment, yet the liquors were withdrawn from transit and were at rest in storage in Alabama for an indefinite time, and it does not appear that this delay was at an intermediate point on the route from Columbus to Jacksonville, nor that it was in any sense incidental to the shipping conditions accompanying the transportation, or to the limited facilities of available carriers.

These considerations are decisively fatal to the claimant's contention. *Ooe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715; *Kelley v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359; *T. & N. O. R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 124, 33 Sup. Ct. 229, 57 L. Ed. 442; *Bowman v. Chi. & N. W. Ry.*, 125 U. S. 465, 8 Sup. Ct. 689, 31 L. Ed. 700.

The numerous cases cited in brief of counsel for appellant are based on facts quite different from these, and are not apt for present use.

The peremptory instruction for the state was properly given.

We find no error in the rulings of the trial court, and the judgment and order appealed from will be affirmed.

Affirmed. All the Justices concur.

(199 Ala. 565)

**GULLATT v. STATE ex rel. DEDGE.**  
(5 Div. 637.)

(Supreme Court of Alabama. April 12, 1917.)

**1. INTOXICATING LIQUORS — 249 — SEARCH AND SEIZURE—DESCRIPTION—VARIANCE BETWEEN WARRANT AND AFFIDAVIT.**

Where a liquor search warrant varied from affidavit in describing property as "3 door W." instead of "2d door W.," both describing property as "the property of Mrs. Cochran," the variance was not fatal as against a motion to quash, when not shown by a plea in abatement that there were two distinct buildings to which the descriptions were applicable.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 376-385.]

**2. INTOXICATING LIQUORS — 249 — SEARCH AND SEIZURE—DESCRIPTION—VARIANCE BETWEEN WARRANT AND AFFIDAVIT—OBJECTION.**

Where question of variance in description of property upon which intoxicating liquors were seized was not presented in circuit court either by motion or plea, it was properly ignored.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 376-385.]

Appeal from Circuit Court, Russell County; J. S. Williams, Judge.

Proceedings by the State of Alabama, on relation of J. W. Dedge, for condemnation and destruction of intoxicating liquors. Judgment of forfeiture and order for destruction granted, and claimant A. L. Gullatt appealed to circuit court, where judgment was affirmed and claimant appeals. Affirmed.

Glenn & De Graffenried and H. A. Ferrell, all of Seale, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for appellee.

**SOMERVILLE, J.** This case was submitted with 5 Div. 640, *Ben Edmunds v. State*, 74 South. 965, and all the questions here presented, with a single exception to be noted, were there decided adversely to appellant.

[1] In this case the affidavit describes the premises to be searched as "a frame bld. located on Girard car line 2d door W. of first branch or creek, known as a dwelling house known as the property of Mrs. Cochran, also all other houses on said premises." The warrant follows this description exactly, excepting only that "2d door W." in the affidavit read "3 door W." in the warrant.

Motion was made by the claimant in the justice's court "to quash the affidavit, warrant, seizure and return in this cause," on the ground among others of this alleged variance between the affidavit and the warrant. This motion was overruled by the justice.

It is sufficiently obvious that this numerical variance in the designation of the building to be searched was, in view of the precise identity of the description in all other particulars, a mere inadvertence on the part of the magistrate. As against a motion to quash from the face of the record the identity of the buildings described is sufficiently imported by the common designation of the building as one "known as the property of Mrs. Cochran." The proper method of raising the question of a variance was by a plea in abatement showing that there were two distinct buildings to which the several descriptions were severally applicable. A mere variance as to the number of a building, if the description otherwise identifies it, is not a good ground of objection. *Com. v. Intox. Liq.*, 117 Mass. 427; 2 Wool. & Thornt. *Intox. Liq.* § 618.

[2] This question was not presented in the circuit court, either by motion or plea, and it was properly ignored by that court.

Finding no error in the record, the judgment and order of the circuit court will be affirmed.

Affirmed.

**ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.**

(199 Ala. 700)

**PHELPS v. STATE** ex rel. DEDGE.**RICHARDS v. SAME.****KITRELL v. SAME.**

(5 Div. 638, 641, 649.)

(Supreme Court of Alabama. April 12, 1917.)

Appeal from Circuit Court, Russell County; J. S. Williams, Judge.

Proceedings in justice court by the State of Alabama, on relation of J. W. Dedge, for condemnation and destruction of intoxicating liquors. Judgment of forfeiture and order for destruction granted, and claimants O. C. Phelps, D. L. Richards, and J. D. Kitrell appealed to circuit court, where judgment was affirmed, and claimants appeal. Affirmed.

Glenn & De Graffenried and H. A. Ferrell, all of Seale, and T. H. Seay, of New York, for appellants. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for appellee.

**SOMERVILLE, J.** All the questions presented in these cases have been ruled adversely to the appellants in the companion case of Ben Edmunds v. State, 74 South. 965, and on the authority of that case the several judgments herein will be affirmed.

Affirmed. All the Justices concur.

(199 Ala. 519)

**SHELTON v. LARKIN et al.** (8 Div. 941.)

(Supreme Court of Alabama. April 5, 1917.)

1. **APPEAL AND ERROR**  $\S$  1050(1)—**HARMLESS ERROR—ADMISSION OF EVIDENCE.**

Error, if any, in allowing plaintiff in forcible entry and detainer, in which the real dispute was as to a boundary fence, to testify that he advised with his attorney about the differences between the parties, and then gave defendant notice to quit building a fence, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157.]

2. **BOUNDARIES**  $\S$  35(1) — **EVIDENCE—CONVERSATIONS BETWEEN PARTIES.**

A conversation between the parties and others in their presence as to the dividing line between the parties, involved in the action, is admissible.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 153, 177.]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Action by Pleas Larkin and others against W. P. Shelton. Judgment for plaintiffs, and defendant appeals. Affirmed.

Milo Moody, of Scottsboro, for appellant.

**MAYFIELD, J.** The action was forcible entry and detainer, by appellees against appellant, and resulted in judgment for plaintiffs. Defendant appeals.

The only assignments of error go to rulings of the court in admitting evidence over appellant's objections. They have each been carefully examined, and we find no error as to any ruling; but if error there was, it was clearly without injury. The real, the only, dispute between the parties was as to a boundary wire fence between the lands of the respective parties.

[1] One of the objections goes to the court's allowing plaintiff to testify that he advised

with an attorney about the differences between the parties, and, after so advising, gave defendant notice to quit building a fence. Certainly there is shown no error or injury here.

The second assignment of error is practically the same as the first, and counsel for appellant says so in brief.

[2] The last two assignments (third and fourth) raise the correctness of the action of the court in allowing proof to be made of a conversation between the parties, and others in their presence, as to the dividing line between the parties. Assuredly, there was no error or injury here.

Affirmed.

**ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.**

(199 Ala. 551)

**MAYO v. MAYO.** (7 Div. 848.)

(Supreme Court of Alabama. April 5, 1917.)

**DIVORCE**  $\S$  37(1)—**ABANDONMENT.**

To make a case of abandonment such as will authorize divorce, there must be a final departure, without the consent of the other party, without sufficient reason, and without the intention to return.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 107.]

Appeal from Clay County Court; El. J. Garrison, Judge.

Bill for divorce by A. B. Mayo against Temple Mayo. From a decree granting divorce, defendant appeals. Reversed and rendered.

Cornelius & Vann, of Ashland, and Riddle & Riddle, of Talladega, for appellant. Lackey & Rowland and S. W. Fruet, all of Ashland, for appellee.

**THOMAS, J.** This is a bill for divorce on the general grounds of abandonment. From the decree granting the divorce the appeal is taken.

Under the authority of *Brown v. Brown*, 178 Ala. 121, 59 South. 48, the record does not show a voluntary abandonment of the husband by the wife. There is disclosed a case of domestic infelicity between complainant and respondent (respectively, appellee and appellant here), respondent being the second wife of complainant, and complainant being the father of children by the first wife; but the willingness of the respondent wife to live with the complainant husband, if only he would provide for her such a humble home as that from whence he moved to the "Car-wile house," is shown by the evidence. To make a case of abandonment such as will authorize a divorce, there must be a final departure, without the consent of the other party, without sufficient reason therefor, and without the intention to return. *Jones v. Jones*, 95 Ala. 443, 11 South. 11, 18 L. R. A.

95; *Dabbs v. Dabbs*, 71 South. 696; *Gobel v. State*, 72 South. 756; 14 Cyc. 611, and authorities there collected.

It is not necessary that we discuss the evidence; it is sufficient to say that it has been read at length by this court, and carefully considered, and that it is the opinion of the court that the decree of the chancellor should be reversed. A decree will be here rendered reversing the decree of the chancellor, denying all the relief prayed in complainant's bill, and dismissing the bill of complaint. And appellee is taxed with all the costs in this court and in the lower court.

Reversed and rendered.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(16 Ala. App. 4)

JOHNSON v. STATE ex rel. JONES.  
(8 Div. 467.)

(Court of Appeals of Alabama. March 23, 1917.  
Rehearing Denied April 10, 1917.)

1. BASTARDS §55 — EVIDENCE — CONVERSATION NOT IN DEFENDANT'S PRESENCE.

Conversation between defendant's father and prosecutrix in bastardy proceedings was inadmissible, although defendant was "standing in the door," it not being shown what door was meant, nor the parties' distance therefrom, nor tone and volume of voices.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. § 153.]

2. BASTARDS §60 — EVIDENCE — ADMISSION BY ACCUSED — SILENCE.

Defendant's silence in the face of accusation is admissible as a confession or admission only where he is shown to have heard and understood accusation and remained silent.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 166, 169.]

3. BASTARDS §55 — EVIDENCE — CONVERSATION NOT IN DEFENDANT'S PRESENCE.

Statement as to conversation, not shown to have been in defendant's presence, brought out on cross-examination of defendant's witness, did not admit proof of entire conversation, on the theory that defendant had offered a part thereof and the state had a right to show all that was said.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. § 153.]

4. BASTARDS §55 — CRIMINAL PROSECUTION — EVIDENCE.

The fact that the child's eyes resembled in color the eyes of its maternal grandfather was inadmissible in a bastardy proceeding, having no tendency to show that defendant was the father of the child which was the issue.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. § 153.]

5. BASTARDS §92 — APPEAL AND ERROR — COURT'S DISCRETION — CROSS-EXAMINATION.

The court's ruling in allowing cross-examination to extend to irrelevant matters will not be reviewed; this being a matter of discretion.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 228-239.]

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

Grady Johnson was convicted of bastardy, and he appeals. Reversed and remanded.

John A. Lusk & Son, of Guntersville, for appellant. William L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for appellee.

BROWN, P. J. [1] The conversation between Ollie Johnson, the father of the defendant, and the prosecutrix is not shown to have been in the presence of the defendant. It was shown that the defendant and Donehue, the constable, "were standing in the door"; but whether the door was the door to the room in which the conversation took place, or some other door, the distance of the door from the parties in conversation, the volume and tone of their voices, were not shown.

[2] For silence in the face of accusation to be admissible as a confession or an admission against interest, it must be shown that the party accused heard and understood the charge and that he was silent. *Rowlan v. State*, 14 Ala. App. 17, 70 South. 953; *Martin v. State*, 39 Ala. 523.

[3] The admission of the testimony as to this conversation over the defendant's objection cannot be justified on the ground that the defendant had offered a part of the conversation, and the state was entitled to show all, as was held in *Webb v. State*, 100 Ala. 47, 14 South. 865. While it is shown that the witness Ollie Johnson had testified as a witness in behalf of the defendant before this conversation was offered and had testified that he said to Mrs. Jones that he was ready for trial, this statement was brought out on cross-examination by the solicitor, and cannot be made the basis for the admission of the entire conversation on the theory that defendant had offered a part of the conversation and the state had the right to show all that was said.

[4] If a fact is irrelevant, it cannot be shown by autoptic preference or otherwise. *Wigmore, Evidence*, § 1154. The fact that the child's eyes resembled in color the eyes of its maternal grandfather clearly had no tendency to show that the defendant was the father of the child, and that was the issue before the jury. *Paulk v. State*, 52 Ala. 427.

[5] The other matters complained of pertain to the rulings of the court in allowing the cross-examination of the witness to extend to irrelevant matters. This was a matter of discretion that will not be reviewed. *Cox v. State*, 162 Ala. 68, 50 South. 398.

Reversed and remanded.



(73 Fla. 363)

**MURPHY v. HOHNE.**

(Supreme Court of Florida. March 31, 1917.  
On Application for Rehearing,  
April 19, 1917.)

(Syllabus by the Court.)

**1. APPEAL AND ERROR ⇨449—SPECIFIC PERFORMANCE ⇨8—DISCRETION OF COURT—APPEAL.**

Applications for the enforcement of specific performance of contracts for the sale of real estate are addressed to the sound judicial discretion of the chancellor. Such discretion is controlled by the provisions and principles of law and equity applicable to the particular facts and circumstances; and, unless it clearly appears that the chancellor has erred in his decree in refusing a specific performance, it will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3835; Specific Performance, Cent. Dig. §§ 17, 18.]

**2. SPECIFIC PERFORMANCE ⇨8—SALE OF LAND—ENFORCEMENT.**

The enforcement by a court of equity of a specific performance of a contract is not a matter of right in either party to such contract, but a matter for the exercise of a sound judicial discretion by the court, and should only be exercised when a decree for specific performance would be strictly equitable as to all the parties under the facts as they exist.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 17, 18.]

**3. SPECIFIC PERFORMANCE ⇨47—SALE OF LAND—IMPROVEMENTS.**

Improvements afford no independent ground for specific performance unless they are both valuable and permanent and are warranted by the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 132.]

**4. SPECIFIC PERFORMANCE ⇨1—SALE OF REAL ESTATE—GROUNDS.**

An enforcement in equity of the specific performance of a contract to convey real estate is not a matter of right except as such enforcement may be essential to the maintenance of a legal right to which the movant is clearly and equitably entitled.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 1.]

Appeal from Circuit Court, Hillsborough County; F. M. Robles, Judge.

Bill by James H. Murphy against Emmett Hohne. Demurrer to bill sustained, and complainant appeals. Order affirmed.

Hilton S. Hampton and Fred J. Hampton, both of Tampa, for appellant. Chas. B. Parkhill, of Tampa, for appellee.

**WHITFIELD, J.** The bill of complaint herein is as follows:

"James H. Murphy, by his solicitor, Hilton S. Hampton, brings this his amended bill of complaint against Emmett Hohne, and thereupon your orator complains and says: That on the 18th day of June, 1915, the defendant was seized and possessed of the following premises lying in Hillsborough county, Fla.: Lots 1, 2, and 3 of block 3 of Luna Park, as per revised map of the same recorded in the records of Hillsborough county, Fla. And desiring to sell the same to the complainant, thereupon the complainant then and there agreed to pay the sum of \$449 in cash, and the complainant fur-

ther agreed to assume and pay all taxes now due and owing on said premises, together with three paving certificates, one for \$118.15, another for the same amount, and a third for the sum of \$175.20, together with the taxes thereon amounting to approximately the sum of \$150, and further agreed to furnish an abstract at a cost of \$21.50.

"And the said defendant agreed for the consideration above named to execute and deliver a warranty deed of conveyance conveying the property to your orator, clear of incumbrances, save and except the taxes and paving above specified, and in pursuance of said agreement your orator then and there paid to the defendant \$50 cash, and was then and there let into the possession of the property, and proceeded to improve the same; that after the consummation of said agreement the defendant stated to your orator that he had a wife who was in Brewton, Ala.; therefore he could not immediately deliver a deed, but, having previously given your orator a receipt, which is attached to this bill as a part of the same and marked Exhibit A, agreed that he would take with him a warranty deed and would have the same executed in Brewton, Ala., would procure his wife's signature and separate acknowledgment to the same, and would send it to the American National Bank of Tampa, Fla., at which time your orator was to pay the balance of the purchase price, amounting to \$289.

"Your orator further represents that at the time of purchase your orator agreed to pay the defendant a price then considered by your orator in excess of the value of the land, for the reason that your orator's wife has become very much attached to said lot and desired the same for a home by reason of its location, and has frequently begged your orator to ascertain the owner of the same and purchase it.

"Your orator further represents that, although he has paid the part of the purchase price demanded, has been let into possession of the said property and is now in possession of the same, has expended divers sums of money in improving said property, in grubbing, grading, and clearing the same for building, has purchased the abstract as above specified, has done all things on his part agreed to be done and performed, and is ready, willing, and able to carry out all conditions, payments, and stipulations on his part agreed to be done and performed, yet the defendant, notwithstanding the premises and the said payments, but with a fraudulent design to extort the payment of additional money from your orator, in bad faith and with the purpose of escaping his just obligations, has refused to make and execute and deliver said deed, and, as the defendant is insolvent, your orator has been compelled, having no other remedy save in a court of equity, to file this bill of complaint.

"Your orator further represents that the said complainant is now the holder of the legal title to the foregoing property, and same is clear of incumbrance, save and except the taxes and paving certificate, which under the agreement of purchase your orator has assumed as part consideration, and your orator is ready, able, and willing to make said payments, and hereby offers and tenders to pay the balance of the purchase price upon tender of a deed in accordance with the contract of the parties.

"The premises considered, your orator prays:

"(1) That the said Emmett Hohne, who is made a party defendant to this bill, may be decreed to answer the same, answer under oath being hereby waived.

"(2) That on final hearing this court will order and decree that the defendant do specifically perform the agreement hereinbefore set forth by making, executing, and delivering to your orator, upon payment of the balance of the pur-

chase price, as agreed, a deed of conveyance as contracted, conveying the property described in this bill of complaint to your orator, clear of incumbrance save and except taxes and paving certificates, and in the event of his failure to do so that the decree of this court may operate as such conveyance; that he do procure to the said deed, as agreed, the signature of his wife, relinquishing her dower therein in the manner required by the laws of the state of Florida, and in case of his failure to procure the signature of his said wife, and her separate acknowledgment to said deed in the form required by law, that the value of the existing dower interest of his said wife may be computed, and that your orator may have credit therefor on the purchase price of the land sought to have conveyed, or have indemnity therefor.

"(3) That your orator may have such other and further relief in the premises as may be agreeable to equity, and as the circumstances of this case shall warrant.

"(4) That a writ of subpoena do issue directed to the defendant, Emmett Hohne, requiring him on a day and under a penalty to be therein fixed to be and appear before this honorable court, full, true, and perfect answer to make to all and singular the allegations in this bill of complaint, and to stand to and perform such other and further order in the premises as may be proper."

Exhibit A is as follows:

"Received from James H. Murphy the sum of fifty (\$50.00) dollars, being part payment for the purchase price of the following property in Hillsborough county, Fla.:

"Lots 1, 2, and 3 in block 3 of Luna Park, a subdivision, as per recorded plat thereof.

"I agree to furnish a warranty deed, clear of incumbrances, save taxes since 1903, and assessments for paying to the said Murphy upon his paying to me the balance of the purchase price, to wit, \$289, the total purchase price of the property being \$339.99, plus taxes and paving which Mr. Murphy agrees to pay since 1903.

"Witness my hand and seal on this 18th day of June, A. D. 1915.

"Emmett Hohne. [Seal]"

A demurrer to the bill of complaint was filed on the following grounds:

"(1) The bill is without equity.

"(2) The allegations of the bill of complaint do not entitle the complainant to the relief prayed for therein.

"(3) The allegations of the bill of complaint show that the complainant is not entitled to the relief prayed for therein.

"(4) The allegations of said bill seek to vary the terms of the written contract by parol testimony."

This demurrer was sustained, and the complainant appealed.

[1] Applications for the enforcement of specific performance of a contract for the sale of real estate are addressed to the sound judicial discretion of the chancellor. Such discretion is controlled by the provisions and principles of law and equity applicable to the particular facts and circumstances; and, unless it clearly appears that the chancellor has erred in his decree in refusing a specific performance, it will not be disturbed on appeal. *Gaskins v. Byrd*, 66 Fla. 432, 63 South. 824.

[2] The enforcement by a court of equity

of a specific performance of a contract is not a matter of right in either party to such contract, but a matter for the exercise of a sound judicial discretion by the court, and should only be exercised when a decree for specific performance would be strictly equitable as to all the parties under the facts as they exist. *Rose v. Henderson*, 63 Fla. 564, 59 South. 138.

[3] Improvements afford no independent ground for specific performance unless they are both valuable and permanent and are warranted by the contract. *L'Engle v. Overstreet*, 61 Fla. 653, 55 South. 381.

[4] An enforcement in equity of the specific performance of a contract to convey real estate is not a matter of right except as such enforcement may be essential to the maintenance of a legal right to which the movant is clearly and equitably entitled. As the complainant below has no right to enforce specific performance against the wife, and as when the contract was made the complainant, not knowing the defendant was a married man, contemplated a conveyance by the defendant of the entire property rights in the land, which could not have been contracted for if contemplated by the defendant, he knowing he had a wife, and no contract by her being made as required by the statute, the court will not require specific performance in part and compensation for the remainder; that relief not appearing in this case to be essential to the maintenance of the legal rights of the complainant growing out of the contract as it was accepted by him. It does not clearly appear that appropriate proceedings at law will not afford a complete remedy. The defendant apparently owns the property in controversy.

An abuse of discretion is not shown in the order sustaining the demurrer to the bill of complaint which was appealed from, and such order is affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, and ELLIS, JJ., concur.

On Application for Rehearing.

PER OURIAM. The allegations of the complainant clearly show that in accepting the contract to convey he did not contemplate the existence of or the conveyance of a dower interest in the land; and, though the complainant may have been deceived as to the defendant's right to convey the land, this does not afford an equity for specific performance. Deception may give a right of action at law or in equity for appropriate relief; but specific performance is not a general remedy for deception, and the allegations in this case do not show a clear right to enforce in part a contract to convey land. Rehearing denied. All the Justices concur.

(73 Fla. 866)

## ALBRITTON et al. v. SCOTT.

(Supreme Court of Florida. April 6, 1917.)

*(Syllabus by the Court.)*1. EXEMPTIONS  $\S$  93, 133—WAIVER—SALE OF HOMESTEAD—VALIDITY.

When a homestead to which the exemption from forced sale is attached is sold in violation of the exemption rights conferred by the Constitution, such sale is void. A mere failure to resist the sale is not a waiver of the exemption rights.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 116, 117, 161.]

2. APPEAL AND ERROR  $\S$  967(1)—DISCRETION OF TRIAL COURT TAKING TESTIMONY.

Where specific performance is sought, a chancellor will not be held in error for requiring testimony to be taken on complicated matters of fact presented for decision on bill and answers and exceptions to the answer when no abuse of discretion appears.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3841.]

Appeal from Circuit Court, De Soto County; F. A. Whitney, Judge.

Suit by W. A. Scott against J. W. Albritton and others. Decree for plaintiff in part with a reference for taking evidence, and defendants appeal. Affirmed.

John W. Burton, of Arcadia, and John B. Singeltary, of Bradentown, for appellants. Treadwell & Treadwell, of Arcadia, for appellee.

**PER CURIAM.** This appeal is from a decree that is in part at least interlocutory; and, as further proceedings should be had to properly determine the equities involved, a full statement of the voluminous pleadings will not now be made.

Scott brought suit to cancel conveyances made by the sheriff and the purchasers at a forced sale of property then owned by Scott and occupied by him and his family as a homestead, and also to enforce specific performance of a contract for the sale of the property made with J. W. Albritton, as vendee, before the sheriff's sale, and for other purposes not necessary to be stated. A hearing was had on bill, answer, and exceptions to the answer. The court decreed a cancellation of the conveyance of the property under forced sale; no waiver of the homestead exemption rights appearing. The decree further ordered:

"That for the purpose of doing complete equity between the parties according to the prayer of the bill that this cause be referred to a master in chancery, to be agreed upon by counsel, for the purpose of taking such evidence as the parties are advised with reference to the issues involved in the pleadings, as to what the contract was between the complainant and the defendant.

"That the complainant take such action with reference to properly relieving the records by satisfaction, or otherwise, as he is advised is necessary, of the International Harvester Company judgment, and that the complainant also produce an abstract showing authentically the condition of said title and file the same for the inspection of counsel for defendant, and that

said master report such evidence and his conclusions as to the condition of such title, and any defects therein, if any remain unclear, and also an account of the money expended, with interest, by the said defendant Albritton in relieving said title from the incumbrance of the mortgage to the State Bank of Bowling Green, as well as taxes or tax sales."

[1] On appeal from this decree the defendants below advance numerous contentions that reversible error was committed, but they do not show an abuse of discretion in the chancellor. When a homestead to which the exemption from forced sale is attached is sold in violation of the exemption rights conferred by the Constitution, such sale is void. A mere failure to resist the sale is not a waiver of the exemption rights.

[2] It cannot be said on this record that the chancellor erred in requiring evidence to be taken on the complicated material matters presented by the pleadings.

The order appealed from is affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITEFIELD, and ELLIS, JJ., concur.

(73 Fla. 432)

## ANDERSON v. SOUTHERN COTTON OIL CO.

(Supreme Court of Florida. Feb. 23, 1917.  
Rehearing Denied May 4, 1917.)

*(Syllabus by the Court.)*1. APPEAL AND ERROR  $\S$  927(7)—DIRECTED VERDICT—REVIEW.

In determining whether error was committed in directing a verdict, due consideration should be given to the organic right of trial by jury. Otherwise fundamental principles may be subordinated to procedure or convenience.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3748.]

2. NEW TRIAL  $\S$  6—TRIAL  $\S$  171—DIRECTED VERDICT.

The considerations and legal principles that guide the judicial discretion in directing a verdict and in granting a new trial on the evidence are not the same.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 9, 10; Trial, Cent. Dig. § 396.]

3. TRIAL  $\S$  173—DIRECTED VERDICT—RULE.

In directing a verdict, the court is governed by practically the same rules that are applicable in demurrers to evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403.]

4. TRIAL  $\S$  178—MOTION FOR DIRECTED VERDICT—ADMISSIONS.

A party in moving for a directed verdict admits, not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403.]

5. TRIAL  $\S$  139(1)—DIRECTION OF VERDICT.

It is reversible error to direct a verdict for one party when there is substantial evidence tending to prove the issue upon which the jury could lawfully find a verdict for the opposite party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341.]

**6. MASTER AND SERVANT ⇐332(2) — INJURY TO THIRD PERSON—SCOPE OF AUTHORITY—QUESTION FOR JURY.**

Where different conclusions may fairly be drawn from the evidence as to whether an employé driver of an automobile was acting within the express or implied authority of the defendant employer at the time his alleged negligence caused the injury complained of, the evidence should be submitted to the jury under appropriate instructions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1275.]

**7. MASTER AND SERVANT ⇐332(2)—INJURY TO THIRD PERSON — LIABILITY — QUESTION FOR JURY.**

Where with the acquiescence of the employer an employé while engaged with the employer's automobile in the general line of his authority uses the automobile for his own purposes, and while doing so injures one on the street, the jury should be permitted to determine under appropriate instructions whether the defendant employer is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1275.]

Ellis and Shackelford, JJ., dissenting.

Error to Court of Record, Escambia County; Kirke Monroe, Judge.

Suit by Louis J. Anderson against the Southern Cotton Oil Company. Judgment for defendant on directed verdict, and plaintiff brings error. Reversed.

F. W. Marsh and C. Moreno Jones, both of Pensacola, for plaintiff in error. Watson & Pasco, of Pensacola, for defendant in error.

**WHITFIELD, J.** The declaration herein is as follows:

"The plaintiff, Louis J. Anderson, sues the Southern Cotton Oil Company, a corporation, for that, to wit: On the — day of April, A. D. 1914, said defendant was the owner and did operate its business and for the use and convenience of its agents and servants a certain automobile, and permitted and authorized the use and operation of said automobile by its said agents and servants for the purpose of transporting themselves from defendant's place of business to their meals in Pensacola, Fla., and to return therefrom to their employment at defendant's place of business; that on said day said automobile was being run and operated by its agent and servant in and upon the streets of the city of Pensacola, county of Escambia, state of Florida, with the permission of and by the authority of said defendant, in transporting himself from his lunch in said city to his place of employment, to wit, the place of business of said defendant.

"That while said plaintiff was riding on a motorcycle and proceeding with due care along West Garden street, in said city, county and state, said defendant's automobile being so run and operated by its agent and servant, and at a time and place and with the permission and authority of the defendant as aforesaid, and within the scope of his authority as such agent and servant, to wit, in transporting himself back to the place of business of said defendant, so carelessly and negligently run, drove and operated said automobile, and without any negligence on the part of the plaintiff, at the intersection of Garden and Donelson streets in said city, that same violently came in contact with and did strike against with great force and violence, the leg, foot, and ankle of plaintiff, whereby plain-

tiff was greatly injured and maimed, his leg, foot, and ankle broken, fractured, bruised, and lacerated, and plaintiff suffered other great physical injury and contusions. That as result of said injuries, plaintiff suffered, and still suffers, great pain and bodily discomfort, and was for a long time confined to his bed, and has been put to a large expense for medical and surgical treatment and attendance, and has been for a long time, and still is, prevented from working or following his vocation, or earning a livelihood, and is permanently disabled and injured, and will be permanently prevented from working at his trade and occupation or of performing manual labor. And plaintiff claims damage in the sum of \$15,000. Wherefore he sues.

**"Second Count.**

"The plaintiff, L. J. Anderson, sues the defendant, Southern Cotton Oil Company, a corporation, doing business in the county of Escambia, state of Florida, for that, to wit, on the — day of April, A. D. 1914, said defendant was possessed of and owned a certain automobile, and on said date was by its agent and servant driving, operating, and conducting same on and upon the streets of the city of Pensacola, county and state aforesaid; that while the plaintiff was riding upon a motorcycle at the intersection of Garden and Donelson streets in the city, county, and state aforesaid, and was proceeding with due care and without any negligence on his part, said defendant by its agent and servant so carelessly and negligently drove, managed, and operated said automobile that thereby said automobile was driven with great force and violence against the leg, foot, and ankle of plaintiff. Whereby plaintiff was greatly injured and maimed, his leg, foot, and ankle broken, fractured, bruised, and lacerated, and plaintiff suffered other great physical injury and contusions. That as a result of said injuries said plaintiff suffered, and still suffers, great pain and bodily discomfort, and was a long time confined to his bed, and has been put to a large expense for medical and surgical treatment and attendance, and has been for a long time, and still is, prevented from working at his trade and occupation, and is permanently maimed, crippled, and injured. And plaintiff claims damages in the sum of \$15,000. Wherefore he sues."

To the first count pleas of not guilty and contributory negligence were filed, while to the second count a plea of not guilty was filed.

At the trial the court directed a verdict for the defendant, on which judgment was rendered, and the plaintiff took writ of error.

[1] As the court directed a verdict for the defendant after all the evidence for both parties had been submitted, the question to be determined is whether "no sufficient evidence has been submitted upon which the jury could legally find a verdict for" the plaintiff. Chapter 6220, Acts of 1911 (Comp. Laws 1914, § 1496), amending section 1496, Gen. Stats. of 1906.

In determining whether error was committed in directing a verdict, due consideration should be given to the organic right of trial by jury. Otherwise fundamental principles may be subordinated to procedure or convenience.

[2-8] The considerations and legal principles that guide the judicial discretion in

directing a verdict and in granting a new trial on the evidence are not the same. *Florida East Coast Ry. v. Hayes*, 66 Fla. 589, 64 South. 274, decided at the last term. In directing a verdict, the court is governed by practically the same rules that are applicable in demurrers to evidence. A party, in moving for a directed verdict, admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. 6 Ency. Pl. & Pr. 692 et seq. The statute enacts that:

"If \* \* \* after all the evidence shall have been submitted on behalf of the plaintiff in any civil case, it be apparent \* \* \* that no evidence has been submitted upon which the jury could lawfully find a verdict for the plaintiff, the judge may then direct the jury to find a verdict for the defendant; and if, after all the evidence of all the parties shall have been submitted, it be apparent to the judge \* \* \* that no sufficient evidence has been submitted upon which the jury could legally find a verdict for one party, the judge may direct the jury to find a verdict for the opposite party." Chapter 6220, Acts of 1911.

Under this statute, unless "it be apparent to the judge that no sufficient evidence has been submitted upon which the jury could legally find" for one party, the court is not authorized to direct a verdict for the opposite party. The action of the court under the statute should be such as not to invade the organic "right of trial by jury." When the facts are not in dispute, and the evidence, with all the inferences that a jury may lawfully deduce from it, does not, as matter of law, have a tendency to establish the cause of action alleged, the judge may direct a verdict for the defendant. But the court should never direct a verdict for one party unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. Where there is room for a difference of opinion between reasonable men as to the proof of facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the court should submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail, and not primarily the views of the judge. In an action for negligence where there is any substantial testimony from which the jury could find the issues in favor of the plaintiff, a peremptory charge for the defendant should not be given. A case should not be taken from the jury by directing a verdict for the defendant on the evidence, unless the conclusion follows as a matter of law that no recovery can be lawfully had upon any view taken of facts that the evidence tends to establish. The credibility and probative force of conflicting testimony should not be determined on a motion for a directed verdict. The duty devolving upon the court in

reference to directing a verdict on the evidence may become, in many cases, one of delicacy, and it should be cautiously exercised. *Gunn v. City of Jacksonville*, 67 Fla. 40, 64 South. 435; *Rogers v. Meinhardt*, 37 Fla. 480, 19 South. 878.

When it is clear that no error was committed by the trial court in directing a verdict for one of the parties, an appropriate judgment rendered on such directed verdict will not be disturbed. *Tedder v. Fralleggh-Lines-Smith Co.*, 55 Fla. 496, 46 South. 419; *Wade v. Louisville & N. R. Co.*, 54 Fla. 277, 45 South. 472; *Bass v. Ramos*, 58 Fla. 161, 50 South. 945, 138 Am. St. Rep. 105; *Wilson v. Johnson*, 51 Fla. 370, 41 South. 395; *Stone v. Citizens' State Bank*, 64 Fla. 456, 59 South. 945; *Mugge v. Jacksonville*, 53 Fla. 323, 43 South. 91; *Investment Co. v. Trueman*, 63 Fla. 184, 57 South. 663; *Bell v. Niles*, 61 Fla. 114, 55 South. 392; *Gunn v. City of Jacksonville*, 67 Fla. 40, 64 South. 435; *Bland v. Fidelity Trust Co.*, 71 Fla. 499, 71 South. 630, L. R. A. 1916F, 209; *American Mercantile Co. v. Circular Advertising Co.*, 71 Fla. 522, 71 South. 607; *Berryhill-Cromartie Co. v. Manitowoc Shipbuilding & Dry Dock Co.*, 66 Fla. 170, 63 South. 720.

When the evidence adduced as to the material issues in a cause is not conflicting, and the evidence, with all the inferences that a jury may lawfully deduce from it favorable to the plaintiff, does not afford a sufficient legal basis for a verdict for the plaintiff, the trial judge may direct a verdict for the defendant.

Conflicts in the evidence as to mere immaterial matters will not require a submission of a cause to the jury if on the whole evidence there is a legal predicate for a verdict for one party only, in which case a verdict for that party may be directed.

But it is reversible error to direct a verdict for one party when there is substantial evidence tending to prove the issue upon which the jury could lawfully find a verdict for the opposite party. *Haile v. Mason Hotel & Investment Co.*, 71 Fla. 469, 71 South. 540; *Gunn v. City of Jacksonville*, 67 Fla. 40, 64 South. 435; *King v. Cooney-Eckstein Co.*, 66 Fla. 246, 63 South. 659, Ann. Cas. 1916C, 163; *Hammond v. Jacksonville Electric Co.*, 66 Fla. 145, 63 South. 709; *Johnson v. Louisville & N. R. Co.*, 59 Fla. 305, 52 South. 195.

A case should not be taken from the jury unless the conclusion follows from the evidence as matter of law that no recovery can be lawfully had upon any view taken of facts that the evidence tends to establish. *Jacksonville Terminal Co. v. Smith*, 67 Fla. 10, 64 South. 354.

Where different conclusions may fairly be drawn from the evidence as to whether an employé driver of an automobile was acting within the express or implied authority of the defendant employer at the time his alleged negligence caused the injury complained of, the evidence should be submitted to the

jury under appropriate instructions. See *Reynolds v. Denholm*, 213 Mass. 576, 100 N. E. 1006; *George v. Carstens Packing Co.*, 91 Wash. 637, 158 Pac. 529; *Dockweiler v. American Piano Co.*, 94 Misc. Rep. 712, 100 N. Y. Supp. 270; *McKeever v. Ratcliffe*, 218 Mass. 17, 105 N. E. 552.

[7] It appears that the Southern Cotton Oil Company owned the automobile and authorized its daily use by the driver, who was the cashier of the company, in going to and fro between the company's milling plant in the suburbs of Pensacola, Fla., and the business center of the city to transact the business of the company and incidentally the driver to get his dinner. The driver had while in the city during the noon hour frequently used the automobile in taking a young lady to her place of business from her home several blocks away from the direct route to the plant. This was known to the managing officer of the company, and not objected to by him. The young lady did not work for the defendant. On the day of the accident the driver while in the city, as he had frequently done, drove to the young lady's home to take her to her office. Upon arriving at her home he was requested to go to a nearby residence for her raincoat. While going for the raincoat the injury occurred by a collision in the street. Was the defendant company liable for the acts of the driver at the time of the accident?

It has been held that where without the employer's knowledge or consent there is a deviation in the use of an automobile from the direct line of the employer's business solely for the purposes of the employé or where there is a temporary abandonment of the employer's business for the employé's own purposes, and an injury was inflicted by negligent driving while the employé was returning to the sphere of the employer's business, the question as to whether the employer is liable should be submitted to the jury under appropriate instructions. *George v. Carstens Packing Co.*, 91 Wash. 637, 158 Pac. 529; *Jones v. Weigand*, 134 App. Div. 644, 119 N. Y. Supp. 441; *Slothower v. Clark*, 191 Mo. App. 105, 179 S. W. 55; *Carrier v. Donovan*, 88 Conn. 37, 89 Atl. 894.

If where the employé without the knowledge or consent of his employer has been on a journey for himself in his employer's automobile and while returning to the sphere of the employer's business negligently injures another in the public highway, the question of the employer's liability should be submitted to the jury, no good reason appears why a question is not made for the jury when the injury occurs while the employé with the employer's acquiescence is going to or is at a place solely for the employé's own business or pleasure.

While automobiles may not be classed as per se dangerous instrumentalities, yet because of their speed and weight they may suddenly become extremely dangerous by

negligent or inefficient use. The lawmaking power of the state, in recognition of the many and great dangers incident to their use, has enacted special regulations for the running of automobiles or motor vehicles on the public roads and highways of the state. Chapter 5437, Acts 1905; sections 859a et seq. Comp. Laws 1914. These regulations relate primarily to duties that are imposed upon the owners of such vehicles. While these regulations do not expressly enlarge the common-law liabilities of employers for the negligence of the employés, the statute does impose upon the owners of automobiles and motor vehicles duties and obligations not put upon the owners of other vehicles that are not so peculiarly dangerous in their operation, and specifically requires license, numbering, etc., for purposes of identifying the owner, and enacts that automobiles shall not be so operated on a public highway "as to endanger the life or limb of any person." It is also enacted that in case of accident the name and address of the owner shall be given on request. The owners of automobiles in this state are bound to observe statutory regulations of their use and assume liability commensurate with the dangers to which the owners or their agents subject others in using the automobiles on the public highways. The principles of the common law do not permit the owner of an instrumentality that is not dangerous per se, but is peculiarly dangerous in its operation, to authorize another to use such instrumentality on the public highways without imposing upon such owner liability for negligent use. The liability grows out of the obligation of the owner to have the vehicle, that is not inherently dangerous per se, but peculiarly dangerous in its use, properly operated when it is by his authority on the public highway. In view of the dangers incident to the operation of automobiles and of the duties and obligations of the owners of motor vehicles under the statutes of the state, it could not be said that on the facts of this case no question was made for the jury to decide.

The employé was acting during the day in the line of his employer's business, the use of the car in going for the young lady was acquiesced in by the owner, the trip apparently did not interfere with, and was not so wholly disconnected from, the employer's business as to make it as matter of law an abandonment, even temporarily, of the employer's business. These considerations, coupled with the obligation of the employer to the public, growing out of his acquiescence in the use on the public highways of the automobile for the employé's personal benefit while generally engaged in the employer's business on the streets of the city, and involving peculiar and sudden dangers if negligently driven, made a case for the jury to determine, under appropriate instructions from the court, whether the defendant employer is liable for

injuries caused by negligence of the employé in using the employer's automobile on the public highways with the consent of the employer for the employé's own purposes and while the employé was acting within his general authority from the employer.

The judgment is reversed.

BROWNE, C. J., and TAYLOR, J., concur.

ELLIS, J. (dissenting). I am unable to assent to the proposition that the owner of an automobile who permits another to use it for the latter's sole convenience or pleasure becomes liable in damages to a stranger who may sustain an injury because of the negligent operation of the machine while so employed.

Nor do I agree that the owner of an automobile, whose servant or employé is permitted to use the machine in the transaction of his employer's business, but who departs from his master's business and goes upon an independent errand of his own, is liable in damages for the tortious act of such employé, committed in the negligent operation of the machine while he is upon the independent and separate errand of his own.

Such propositions ignore the maxims "Respondeat superior" and "Qui facit per alium, facit per se." The doctrine of the liability of the master for the wrongful acts of the servant rests upon the above maxims. Was the wrongful act done in the cause and within the scope of the servant's employment? If so, the master as a matter of law is liable. If not, the master is not liable. See *Hardeman v. Williams*, 150 Ala. 415, 43 South. 726, 10 L. R. A. (N. S.) 653; *Palos Coal & Coke Co. v. Benson*, 145 Ala. 664, 39 South. 727; *City Delivery Co. v. Henry*, 139 Ala. 161, 34 South. 389; *Fones v. Phillips*, 39 Ark. 17, 43 Am. Rep. 264; *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224; *Nonn v. Chicago City R. Co.*, 232 Ill. 378, 83 N. E. 924, 122 Am. St. Rep. 114; *Kansas L. Co. Jr. v. Central Bank*, 34 Kan. 635, 9 Pac. 751; *Adams v. Cost*, 62 Md. 264, 50 Am. Rep. 211; *Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133, 5 L. R. A. (N. S.) 598; *Morier v. St. Paul, M. & M. Ry. Co.*, 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793.

In the case of *Slater v. Advance Thresher Co.*, supra, many cases are collected and discussed by the court, in which damages were sought to be recovered for injuries sustained by reason of the negligent use of an automobile by an employé of another while not engaged in the service of his employer, but which did occur while the servant or employé was engaged upon a private, independent, and personal errand of his own. The doctrine is announced as universally true, sustained by text-writers and the decisions of the courts of the United States generally, that:

The "master is not liable for injuries occasioned to a third person by the negligence of his servant while the latter is engaged in some act beyond the scope of his employment, for his own or the purposes of another, although he may be using the instrumentalities furnished by the master with which to perform his duties as servant."

See *Stewart v. Baruch*, 103 App. Div. 577, 93 N. Y. Supp. 161; *Clark v. Buckmobile Co.*, 107 App. Div. 120, 94 N. Y. Supp. 771; *Reynolds v. Buck*, 127 Iowa, 601, 103 N. W. 946; *Quigley v. Thompson*, 211 Pa. 107, 60 Atl. 506; *Brokaw v. New Jersey R. R. & Transp. Co.*, 32 N. J. Law, 328, 90 Am. Dec. 659. Also authorities cited in 32 Cyc. 1891; 1 *Shearman & Redfield on Negligence* (6th Ed.) 348-367. See, also, cases cited in 4 *Current Law*, 609.

The facts in the case at bar are undisputed. Elliott Barrow was employed by the Southern Cotton Oil Company as its cashier. He was in control of the automobile when the accident occurred. The automobile was owned by the company and was used by its employés, not only for errands of the company and its business, but this employé was permitted to use it on various occasions for his own convenience and pleasure. On the day when the accident occurred this employé took the car into Pensacola on an errand for the company, and he was to return in it to his office at the company's plant about 1 o'clock, after eating his lunch. He finished eating his lunch, and instead of returning to his office, he went out on Garden street to get a young lady friend and bring her to the place where she was employed on Palafox street. Therefore, in going for the young lady, it was Barrow's intention to return with her to her place of employment before he should start on the return trip to his own place of employment, viz., the company's offices. While on this separate-independent and purely personal-trip, he undertook for the young lady another and distinct employment or errand. It was while on this latter errand that the injury occurred.

If Barrow while at his lunch had consented to engage his services for a monetary consideration to a stranger which involved the use of the machine, and while executing a commission for this person should have by the negligent use of the machine injured another, by what process of reasoning could it be said that the Southern Cotton Oil Company should be held liable for the injury? Such a holding would certainly not be supported by either precedent or principle.

The only difference between such a situation and the one at bar is the absence of any monetary consideration paid to Barrow by the young lady in whose service he was operating the machine when the injury occurred. But whether the consideration was paid in money or found in the gratification of his own desire in being of service to the young woman of his dreams, the principle is the same. His errand was an independent one, he was not on the company's business, he

was not acting in the scope of his employment, he was not engaged in the furtherance of his master's business, but his services were being independently rendered to another for a consideration which was none the less sufficient because sentimental, and one in which the employer, being a corporation, could not possibly have had any concern.

Nor did the employer put the employé in motion to do that which was done resulting in the injury; therefore neither of the maxims quoted above applies. I think, therefore, that the court did not err in instructing the verdict.

I am authorized to say that SHACKLEFORD, J., concurs in this dissent.

(73 Fla. 858)

### CIPRIAN v. STATE.

(Supreme Court of Florida. April 6, 1917.)

(Syllabus by the Court.)

#### 1. FALSE PRETENSES $\S$ 44—EVIDENCE—RELEVANCY.

In a prosecution for obtaining goods under false pretenses, written instruments, not relevant to the issue being tried, are properly excluded on objection when offered in evidence.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig.  $\S$  58.]

#### 2. FALSE PRETENSES $\S$ 48—EVIDENCE—SALE.

Where a charge is that the defendant with intent to defraud did willfully and falsely represent that he was the owner of a chattel exchanged for another chattel, it is not error to exclude evidence and to refuse a charge as to the defendant's right to sell the chattel that was in fact the property of another.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig.  $\S$  61.]

#### 3. CRIMINAL LAW $\S$ 829(1)—GIVEN INSTRUCTIONS—REQUESTED INSTRUCTIONS.

It is not error to refuse a charge that is covered by a charge given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  2011.]

#### 4. CRIMINAL LAW $\S$ 1182—APPEAL—AFFIRMANCE.

Where the evidence is ample to sustain a verdict that is not manifestly against the weight and probative force of the testimony, and no prejudicial errors of law or procedure appear, the judgment will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.  $\S$  3203-3214.]

Error to Circuit Court, Jackson County; Cephas L. Wilson, Judge.

J. G. Ciprian was convicted of the statutory offense of obtaining property under false pretense, and he brings error. Affirmed.

J. M. Calhoun and Moses Guyton, both of Marianna, for plaintiff in error. T. F. West, Atty. Gen., and Glenn Terrell, Asst. Atty. Gen., for the State.

PER CURIAM. Ciprian was convicted of the statutory offense of obtaining property

under false pretenses, and took writ of error.

The indictment charges that the defendant with the intent to injure and defraud did willfully and falsely pretend and represent that he was the owner of a certain piano then in his possession, and that he had a good right to sell and convey the same, and had a good right to trade and barter it, and that it was unincumbered, and did offer to trade said piano to a named person for a certain automobile, the property of such person, of the value of \$250, and that such person not knowing the piano was not the property of the defendant, and believing the statements of the defendant that the piano was his property, and relying upon the same to be true, did swap and trade the automobile to defendant for the piano, and did then and there deliver said automobile of the value aforesaid to the defendant in exchange for said piano, when in truth and fact the piano was not the property of the defendant, and the defendant had no authority to swap the piano for the automobile, the piano was the property of the Starr Piano Company, and the defendant knew his said representation was false, and did thereby defraud such named person out of the automobile. Trial was had on a plea of not guilty.

[1] The court properly excluded letters and a contract that were not relevant to the issue made.

[2, 3] A requested charge including the proposition that if the defendant had a right to sell the piano the purchaser would not be defrauded whether the defendant's principal accepted or approved of said sale or not, was properly refused, it not being material or relevant to the issue as made. A refused charge as to the necessity of an intent to defraud was not error, as a charge on this subject was given.

Objection was sustained to a question asked the defendant if he had a right to sell the piano. As the issue made by the pleadings and evidence was whether he owned the piano and had a right to trade and barter it, evidence as to whether he had "a right to sell that piano" was not material. The defendant offered no evidence that he owned the piano with a right to barter it.

[4] The evidence is ample to sustain the charge brought under the statute providing that "whoever designedly by false pretense, \* \* \* and with intent to defraud, obtains from another person any property \* \* \* shall be punished," etc. Section 3319, Gen. Stats. of 1906, Florida Compiled Laws 1914. Judgment affirmed.

BROWNE, C. J., and TAYLOR, SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.



(73 Fla. 373)

**GLASS v. VIRGINIA-CAROLINA CHEMICAL CO.**

(Supreme Court of Florida. April 17, 1917.)

*(Syllabus by the Court.)***BILLS AND NOTES §537(3)—DIRECTED VERDICT—EVIDENCE.**

On an issue of failure of consideration in an action on a promissory note, where there is some substantial evidence tending to prove the issue of failure of consideration, a verdict for the plaintiff should not be directed by the court.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1866-1870.]

Error to Circuit Court, Alachua County; J. T. Willa, Judge.

Action by the Virginia-Carolina Chemical Company against Thomas B. Glass. Judgment for plaintiff on a directed verdict, and defendant brings error. Reversed.

Hilburn & Merryday, of Palatka, for plaintiff in error. W. S. Broome, of Gainesville, for defendant in error.

**SHACKLEFORD, J.** The Virginia-Carolina Chemical Company, a corporation, instituted an action at law against Thomas B. Glass. The declaration contains three counts, the first count being based upon a certain promissory note, dated the 4th day of February, 1913, executed by the defendant to the order of the plaintiff for the amount of \$1,937.73 and payable on the 1st day of June, 1913, "with interest from maturity at the rate of 8 per cent. per annum, with all costs of collection, including 10 per cent. attorney's fees, if collected by law or through an attorney," and the second and third counts being the common counts for goods, wares, and merchandise bargained, sold, and delivered to the defendant by the plaintiff at the defendant's request and for money found to be due the plaintiff by the defendant on an account stated between them. To the declaration the defendant filed the following amended pleas:

"That the plaintiff at the commencement of this suit was, and still is, indebted to this defendant in an amount larger than the plaintiff claims, for this, to wit: That on and prior to the 4th day of February, A. D. 1913, the said plaintiff was engaged in the manufacture and sale of commercial fertilizer in the state of Florida under the name of the Florida Fertilizer Company, and that under the said name, the plaintiff, prior to the 4th day of February, 1913, and on or about, to wit, the 19th day of October, A. D. 1912, entered into a bargain or contract with this defendant, wherein and whereby the plaintiff agreed to bargain, sell, and deliver to this defendant 50 tons of commercial fertilizer for the agreed price of \$1,475; and that it was the duty of the plaintiff upon selling or offering for sale the said fertilizing material to securely attach a label or tag to each and every package, barrel, or bag of said commercial fertilizer, showing the number of net pounds of fertilizer in the package, the name, the brand or trade-mark under which the fertilizer was sold, and the name and address of the manufacturer, and the chemical analysis of such fertilizer, stating the minimum per centage of ammonia and the source from which such ammonia was

derived, the minimum per centage of potash soluble in water, the minimum per centage of available phosphoric acid, the minimum per centage of insoluble phosphoric acid, the maximum per centage of moisture contained therein, also the maximum per centage of chlorine contained therein, and the material from which such fertilizer was compounded.

"And that after the said 19th day of October, 1912, and prior to the 4th day of February, 1913, the plaintiff delivered to the defendant the said 50 tons of fertilizing material pursuant to the said agreement or contract, and that attached to each package thereof was a tag upon which the following representations, statement, guaranty, and analysis was given:

100 Pounds.

Special Potato Mixture.

For T. B. Glass, Hastings, Fla.

Manufactured by

Florida Fertilizer Company, Branch Gainesville, Fla.

Guaranteed Analysis.

Moisture, 213 degrees F., not to exceed 10	per cent.
Ammonia (from bright cotton seed meal, blood and bone), not less than 4½	per cent.
Available phosphoric acid, not less than .....	6 per cent.
Insoluble phosphoric acid, not less than .....	1 per cent.
Potash, K <sub>2</sub> O, not less than .....	7 per cent.
Chlorine, not to exceed .....	1 per cent.

"These goods are made from 500 pounds cotton seed meal, 7½ per cent.; 525 pounds blood and bone, 10 per cent.; 675 pounds acid phosphate, 16 per cent.; 300 pounds high-grade sulphate potash 48 per cent.

"That the defendant is now and was at the time of the purchase of said fertilizer a citizen of the state of Florida, and that he purchased said fertilizing material for his own use, and that at the time of the sale and delivery of said fertilizing material the plaintiff was engaged in the business of manufacturing and selling fertilizer in the state of Florida; and that on or about the 23rd day of November, 1913, this defendant, after receiving said fertilizing material from the plaintiff as aforesaid under the said guaranteed analysis as given above, did submit a fair sample of said fertilizing material to the commissioner of agriculture of the state of Florida for analysis; and that sample so submitted was secured in the presence of two disinterested persons, and in the presence of such disinterested persons was securely bottled, corked, and sealed, and that said sample so securely bottled, corked, and sealed was, in the presence of said disinterested persons, placed in the hands of a disinterested person to be delivered by him for this defendant to the commissioner of agriculture of the state of Florida, and that said sample so delivered to said disinterested person was delivered to the commissioner of agriculture of the state of Florida for this defendant; and that the commissioner of agriculture of the state of Florida did on or about the 9th day of December, 1913, require the state chemist to analyze the said sample of fertilizer so taken, and that such analysis was made, and that upon such analysis being so made, this defendant found that the said fertilizing material was deficient in certain of its constituent elements, and did not contain the per centage of ammonia derived from high-grade blood and bone and bright cotton seed meal which said tag and guaranteed analysis guaranteed said fertilizing material to contain, and was deficient in potash. And this defendant discovered from said analysis so made that he had been defrauded by the deficiencies hereinabove specified.

"And the defendant further says that the amount demanded by the plaintiff, the manufac-

turer or vendor of said fertilizing material so purchased was \$1,475.

"Wherefore this defendant says that the plaintiff by reason of the facts stated herein became, was, and still is indebted to the defendant in the sum of money equal to twice the amount demanded by the plaintiff for said material, that is to say: The plaintiff became, was, and still is indebted to the defendant in the sum of \$2,950, which said sum this defendant is willing to set off against the plaintiff's claim and for which said sum this defendant prays judgment, and this defendant hereto attaches a bill of particulars, marked Exhibit A, to be taken with and as a part of this plea to the same extent and as fully as if herein set forth in full.

"And for an amended second plea to plaintiff's declaration and each count thereof, this defendant says: That on or about the 19th day of October, 1912, the plaintiff then being the manufacturer and vendor of commercial fertilizer in the state of Florida, entered into an agreement with the defendant wherein the defendant, in consideration of the promise and agreement on part of the plaintiff to sell and deliver to the defendant 50 tons of fertilizing material at \$29.50 per ton, and 15 tons of fertilizing material at \$30.64 per ton, which the plaintiff represented to be of a kind, grade, and quality, and compounded from materials which would make a fertilizer fit and suitable for the purpose of growing and producing Irish potatoes in the defendant's potato fields in the vicinity of Hastings, Fla., did promise to pay the plaintiff the sum of \$1,937.75.

"That thereafter, during the months of December, 1912, and January, 1913, the plaintiff delivered the 65 tons of fertilizing material, which it had agreed to sell, and which it had represented to the defendant was fit for the purposes aforesaid.

"That the defendant, relying upon the promise of the plaintiff, and believing that the fertilizer was of a kind, grade, and quality, and believing that said fertilizer was fit and suitable for the purposes for which it was purchased, gave his promissory note to the plaintiff for \$1,937.75, which said amount of said promissory note included the amount of purchase price of said fertilizing material, that the said promissory note above mentioned and referred to is the promissory note sued upon in plaintiff's declaration, and that the amount of \$1,937.75 is the sum of money sued for and claimed in plaintiff's declaration. That the defendant relying upon the aforesaid promise of the plaintiff and believing that it had kept its agreement and furnished the fertilizer which it had promised to furnish, and that the fertilizer was fit for the purpose for which it was sold as aforesaid, planted in due season a crop of Irish potatoes in his fields in the vicinity of Hastings, Fla., to be harvested in the spring of 1913. That in planting said fields the defendant used and planted standard and suitable seed potatoes, which were well adapted for use in planting such fields, and farmed and cultivated the same according to the usual and approved method of farming and cultivation for Irish potatoes culture in that vicinity.

"That all but 400 pounds of said fertilizing material purchased as aforesaid was consumed in the effort to cultivate said Irish potatoes, and that said fertilizer was properly applied and used for such purpose. But notwithstanding the promise and undertaking on the part of the plaintiff and the guarantee made as to the kind, quality, and fitness of said fertilizer, the plaintiff violated his promise to furnish a kind and grade of fertilizer fit and suitable for the purpose aforesaid, and furnished to the defendant a fertilizer which was wholly unfit for use in growing and cultivating Irish potatoes in the defendant's fields in the vicinity of Hastings, Fla., and that the said fertilizing material so furnished as aforesaid did not and would not serve the purpose for which it was prepared, and that

the plaintiff assured the defendant it would serve.

"That the said worthlessness and unfitness of said fertilizer was not discovered by this defendant until long after said note was given, and not until all but 400 pounds of said fertilizer was used and consumed in an effort to produce a crop of Irish potatoes by use thereof in the manner aforesaid.

"That no other consideration was given by the plaintiff to the defendant for the said sum of \$1,937.75 sued for by the plaintiff in its declaration.

"Wherefore this defendant says that by reason of the facts stated herein the consideration for the said 50 tons of fertilizer at \$29.50 per ton, and the said 15 tons of fertilizer at \$30.64 per ton, totalling and aggregating the sum of \$1,937.75, wholly failed.

"And for a plea to the second and third counts in plaintiff's declaration, this defendant says that he never was indebted as alleged."

To these pleas the plaintiff filed the following replications:

"For replication to defendant's first amended plea, the plaintiff says that it was not at the commencement of this suit, and that it is not now indebted to the defendant as set forth and alleged in the defendant's said first amended plea; and the plaintiff further says that the defendant did not on or about the 28th day of November, 1913, after receiving said fertilizing material from the plaintiff, as averred in plaintiff's said amended plea, submit a fair sample of said fertilizing material to the commissioner of agriculture of the state of Florida for analysis, but the plaintiff says that the sample of said fertilizing material, so selected by the defendant and submitted to the commissioner of agriculture of the state of Florida, for analysis, was selected by the defendant about one year after the use of said fertilizing material by the defendant, as is shown in the said plea of the defendant; and the plaintiff says that at the time of the sale and delivery by the plaintiff to the defendant of the fertilizing material set forth and mentioned in said amended plea, the said fertilizing material did contain the percentage of ammonia derived from high-grade blood and bone and bright cotton seed meal, which said tag and guaranteed analysis, guaranteeing said fertilizing material, contain, and was not deficient in potash.

"2. And for a replication to the defendant's amended second plea to plaintiff's declaration, this defendant says that the fertilizer mentioned in said amended plea was made from the formula prescribed and furnished by defendant, and was compounded and manufactured especially for defendant, according to defendant's instructions and from the materials named, authorized, and directed by defendant; and plaintiff denies that it made any representations, warranties, or guarantees that said fertilizer was fit for the purpose of growing and fertilizing a crop of Irish potatoes in defendant's potato fields at or near Hastings, Fla., but that as before stated said fertilizer was compounded from the materials authorized and directed by defendant to be compounded from and according to the formula furnished plaintiff by defendant; and plaintiff further says that said fertilizing material was not unfit for use as a fertilizer in defendant's potato fields for the purpose of growing and raising a crop of Irish potatoes; and plaintiff further says that said fertilizing material was not worthless as a fertilizer for potatoes in the Irish potato fields in and near Hastings, Fla., as set forth in defendant's said amended plea; and the plaintiff further says that the said defendant did not rely upon any promise of the plaintiff that said fertilizer was of a kind, grade, and quality and fit for the purpose alleged in said amended plea; and plaintiff further denies each and every allegation and averment of the defendant's

said amended plea, wherein the said defendant sets forth a defense to the plaintiff's cause of action upon the ground of a failure of consideration.

"And now comes the plaintiff and joins issue upon each and every of the amended pleas of the defendant, filed herein on August 10, 1914."

We must confess that, as the plaintiff filed special replications to the amended first and second pleas, and at the same time "joins issue upon each and every of the amended pleas," which, in so far as the transcript discloses, would include such first and second amended pleas, which are addressed to the entire declaration, as well as the plea addressed to the second and third counts, it is somewhat difficult to determine just what issues were made by the pleadings. Be that as it may, the case was tried before a jury upon such issues, and after all the evidence of the parties litigant had been submitted the trial judge directed the jury to find a verdict for the plaintiff, whereupon the jury returned a verdict in favor of the plaintiff for the amount of \$2,519, upon which verdict judgment was rendered and entered. This judgment the defendant has brought here for review, and has assigned eight errors, the second and fourth of which are abandoned.

As there was some substantial evidence tending to prove the issue of failure of consideration, it was error to direct a verdict for the plaintiff. See *Gardner Lumber Co. v. Bank of Commerce*, 73 Fla. —, 74 South. 313. Also see *Carney v. Stringfellow*, 74 South. 866, decided here at the present term.

For this error the judgment must be reversed.

BROWNE, C. J., and TAYLOR, WHITEFIELD, and ELLIS, JJ., concur.

(73 Fla. 832)

#### KERSEY v. STATE.

(Supreme Court of Florida. April 5, 1917.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW §448(1), 1153(1) — EVIDENCE — FACT OR OPINION — DISCRETION OF TRIAL COURT.

As a general rule, ordinary witnesses are required to confine their testimony to facts, and are not permitted to give their opinions and conclusions; but to this rule there are certain exceptions, and as to whether or not the facts and circumstances testified to in a case are of such a nature as to warrant the admission of the opinions and conclusions must be largely within the discretion of the trial judge, and an appellate court should not interfere with the exercise of such discretion unless a clear abuse thereof is made to appear.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1035, 1036, 3061.]

#### 2. CRIMINAL LAW §1169(9) — APPEAL — HARMLESS ERROR.

Courts of justice exist for the administration and furtherance of justice, the object of a trial being to approximate justice as nearly as possible; and, unless it is made to appear to an appellate court that some injustice or wrong has been done a defendant in a criminal prosecution

by permitting an ordinary witness to give his opinion or conclusion, such court will not interfere with the action of the trial court in admitting such testimony.

#### 3. CRIMINAL LAW §451(2) — EVIDENCE — OPINION OR CONCLUSION.

If the jury may be fully equipped by the testimony of the facts and circumstances as detailed by an ordinary witness—in other words, if all the data may be exactly reproduced by testimonial words and gestures, an ordinary witness should not be permitted to give his opinion, it being the province of the jury to form opinions and draw conclusions from the facts and circumstances given in evidence; but, where all the data cannot be exactly so reproduced, ordinary witnesses may, where justice requires it, be permitted to give their opinions in connection with the facts upon which they are founded, in order that the jurors may be in a position to draw correct or proper conclusions therefrom.

#### 4. CRIMINAL LAW §448(1) — OPINION EVIDENCE—BEST EVIDENCE.

Opinions of ordinary witnesses based upon or derived from their observation or experience may be admissible in evidence in connection with component facts, when, from the nature of the subject under investigation, no better evidence can be obtained.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1035, 1036.]

#### 5. CRIMINAL LAW §451(1), 465—EVIDENCE—OPINION OR CONCLUSION—GROUNDS.

Before an ordinary witness is permitted to give in evidence his opinion or conclusion concerning a matter he should be required to detail to the jury, so far as he is able to do so by testimonial words and gestures, all the facts and circumstances upon which his opinion is based, in order that the jury may have some basis by which to judge the value of the opinion; it should be made to appear to the trial court that the subject-matter to which the testimony relates cannot be reproduced and described to the jury precisely as it appeared to the witness at the time, and that the facts upon which the witness is called to express his opinion are such as men in general are capable of comprehending and understanding.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1040, 1057.]

#### 6. CRIMINAL LAW §691 — EVIDENCE—PRELIMINARY QUESTION—OBJECTION.

A mere preliminary question to a witness is not open to objection.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1628.]

#### 7. CRIMINAL LAW §694—ANSWER TO QUESTION—OBJECTIONABLE TESTIMONY—MOTION TO STRIKE.

Where an answer to a question presents evidence which is illegal or objectionable on any known ground, the proper practice is a motion to strike it out and have the jury directed not to consider it; the movant specifying his objections to the evidence with like particularity as in objecting to questions.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1631, 1632.]

#### 8. WITNESSES §37(1)—NONEXPERT WITNESSES—POWDER BURNS.

A nonexpert witness in a criminal prosecution for murder, who has testified that he was a member of the coroner's jury that held the inquest and that he made an examination of the body of the deceased, may be permitted to testify that he saw no powder burns on the flesh.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 80, 83, 87.]

**9. CRIMINAL LAW §859—TRIAL—READING TESTIMONY FROM REPORTER'S NOTES.**

It is of the utmost importance that the jury should hear the testimony given by witnesses, and when the trial judge is in doubt as to whether the jury can hear the testimony given by a witness, especially one of tender years, such judge may properly ask the jury if they can hear the testimony of the witness and, upon one of the jurors replying, "not very well," may direct the court reporter to read such testimony from his notes to the jury, and where, in response to a question from the trial judge, such witness states that his testimony as read was as he had given it, no error in having the testimony so read is committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1600, 2064.]

**10. CRIMINAL LAW §656(1)—TRIAL—EMPHASIZING TESTIMONY OF WITNESS.**

The trial judge may not be said to emphasize improperly the testimony of a witness because the witness is speaking in such a low tone that the judge, apprehending that the testimony might not be audible to the jury, several times asked the jury if they could hear the witness, and requested the witness to "talk up," especially when the trial judge expressly states to the jury that his only purpose in so doing was in order that they might hear the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524, 1527, 1528.]

**11. CRIMINAL LAW §698, 694, 1153(1)—APPEAL—TRIAL—OBJECTION TO TESTIMONY—MOTION TO STRIKE TESTIMONY—DISCRETION OF TRIAL COURT.**

If a question is propounded to a witness which tends to elicit improper testimony, it is the duty of the opposite party to object to it and obtain a ruling on his objection. If improper testimony is given in response to a proper question, the proper method of removing it from the consideration of the jury is a motion to strike it. If improper testimony is given in response to an improper question to which no objection is made, a motion to strike is the recognized mode of removing it, but in such a case the granting or refusing of the motion is in the sound discretion of the trial court, and an appellate court will not disturb such ruling unless an abuse of discretion is shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1630-1632, 3061.]

**12. CRIMINAL LAW §532(2), 1158(4)—APPEAL—CHARACTER OF CONFESSION—REVIEW.**

It is the province of the trial judge to determine whether or not an alleged confession made by a defendant in a criminal prosecution was freely and voluntarily made, and, in considering such question, such judge must determine the facts even upon conflicting evidence, and the appellate court, when called upon to review his ruling upon such evidence, must accord to his finding the presumption that it is correct, and refuse to disturb it, unless error in such ruling is clearly made to appear.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1218, 3061-3066.]

**13. HOMICIDE §338(1)—APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

In a prosecution for murder, when the indictment charges and the uncontradicted proofs establish that the deceased came to her death from a wound inflicted by a discharge from a shotgun, no harmful error is committed in excluding the testimony of the defendant that the deceased, who was his wife and with whose murder he stood charged, had stated to him just previous to the time that her body was found that she had taken poison for the purpose of

committing suicide, especially when the evidence further establishes that it was a practical impossibility for the deceased to have committed suicide by shooting herself.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 709.]

**14. CRIMINAL LAW §1129(6)—APPEAL—ASSIGNMENTS OF ERROR.**

An appellate court will refuse to consider an assignment of error which has no basis in the transcript of the record, as not being properly before it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2963.]

**15. CRIMINAL LAW §1142—APPEAL—REFUSAL OF INSTRUCTION.**

In a prosecution for murder, an instruction requested by the defendant that has no basis in the transcript of the record will be held by the appellate court to have been properly refused, especially when the trial judge has fully instructed the jury in his general charge upon the law of homicide in the different grades and what the burden was which rested upon the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3014, 3016-3037.]

**16. CRIMINAL LAW §1088(9)—TRIAL—PRESENCE OF ACCUSED.**

The safer and better practice is to have the record in a criminal prosecution affirmatively show that the defendant was personally present at every step in or stage of the trial, but it will be held by an appellate court to be sufficient if it appears by necessary and reasonable implications from record entries that the defendant was present at all necessary "stages of the trial."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2766.]

**17. CRIMINAL LAW §1166½(4)—HARMLESS ERROR—DEFENDANT'S ABSENCE DURING VIEW.**

In a trial for murder, where it clearly appears from the transcript of the record that, on the application of the counsel for the defendant, the defendant then being present, the court directed a view by the jury of the second story of the county jail, that counsel for the defendant was present with the judge and jury during the view, during which it was discovered that the defendant was not present, whereupon the court ordered the jury to cease their view and immediately sent an officer for the defendant, and, when the officer returned with the defendant, the view was resumed and continued, that no testimony was taken during the absence of the defendant, that no objection was made to the proceedings, and that nothing which could have been harmful to the defendant transpired during his absence while such view was being taken, that the view affected no conflicts in the evidence, and that the evidence, without reference to the view, fully sustained the verdict, and no objection was made to the view proceedings until after the verdict, the judgment will not be reversed merely because the defendant was not present at the time when the jury began their view, but was not denied the privilege of being present.

**18. CRIMINAL LAW §1165(2)—CONVICTION—HARMLESS ERROR—REVERSAL.**

A judgment of conviction will not be reversed on writ of error even if technical errors were committed in rulings on the admissibility of evidence or in charges given or refused or in other matters of procedure, where the evidence of guilt is clear and ample and no fundamental rights of the defendants were violated, and it appears from the whole record that such techni-

cal errors, if any, were not prejudicial to the defendants.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3086.]

Error to Circuit Court, St. Lucie County; Jas. W. Perkins, Judge.

Charles B. Kersey was convicted of murder in the second degree, and he brings error. Affirmed.

A. D. Penney, of Miami, Fred Fee, of Ft. Pierce, and M. K. Adcock, of Miami, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

SHACKLEFORD, J. Charles B. Kersey was indicted for the crime of murder in the first degree, tried before a jury, convicted of the crime of murder in the second degree, and sentenced to confinement at hard labor in the state prison during the remainder of his natural life. Before taking up for consideration the errors which have been assigned and argued before us, we think it advisable to state that the evidence adduced establishes the fact that Edith Kersey, for causing whose death by shooting her with a shotgun the defendant was placed on trial under an indictment charging him with the crime of murder in the first degree, was the lawful wife of the defendant, and they were living together at the time of Edith Kersey's death as husband and wife, and had been so living together ever since the consummation of their marriage, during a period of about six weeks. The evidence further establishes that Edith Kersey came to her death from a wound in her head which was inflicted by the discharge of a shotgun loaded with powder and small shot, and that at the time of such discharge the deceased was lying in bed in the home occupied by her and her husband, the defendant. Upon these points the evidence is uncontradicted.

The second and third assignments, which are argued together, are as follows:

"II. Because of the admission, under the objection of plaintiff in error, of the testimony of the witness J. R. Johnson to the effect that, in his opinion, if the gun had been fired from the position in which it was found, the load or shot would have ranged or gone straight into the head of deceased, and not inward and upward.

"III. Because the lower court, in passing upon the admissibility of the evidence complained of, in assignment of error No. 2, left it to the witness J. R. Johnson to decide whether or not it was opinion evidence, and therefore admissible, whereas that question should have been decided by the court, and not the witness."

The bill of exceptions discloses that, after Dr. Frederick A. Grossman and W. T. Jones, the sheriff of St. Lucie county, had been introduced as witnesses on behalf of the state and had testified, among other things, as to the position in which the body of the deceased was found, and also as to its condition, J. R. Johnson was called to the witness stand by the state, and testified that he was coun-

ty judge of St. Lucie county, and that he held an inquest upon the body of Edith Kersey and proceeded to testify as to the position and condition in which he found the body, and also to describe the room in which it was found and certain objects therein and their relative positions, including the bed upon which the body of the deceased was lying, a chair, a stick, and a gun. The witness was then asked by the state:

"If the gun had been fired from the position in which you found it, in what direction would that load necessarily have gone?"

The defendant objected "on the ground that it calls for the opinion of the witness and a conclusion of a fact," stating:

"Let the witness state the physical facts, and then let the jury draw those conclusions, the position of the gun," etc.

The court overruled the objection, to which ruling the defendant excepted, and the witness then answered as follows:

"The load would have gone straight in this direction with reference to the head the load went in this way and lodged here, and the barrel of the gun was pointing squarely towards the head."

Thereupon the following proceedings took place:

"By Mr. Adcock: If the court please, we move the court to strike the answer of the witness upon the same ground that the objection was made upon, and that is that the witness is not stating physical facts and conditions there, but he is giving his opinions or conclusions from those facts. He ought to state facts and let the jury draw those conclusions from the facts themselves, and it is an invasion of the province of the jury. By the Court: Are you stating your opinion, Judge Johnson, or a physical fact. By the witness: I am stating it upon— By Mr. Adcock: I submit as to whether or not he is reciting his opinion is a question of law for your honor to decide from— By the witness: I am stating it upon this theory, if I were to shoot a gun direct at that post there, that the load would go straight in, and if I would hold it in this angle it would strike in a glancing position. By the Court: I will deny your motion to strike and give you an exception."

In order to render our discussion of these two assignments the more readily intelligible, we would state that there were no eyewitnesses to the shooting, and as the defendant frankly says in his brief:

"It was the theory of plaintiff in error that deceased committed suicide, that she pulled the chair [which was found lying on the floor upon its back near the bed] up near the bed, placed the stock of the gun in the bottom of the chair so as to have the proper range and so that she could hold it and reach it when she was lying down, and that she, with her left hand holding the barrel or muzzle of the gun to her head, with her right hand pushed the broomstick [which was found near the bed] against the trigger of the gun and discharged it."

[1-3] It must be admitted that what has come to be known as the "opinion rule" in evidence has given the courts and text-writers much trouble. Prof. Wigmore devotes an entire chapter to it. See chapter 65, beginning with section 1917 on page 2541 in volume 3 of Wigmore's Evidence. In section 1926 he announces his conclusion as follows:

"That the test of the opinion rule is a flexible, a living one; that there is no fixed form of words, no mere shibboleth, such as the word 'opinion' conveys; this is the important aspect of the principle never to be lost sight of. The question must be asked on each occasion: Can the jury be fully equipped, by the mere recital of the data, to draw inferences; in other words, can all the data be exactly reproduced by mere testimonial words and gestures?"

An interesting discussion of this vexed question will be found in volume 5 of *Ency. of Ev.*, beginning on page 651, and numerous authorities are cited in the notes. We take the following excerpt from page 657:

"The admissibility of the opinions and conclusions of nonexperts rests, as has been judicially declared, upon three necessary conditions which will be considered *seriatim* hereinafter, as follows: (1) That the witness detail to the jury, so far as he is able, the facts and circumstances upon which his opinion is based, in order that the jury may have some basis by which to judge of the value of the opinion; (2) that the subject-matter to which the testimony relates cannot be reproduced and described to the jury precisely as it appeared to the witness at the time; and (3) that the facts upon which the witness is called upon to express his opinion are such as men in general are capable of comprehending and understanding."

Also see *Commonwealth v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401, wherein Mr. Justice Endicott uses the following language:

"The exception to the general rule that witnesses cannot give opinions is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill, or learning, but includes the evidence of common observers, testifying to the results of their observation made at the time in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury. Such evidence has been said to be competent from necessity, on the same ground as the testimony of experts, as the only method of proving certain facts essential to the proper administration of justice. Nor is it a mere opinion which is thus given by a witness, but a conclusion of fact to which his judgment, observation, and common knowledge has led him in regard to a subject-matter which requires no special learning or experiment, but which is within the knowledge of men in general."

[4, 5] In *Hardy v. Merrill*, 56 N. H. 227, text 241, 22 Am. Rep. 441, Mr. Chief Justice Foster thus announces his conclusion:

"And it seems to me quite unnecessary and irrelevant to crave an apology or excuse for the admission of such evidence, by referring it to any exceptions (whether classified, or isolated and arbitrary) to any supposed general rule, according to the language of some books and the custom of some judges. There is, in truth, no general rule requiring the rejection of opinions as evidence. A general rule can hardly be said to exist, which is lost to sight in an enveloping mass of arbitrary exceptions."

"But if a general rule will comfort any who insist upon excluding and suppressing truth, unless the expression of the truth be restrained within the confines of a legal rule, standard, or proposition, let them be content to adopt a formula like this: Opinions of witnesses derived from observation are admissible in evidence, when, from the nature of the subject under investigation, no better evidence can be obtained. No harm can result from such a rule, properly applied. It opens a door for the reception of important truths which would otherwise be excluded, while at the same time the tests of cross-

examination, disclosing the witness' means of knowledge, and his intelligence, judgment, and honesty, restrain the force of the evidence within reasonable limits, by enabling the jury to form a due estimate of its weight and value."

Also see 5 *Ency. of Ev.* 660; *Elzner v. Supreme Lodge, Knights and Ladies of Honor*, 98 Mo. 640, 11 S. W. 991; *Indiana, B. & W. R. Co. v. Hale*, 93 Ind. 79.

This court has several times been confronted with this question. In *Mann v. State*, 23 Fla. 610, 8 South. 207, we held:

"The opinion of a witness, except in expert testimony, is not legitimate evidence, as to any matter that may be reproduced before the jury by a witness, it being the province of the jury to form their own opinion on facts of common experience, uninfluenced by the opinion of any witness on those facts, especially where such opinion is sought on facts given in the testimony of another witness."

Also see *Higginbotham v. State*, 42 Fla. 573, 29 South. 410, 89 Am. St. Rep. 237; *Jones v. State*, 44 Fla. 74, 32 South. 793; *Alford v. State*, 47 Fla. 1, 36 South. 436.

The following statement from 5 *Ency. of Ev.* 662, would seem to be a correct conclusion:

"Whether or not nonexpert testimony, such as is here under consideration, is admissible is a question for the court, and in determining such question and in applying the rules which govern the admission of such testimony the court may exercise its discretion."

As we held in *Wilson v. Johnson*, 51 Fla. 370, 41 South. 395:

"Courts of justice exist for the administration and furtherance of justice, and in the conduct of trials generally much must be left to the discretion of the trial judge."

We have adhered to this holding in a number of subsequent opinions. In *Adams v. State*, 55 Fla. 1, text 3, 46 South. 152, text 153, we said:

"The object of a trial is to approximate justice as nearly as possible, and unless it appears that some injustice or wrong has been done a defendant, this court will not interfere with the action of the trial court."

In the instant case Dr. Frederick A. Grossman, the first witness on behalf of the state, had testified that he made an examination of the body of Edith Kersey after her death, and that the shot which made the wound "entered the skull at an acute angle from below toward the body" and went "upward and inward," and that the shot which caused the wound did not come out. A rigid cross-examination of the witness failed to bring about any change in his testimony in this respect. After W. T. Jones, the sheriff, had testified on behalf of the state, J. R. Johnson, the county judge, who held the inquest, was called to the witness stand by the state and testified, as we have already said, as to the position and condition in which he found the body, also describing the room in which he found the body and certain physical objects therein and their relative positions, including the bed upon which the body of the deceased was lying, a chair, a stick, and a gun. The witness also testified that he

probed the wound and proceeded to describe it, stating that the shot went in at a point on the head, which he indicated, and "ranged upward and lodged in the top point of the head." The witness was examined at considerable length and reproduced all the data, including the relative positions of the body, the bed, the gun, the chair, and the stick in the room, in so far as he could do so by words and gestures, but it is obvious that such data could not be exactly so reproduced. This being true, in accordance with the test suggested by Prof. Wigmore in the third volume of his work on Evidence, (section 1926), which we have quoted above, as well as under the other authorities which we have cited, including our own decisions, we are of the opinion that no reversible error has been made to appear to us in either of the rulings of which complaint is made. We call attention to the difference in the question propounded in the instant case and the questions propounded in the cases of *Mann v. State*, supra, *Jones v. State*, supra, and *Lassiter v. State*, 64 Fla. 337, 59 South. 894, upon which the defendant relies, also the variance in the attendant facts and circumstances. As we said in *Alford v. State*, 47 Fla. 1, text 8, 36 South. 436, text 438:

"Ordinary witnesses may give their opinions in connection with the facts upon which they are founded when the matter to which the testimony relates cannot otherwise be reproduced or made palpable to the jurors that they may draw correct or intelligent conclusions therefrom."

We must hold that these two assignments have not been sustained.

[6-8] The fourth assignment is as follows:

"Because the lower court, over objection of plaintiff in error, permitted the witness George Long to state that there were no powder burns upon the face of deceased."

George Long, a state witness, testified that he was a member of the coroner's jury that held the inquest, and that he made an examination of the body of Edith Kersey and described its appearance and condition, going into details about the wound. We copy the following portion of his direct examination:

"Q. What did you see on the sheets there if anything? A. Nothing but blood. Q. Have you had any experience in shooting guns? A. A little. Q. What was the color of the flesh of that wound on the front side of it? A. Around the gash? Q. Yes. A. It was just like the rest of her flesh. Q. Did you find anything there that did not belong there? A. No, sir; not that I know of. Q. Was there or was there not any indications of powder burns there? By Mr. Adcock: We object to that because it is leading. The witness has stated the color of the flesh there, and because it is leading, and also because it calls for the opinion of the witness. He states the color of the flesh. By the Court: Did you make a thorough examination of the wound? A. Yes, sir. Q. From your examination made of the wound could you tell whether or not there was any powder burns on the flesh? By Mr. Adcock: To which we interpose the same objection. By the Court: Objection is overruled. Exception is noted. By the witness: No, sir; I did not see any powder burns at all."

It will be observed that the question to which the objection interposed was overruled and upon which ruling this assignment is founded was:

"From your examination made of the wound could you tell whether or not there was any powder burns on the flesh?"

This question was a mere preliminary question, and, under the repeated rulings of this court, was not open to objection. *Ortiz v. State*, 30 Fla. 256, 11 South. 611; *Dickens v. State*, 50 Fla. 17, 38 South. 909; *Golden v. State*, 54 Fla. 43, 44 South. 948. No motion was made to strike out the answer. As we held in *Ortiz v. State*, supra:

"Where a question to a witness is not improper in itself, but the answer presents evidence which is illegal or objectionable on any known ground, the proper practice is a motion to strike it out and have the jury directed not to consider it; the movant specifying his objection to the evidence with like particularity as in objecting to questions."

Also see *Schley v. State*, 48 Fla. 53, 37 South. 518.

It would seem that the answer of the witness to the question did not present any illegal or improper testimony. See the reasoning and authorities cited in our discussion of the second and third assignments. Also see *Gantling v. State*, 40 Fla. 237, 23 South. 857.

[9, 10] We now reach the fifth assignment:

"Because the lower court, by his attitude and remarks, and by his action in having the court stenographer to repeat the testimony of the witness Everett Hamilton to the jury, gave undue prominence and emphasis to the testimony of said witness, Everett Hamilton."

The bill of exceptions shows that Everett Hamilton, a state witness, was a boy 11 years of age, who gave in his testimony in such a low tone that the trial judge, apprehending that it might not be audible to the jury, asked the jury if they could hear the witness, to which question one of the jurors replied:

"No, sir; not very well."

The following proceedings then occurred:

"By Mr. Jones: We had better have the testimony read to them. The testimony given by the witness was then read by the reporter to the jury. By Mr. Adcock: If the court please, we want to preserve an exception to the action of the court in having this testimony repeated to the jury; it gives undue prominence. By the Court: I wish you would have made an objection before we started; I could have considered the objection. By the Court: Do you wish to have it stricken— Counsel: It cannot be stricken now. By the Court: Have you any motion to make? By Mr. Adcock: I have no motion I can make. By the Court: Little man, you heard that read over; did you understand what the stenographer read over; you heard him read that, did you? A. Yes, sir. Q. Did he read it as you had stated it? A. Yes, sir. By the Court: Exception is noted. I refuse to strike the evidence. By Mr. Jones: I understand the reason of reading it was because the jurors had not distinctly heard it. By the Court: Yes, sir; it was read at the request of the jury."

Several times subsequently the trial judge asked the jury if they could hear the witness,



and the witness was requested to "talk up." The stenographer's notes are not shown to have been further read to the jury, but the last time the court asked the jury if they could hear the witness the following transpired:

"By Mr. Adcock: May it please the court, we do not care for this testimony, but we want to make an objection to the action of the court in putting this before the jury in such an emphatic way; the jury might attach some importance to your asking them if they hear—By the Court: Do you think that the jury will attach some importance to the court asking them if they can hear? I want the jury to hear. Gentlemen of the jury, I want you to distinctly understand that I want to leave no impression with you of my own anxiety in this except for you to hear the testimony of the witness, and I have asked you to tell me at any time if you do not hear so that the witness will speak distinctly so that you can hear all of the testimony, and I am going to give the gentleman an exception to my asking the jury to tell me whether or not they hear."

No error is made to appear here. The witness was of tender years and inexperienced in court proceedings, doubtless excited, and perhaps somewhat frightened. It was important for the proper administration of justice that the jury should hear his testimony. See *Wilson v. Johnson*, 51 Fla. 370, 41 South. 395, and *Adams v. State*, 55 Fla. 1, 46 South. 152, which we have previously cited. Also see our discussion and holding in *Barton v. State*, 72 Fla. —, 73 South. 230.

[11, 12] The sixth assignment is:

"Because the lower court denied the motion of plaintiff in error to strike the testimony of the witness Everett Hamilton to the effect that he had previously made statements out of court to third parties consistent with those made by him in court upon the witness stand."

The bill of exceptions shows the following, the state attorney examining the witness:

"Now, Everett, has Mr. Parker, this gentleman here, right there, or me, drilled you as to what you should say on this stand, or are you telling the things you saw at that time? A. Well, I am stating what I saw. Q. Stating what you saw? A. Yes, sir. Q. Who did you first tell about that what you say if you remember? A. I do not remember. Well, I remember telling it at Quay, of course—Q. Telling it at Quay? A. Yes, sir; and I have told my brothers. Q. Which brother was that? A. Well, I have told both of them part of it. I never have brought it all in. Q. But you told them about what you have told to this jury to-day; is that right? A. No, sir. Q. I say you have told part to one and part to the other what you told sitting in that chair to-day? A. Yes, sir. By Mr. Adcock: We want to object to that if the court please, and we move to strike the answer proving by the witness his prior statements—consistent statements—made to bolster up his testimony and it is clearly inadmissible, we move to strike that testimony from the record. By the Court: The motion is denied. Exception is noted."

No error appears here. See *Putnal v. State*, 56 Fla. 86, 47 South. 804, and *McMillan v. Reese*, 61 Fla. 360, 55 South. 388. We will add that this witness was subjected to a rigid cross-examination of which the defendant had the full benefit.

The seventh assignment is:

"Because the lower court, in passing upon the admissibility of the testimony of the witness J. T. McCall as to an alleged confession of plaintiff in error, refused to determine the question of fact as to whether said alleged confession was freely and voluntarily made."

This assignment does not call for any extended discussion. The trial court did not refuse to determine whether or not the confession of the defendant was freely and voluntarily made, but after the witness had testified as to the facts and circumstances under which the confession was made the court overruled the objections interposed by the defendant and permitted the witness to testify as to such confession and afterwards overruled the motion of the defendant to strike out such testimony. See *Thomas v. State*, 58 Fla. 122, 51 South. 410, and *McDonald v. State*, 70 Fla. 250, 70 South. 24.

[13] The twelfth assignment is:

"Because the lower court, over the objection of plaintiff in error, excluded the testimony of plaintiff in error to the effect that the deceased had stated to him just previous to the time that her body was found that she had taken poison for the purpose of committing suicide."

The defendant took the witness stand in his own behalf, and during his direct examination, after offering testimony as to what Dr. Grossman stated to the witness as to the result of his examination of the body of Edith Kersey, which was objected to by the state, and the objection sustained, no exception being taken to such ruling, the following proceedings took place:

"Q. Did, if at any time after Dr. Grossman was there to see your wife and during the week previous to the time her body was found, if she ever made a statement to you to the effect that she had taken poison, please state to the jury what that was. By Mr. Jones: If the conversation between the alleged conversation between the deceased and this man is to be permitted to go in I do not know where the range of evidence is limited. It would be in the nature of attempting a self-serving statement; what did she say to you before her death? Now then, the state should be permitted to put in what she said to others in regard to the fight between this defendant and herself, which I am frank to admit are inadmissible, because they would be hearsay; now if the matters that he is inquiring into were res gestae, and if they occurred at the time of the tragedy, some exclamation, something that she said then and there, but not conversation that may have occurred between husband and wife prior, would not be admissible under the old rule that communications where marital relation exists were improper. Why, because it might be a violation; because there might be that intimate relation which prevents and forbids under the law to set aside the veil of marital communications. In this instance this is used for the purpose of bringing in a shielding statement to himself, and under the circumstances I submit to the court it is inadmissible. By Mr. Adcock: What we are offering to prove here is a statement made by the deceased that she had taken poison for a certain purpose. Now that is certainly not a self-serving declaration upon the part of the defendant. He never made that statement. If we were attempting to prove some statement he made out of court that would be self-serving, then that would be self-serving, but what we are attempting to prove is a statement made by



the deceased, and we are attempting to prove that by the evidence of the defendant. By the Court: A statement made by the deceased to the defendant her husband? By Mr. Adcock: Yes; and we submit that to prove our theory of suicide that we can offer in evidence any statement, threat, or attempt which the deceased made or any statement which she made to anybody showing that she did have such a purpose. By the Court: The objection is sustained. Exception is noted."

We have examined all of the authorities cited by the respective parties, but shall not undertake an analysis or discussion of them. If the indictment had charged the defendant with the murder of his wife by the administration of poison to her, we think that the proffered testimony as to the statements of the deceased might have been admissible. However, the indictment did not so charge, and the uncontradicted proofs show that the deceased came to her death from a wound inflicted by a discharge from a shot gun. We are also of the opinion that the evidence establishes that it was a practical impossibility for the deceased to have committed suicide by shooting herself. It necessarily follows that no reversible error was committed in excluding the proffered testimony. Among the authorities cited are the following to which we think it well to refer: *Commonwealth v. Trefethen*, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235; *State v. Beeson*, 155 Iowa, 355, 136 N. W. 817, Ann. Cas. 1914D, 1275, to which is appended an exhaustive note; *Nordan v. State*, 143 Ala. 13, 39 South. 406; *Boyd v. State*, 14 Lea (Tenn.) 161.

[14, 15] The thirteenth assignment, which is argued in connection with the twelfth, is as follows:

"Because the lower court erred in refusing to permit the plaintiff in error to testify to an attempt upon the part of deceased to commit suicide a few days prior to her death."

This assignment has no basis in the record, as the bill of exceptions does not disclose any offer on the part of the defendant "to testify to an attempt upon the part of deceased to commit suicide a few days prior to her death" and the refusal of such testimony by the court. We also refer to our discussion of the immediately preceding assignment.

The fourteenth assignment is as follows:

"Because the lower court erred in refusing to give in charge plaintiff in error's request No. 2, which was as follows: 'If defendant picked the gun up to kill a chicken and accidentally dropped it and it accidentally went off and killed deceased, the defendant would not be guilty of murder as charged in the indictment, and the jury should return a verdict of not guilty.'"

The only possible basis for this requested instruction in the bill of exceptions is the testimony of J. T. McCall, a state witness, who testified that he was a deputy sheriff, and that the defendant made a confession to him in which he stated that he did kill his wife; that he was going to kill a chicken which he saw out of the window and step-

ped back and got the gun and "when I did I dropped it, and it killed her." The defendant positively denied ever having made any such statement to McCall. As the court fully instructed the jury in the general charge upon the law of homicide in the different grades and what the burden was which rested upon the state, and there was no exception to any portion of such charge, we are warranted in assuming that the law was correctly stated. This assignment has not been sustained.

[16, 17] The fifteenth and sixteenth assignments are argued together and are as follows:

"XV. Because the record does not show that plaintiff in error was present in court either in the forenoon or afternoon sessions of court upon the day of October 17, 1916, at which time he was being tried for a capital offense."

"XVI. Because the record does not show that plaintiff in error was present in court upon the afternoon of October 18, 1916, at which time he was being tried for a capital offense."

There is no occasion for any extended discussion of the question presented by these two assignments, as the matter has often been before this court and thoroughly treated. In the case of *Holton v. State*, 2 Fla. 476, we held:

"During the whole of the trial of a capital case the prisoner has a right to be, and must be, present. This is a settled and well-established principle of criminal law; and this principle is violated by sending the charge of the court to the jury, if such a step is taken in the absence of the prisoner."

"The prisoner in a capital case must be personally present during the whole of the trial and at every step taken in the cause. He has the right to discuss questions both of law and fact, and if in any stage of the trial any proceeding is had by which he has been deprived of such right, it is the denial of a right which the Constitution guarantees to him. At every stage of the proceedings he must have an opportunity of coming into court, and being heard. If any other course is pursued, and he is convicted, it cannot be said to be 'by due course of law.'"

We have consistently adhered to this holding in subsequent decisions. In *Gladden v. State*, 12 Fla. 562, text 577, we repeated the holding in *Holton v. State*, supra, and stated that:

"We do not propose to examine the cases upon the subject."

In *Blocker v. State*, 60 Fla. 4, 53 South. 715, we again had occasion to consider the question and referred to a number of prior decisions. It is undoubtedly essential that a defendant in a prosecution for a felony should be personally present at every step in or stage of the trial, and, as we said in *Blocker v. State*, supra, 60 Fla. text 7, 53 South. 716:

"That such facts appear by the record proper as a perpetual memorial that due process of law was observed and accorded to the accused in the trial."

The better practice is to have the record affirmatively show that the accused was personally present at every step in or stage of

the trial, but, as we have held in *McCoy v. State*, 40 Fla. 494, 24 South. 485:

"It is sufficient if it appears by necessary and reasonable implication from record entries that the defendants and the jury were present at all necessary 'stages of the trial.'"

In the instant case the record not only does not show that the defendant was absent at any step in or stage of his trial, but we think that it appears by necessary and reasonable implications from the entries therein that the defendant was personally present at all necessary "stages" of the trial.

The seventeenth assignment is:

"Because plaintiff in error was not present when the jury, together with the trial judge, and officers of court, went to view and did view the upper or second story of the county jail."

We find that the record discloses that the defendant "made a motion that the jury be allowed to visit the jail to inspect same with reference to certain testimony offered in this cause," which motion was granted, "and thereupon the court, jury, attorneys, bailiff, and sheriff visited jail." The bill of exceptions discloses that the following affidavit was presented in connection with the motion for a new trial:

"State of Florida, County of St. Lucie—ss.:

"Personally appeared before me, Loyce D. Hackett, a notary public in and for the state of Florida at large, A. D. Penney and M. K. Adcock, who, being duly sworn, say: That they are the attorneys for the defendant in the case of *State v. Charles B. Kersey*, and defended him in the circuit court of the Seventh judicial circuit of Florida in and for St. Lucie county, at the fall term of said court, A. D. 1916. Affiants state that during the progress of above-mentioned trial the court upon motion of defendant ordered the jury to view the upper or second story of the county jail, and the jury, together with all of the attorneys, the court, clerk, and officers, left the courthouse for that purpose and went to said jail, and while viewing the same it was discovered that defendant was not present, whereupon the court ordered the jury to cease their view, and immediately sent an officer for defendant, and, when the officer returned with defendant, the view was resumed and continued."

While this was an irregularity, it does not constitute reversible error. See *Haynes v. State*, 71 Fla. 585, 72 South. 180, wherein we held:

"Where, in a trial for murder, it clearly appears from the record that on the application of the counsel for the defendant, the defendant being present, the court directed a view by the jury of the place where the homicide was committed, that counsel for the defendant was present with the judge during the view, that no testimony was taken, that no objection was made to the proceedings, that nothing that could have been harmful to the accused transpired during the view, that the view affected no conflicts in the evidence, and that the evidence, without reference to the view, fully sustained the verdict, and no objection is made to the view proceedings until after verdict, the judgment of conviction will not be reversed merely because the defendant was not present at the view, but was not denied the privilege of being present."

In the cited case the view was of the scene where the homicide occurred, while in

the instant case the view was of the second story of the county jail in which the defendant was incarcerated, but there is no difference in the legal principles which control. We content ourselves with referring to our discussion in *Haynes v. State*, supra.

[18] The only remaining assignment questions the sufficiency of the evidence to support the verdict. We have no hesitancy in declaring that we are of the opinion that the evidence adduced is amply sufficient to support the verdict rendered. See *Rhodes v. State*, 65 Fla. 541, 62 South. 653, and cases there cited. As we held in *Seymour v. State*, 66 Fla. 133, 63 South. 7:

"A judgment of conviction will not be reversed on writ of error even if technical errors were committed in rulings on the admissibility of evidence or in charges given or refused or in other matters of procedure, where the evidence of guilt is clear and ample and no fundamental rights of the defendants were violated, and it appears from the whole record that such technical errors, if any, were not prejudicial to the defendants."

No reversible errors having been made to appear to us, the judgment must be affirmed.

TAYLOR, WHITFIELD and ELLIS, JJ., concur.

BROWNE, C. J. (concurring). I think the evidence is ample to justify the verdict, and on the doctrine laid down in *Seymour v. State*, 66 Fla. 133, 63 South. 7, quoted at the conclusion of the opinion in this case, I concur therein.

(141 La. 267)

No. 22168.

WOODS v. LONGVILLE LUMBER CO. et al.  
(Supreme Court of Louisiana. March 12, 1917.  
Rehearing Denied April 16, 1917.)

(Syllabus by the Court.)

1. NEGLIGENCE § 83—LAST CLEAR CHANCE—APPLICATION OF DOCTRINE.

The doctrine of the last clear chance has no application to a case in which the negligence of the injured party continued until the moment of the accident and was the proximate cause of it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115.]

2. RAILROADS § 326(1)—ACCIDENT ON TRACK—NEGLIGENCE.

The law recognizes that locomotive engineers are human beings, and does not exact of them that their brains and muscles shall act instantaneously in an emergency. A railroad company's responsibility for an accident to a person on its track depends, not upon whether the engineer did all that might possibly have been done to avoid the accident, but upon whether he used the appliances at his command with the promptness expected of a prudent and skillful man in his situation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1067, 1068.]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

Suit by Mrs. R. L. Woods, individually and

as tutrix of her minor child, against the Longville Lumber Company and others. Judgment for defendants, and plaintiff individually and as tutrix appeals. Affirmed.

Gayle & Porter, of Lake Charles, for appellant. Pujo & Williamson, of Lake Charles, for appellees.

O'NIELL, J. The plaintiff appeals from a judgment rejecting her demand for damages for the death of R. L. Woods, husband of the plaintiff and father of her minor child. The suit is for the use and benefit of the child as well as on behalf of the widow individually.

R. L. Woods was run over and killed by a locomotive tender operated by the defendant Longville Lumber Company, on the railroad track of the defendant Louisiana & Pacific Railway Company. The defendants were engaged in certain logging operations, and it appears that Woods was employed by both companies as a car repairer at the time of the accident.

While Woods was engaged at his work at a repair switch near the main line of railroad, he was instructed by his superior, the trainmaster, to go and show the crew of an approaching train, called No. 99, where to place a barrel of oil on the switch. Picking up a hammer and two wrenches, Woods ran to the main line and hailed the train, which was backing up at a rate of about 3 or 4 miles an hour. He then walked along the side of the track, in the direction in which the train was traveling, until it passed him, when he went upon the track and followed the train. At that time another locomotive, known as No. 98, was following on the main line, traveling backward and shoving its tender ahead at a rate of about 4 miles an hour and at a distance of 100 yards or perhaps 200 yards behind engine No. 99. The engineer on No. 98 had shut off steam, and the engine was making very little noise. The bell was not ringing, and there was no lookout on the tender of No. 98. The view of the engineer and fireman from their positions in the cab was obstructed by the tender, so that they could not see an object on the track within a distance of 180 or 200 feet in front of the tender, in the direction in which they were traveling.

The day was clear, the track was straight, and there was nothing to obstruct the view of the approaching train from the position of Woods.

A man named Gainey, a brother of the fireman on engine No. 99, but not an employé of either of the defendants, was riding in the cab of that engine, and, looking back, saw Woods walking down the middle of the track at a distance of about 50 feet behind the engine and about 150 or 200 feet in front of the tender of engine No. 98. These positions are stated with reference to the direc-

tion in which Woods and the two trains were traveling, and not with regard to what is ordinarily termed the front end or the rear end of a train or locomotive. Gainey had no reason to fear that Woods was not aware that engine No. 98 was approaching, and, seeing nothing alarming in the situation, turned his attention elsewhere without telling the engineer or fireman on engine No. 99 that Woods was on the track. A minute or perhaps a few minutes later Gainey again looked back in the direction of Woods, and at that instant the tender of Engine No. 98 struck Woods in the back and knocked him down. Gainey immediately signaled or flagged engine No. 98 to stop. The fireman on No. 98 caught the signal instantly and told his engineer to stop. At the same moment the engineer on No. 99, attracted by Gainey's shouting and waving to engine No. 98, looked back and saw Woods attempting to rise from the ground. The foot board on the tender of No. 98 again struck him, rolled him over once or twice, and passed over him. The engineer immediately applied the emergency brake and stopped No. 98.

Woods was found under the tender and near the rear end of it; that is, near the end that had not passed over him. One of the brake beams of the tender was resting on his neck, and his neck was broken. The brake beam under the end of the tender that had passed over him was also so near the ground as to have injured him seriously if not fatally; hence it was impossible to know precisely how and when he received the fatal injury. His heart stopped beating ten minutes after he was removed from under the tender.

The learned counsel for the plaintiff admit that Woods was guilty of negligence in going upon the railroad track without observing that engine No. 98 was approaching; and they admit that his negligence, in walking along the track with his back towards the approaching train and without looking back at any time to avoid the danger continued until Woods was struck and knocked down. Their contention is that, with ordinary care and promptness, the engineer on the locomotive No. 98 could have avoided the killing after the tender had struck Woods and the engineer was informed of the perilous situation. The plaintiff's case therefore depends entirely upon the humane doctrine of the last clear chance.

One witness testified that immediately after the accident the fireman of engine No. 98 admitted that he saw Woods go upon the track and thought the latter had gone across to the other side of the track. The fireman denied having made that statement, and several other witnesses who were present at the time the statement is supposed to have been made testified that they did not hear it. In our opinion, whether the fireman on No. 98 did or did not see Woods go upon the track is of no importance, especial

ly if, seeing Woods go upon the track, the fireman thought he had gone entirely across the track.

[1, 2] In support of the contention that the engineer on No. 98 had the last clear chance to save the life of Woods after knocking him down, the plaintiff's counsel rely upon the following circumstances to show that the engineer did not stop his engine as quickly as he should have stopped it after learning of the perilous situation: When the tender first struck Woods in the back, the hammer he was carrying fell beside the locomotive, and the engineer saw it. When Woods had fallen to the ground and was being rolled over by the foot board of the tender, he screamed, and the engineer heard him. The danger signal from Gainey to the fireman on engine No. 98, the latter's telling the engineer to stop, the falling of the hammer beside the locomotive, and the screaming from in front of or under the tender came to the engineer on engine No. 98 in such quick succession as to be almost instantaneous. He put on the emergency brake immediately and stopped his engine within a distance of 8 feet from where it was when the brake took effect. The distance his engine traveled from the instant the engineer received the warning of danger to the moment the engine stopped was stated by the defendants' witnesses, and found by the district judge, to be 20 or 30 feet. The plaintiff's counsel contend that the distance was 30 or 40 feet. These figures are mere guesses—they can hardly be considered estimates—based upon observations made by the witnesses in moments of such excitement as to be utterly unreliable for accuracy. All that we know, and all that the witnesses could possibly know, in that respect, is that, if the engine was traveling at the rate of 4 miles an hour, it moved nearly 6 feet in every second; that it required some time, not more than a few seconds, but nevertheless some time, for the engineer to realize the situation and apply the brakes. During those few seconds Woods was being rolled over by the foot board and mangled under the brake beams of the tender. No one knows how many seconds or what fractional part of a second elapsed from the time that Woods screamed to the instant he received the fatal injury, nor is it within our province or power to fix a measure or standard of responsibility by the number of seconds in which a locomotive engineer can or should realize a situation of danger and apply the emergency brake. The law recognizes that locomotive engineers are human beings, and it does not exact of them that their brains and muscles shall act instantaneously in an emergency. The railroad company's responsibility depends not upon whether the engineer did all that might possibly have been done to avoid the accident, but upon whether he used the appli-

ances at his command with the promptness expected of a prudent and skillful man in that situation.

The doctrine of the last clear chance has no application to a case in which the negligence of the injured party continued until the moment of the accident and was the proximate cause of it. The negligence of Woods, in remaining on the railroad track without observing the approaching train, continued until the tender of the locomotive struck him. During the few seconds when he was being rolled over by the footboard and mangled under the brake beams of the tender of the locomotive the defendants' employés had no chance whatever to save him.

Whether it was negligence on the part of the employés of the defendant company to run the engine backward, tender foremost, without some one on the tender to act as a lookout, and without ringing the bell, is of no importance in this case, because the negligence of Woods in walking on the track without observing the approaching engine was the proximate cause of his injury and death.

The judgment appealed from is affirmed at the cost of the appellant.

SOMMERVILLE, J., concurs.

(141 La. 272)

No. 22006.

JACOBS v. JACOBS.

(Supreme Court of Louisiana. March 12, 1917.  
Rehearing Denied April 16, 1917.)

(Syllabus by the Court.)

1. NEGLIGENCE  $\Leftrightarrow$  2—AUTOMOBILE DRIVEN—DUTY TO GUEST.

The driver of an automobile, who has invited a guest to ride with him, is not absolved from responsibility for negligence or imprudence merely because he is performing a gratuitous service or favor to his companion.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 3, 4.]

2. NEGLIGENCE  $\Leftrightarrow$  2—AUTOMOBILE DRIVEN—LIABILITY.

Although an invited guest of the driver of an automobile, being a mere licensee, is not entitled to the consideration due by a carrier to a passenger for hire, he is nevertheless entitled to the benefit of the provision of the Civil Code that any act of negligence or imprudence that causes injury to another obliges him who was at fault to pay for the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 3, 4.]

3. NEGLIGENCE  $\Leftrightarrow$  2—AUTOMOBILE DRIVEN—CARE REQUIRED.

As a general rule, it is the duty of the driver of an automobile to maintain a speed sufficiently slow and to have such control of his car that he can stop within the distance in which he can plainly see an obstruction or danger ahead. But that rule does not apply to a case where a dangerous situation which the driver of the automobile had no reason to expect suddenly appeared immediately in front of the car.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 3, 4.]

**4. MUNICIPAL CORPORATIONS ¶705(1)—USE OF STREETS—CARE REQUIRED—EXTRAORDINARY DAMAGES.**

A person driving on a public highway, especially in an incorporated city, has a right to presume and to act upon the presumption that the way is safe for ordinary travel, even at night, and he is not required to be on the lookout for extraordinary dangers or obstructions to which his attention has not been called.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1515.]

**5. NEGLIGENCE ¶14, 93(1)—AUTOMOBILE ACCIDENT—COMMON ENTERPRISE.**

Negligence on the part of the driver of an automobile is not imputable to his guest in the car; nor does one who accepts an invitation to ride in an automobile thereby engage in such a common enterprise or joint venture with the driver that neither would be liable to the other for an act of negligence.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 16, 17, 147, 148.]

**6. NEGLIGENCE ¶3—AUTOMOBILE DRIVER—DUTY TO GUEST.**

The driver's duty and responsibility to his guest in an automobile is merely to be careful and avoid committing any act of negligence or imprudence that might add to or increase the ordinary danger of the occupation.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 5.]

**7. NEGLIGENCE ¶3—AUTOMOBILE DRIVER—DUTY TO GUEST.**

The responsibility of the driver of an automobile for the safety of his guest in the car is not limited to his duty to abstain from acts of gross or willful negligence, but demands that he avoid the ordinary negligence or imprudence referred to in the Civil Code.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 5.]

**8. MUNICIPAL CORPORATIONS ¶705(1)—STREETS—AUTOMOBILE ACCIDENT—LIABILITY OF DRIVER.**

The driver of an automobile is not answerable in damages for personal injuries inflicted upon his guest in the car as a result of an accident, where the facts are: The driver had inquired about the condition of the thoroughfare before entering it and was informed that it was all right; the car, while traveling at a moderate speed on a prominent street in a city, ran into an open canal extending across the thoroughfare, without any guard rail, barrier, red light, or other warning of danger; the glare of an electric light between the driver and the canal prevented his seeing the danger until it was too late to stop his car while going at an ordinary speed; the driver had never traveled over that route before and had no knowledge of the dangerous situation; the guest in the car had traveled over that route several times before and was acquainted with the situation, but did not warn the driver or complain of the speed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1515.]

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Action by Larry Jacobs against Mose Jacobs. From judgment for defendant, plaintiff appeals. Affirmed.

Robert H. Marr, of New Orleans, for appellant. Eraste Vidrine and A. Giffen Levy, both of New Orleans, for appellee.

O'NIELL, J. The plaintiff has appealed from a judgment rejecting his demand for

damages for personal injuries suffered in an automobile accident.

While the defendant was driving his automobile along Banks street, in New Orleans, at night, having the plaintiff and a Mr. Fahs as his guests in the car, he ran into the Broad Street canal, overturning the car, and inflicting serious injury upon himself and his guests.

The plaintiff alleges that the defendant was driving at a high rate of speed, without ordinary care or regard for safety, and that his running into the canal was the result of his gross negligence and recklessness.

The defendant denies that he was driving at a high or dangerous rate of speed, or was guilty of any negligence or carelessness. He avers that the accident was caused entirely by the dangerous situation of the open canal extending across Banks street, unprotected by guard rails, barriers, danger signals, or warnings of any kind; that, before going into Banks street on the night of the accident, never having traveled over that route before, he inquired about the condition of the street, in the presence and hearing of the plaintiff, and was told that the street was all right, paved all the way; that, when he approached the open canal, it had the appearance of a wet streak on the smooth paved street; and that he did not realize the danger until he was too close to the canal to stop his car or change its course to avoid the accident.

On the night of the occurrence the defendant, with Fahs as his guest in his automobile, drove by another route than Banks street to a park on Carrollton avenue, where they attended a prize fight, and met the plaintiff, who resided in the same apartments with the defendant. When the fight was over, the defendant invited the plaintiff to ride home with him. There were so many automobiles leaving the amphitheatre, going via Carrollton avenue and Canal street to the central part of the city, that the defendant thought of avoiding the congestion and confusion by taking Banks street, which was a convenient route for his return. When he and the plaintiff and Fahs were seated in the car, he asked a bystander what was the condition of Banks street, and was told that it was "all right, paved all the way." It was then about 11 o'clock and the plaintiff's automobile was among the last to leave the park.

Banks street is a prominent thoroughfare, having neutral grounds 21 feet wide through its center and a paved driveway 20 feet wide on either side. Broad street crosses Banks street at right angles. The canal where the accident occurred extends through or along the center of Broad street and across Banks street. On either side of the canal along Broad street is a paved driveway 30 feet wide, crossing Banks street and on the same

grade or level with it. At the time of the accident the canal was open at the intersection or ends of the driveway along Banks street. The canal was about 25 or 30 feet wide at the top, the banks sloping to a depth of about 6 feet. There was little or no water in the canal. It was spanned by a bridge 36 feet wide, the center of which was in line with the center of the neutral grounds extending along Banks street. The floor of the bridge was level and even with the surface or grade of Broad street and Banks street, and was built on steel I-beams, with no superstructure except the railings on either side of the bridge. They were constructed of gas pipe, about 3 inches in diameter, there being two horizontal rails on 6 standards 4 feet high, the end posts being about 6 inches in diameter. The driveway in the center of the bridge was 22 feet wide, on either side of which was a footpath 6 feet wide and 6 inches higher than the surface of the driveway, the floor of the footpath extending 12 inches beyond the railings on each side of the bridge. The 6-inch curbing at the edge of the footpath on the bridge curved around the ends of the footpath and continued along the bank of the canal, separating it from the driveway on Broad street. The distance from the ends of the neutral ground on Banks street to the edge of the bridge on the canal was only 49 feet.

From the foregoing description of the intersection of Broad street and Banks street it will be observed that a vehicle traveling to or from the central part of the city on the right driveway along Banks street, when it came to the intersection of Broad street, had to turn rather abruptly to the left, at the end of the neutral ground on Banks street, then turn immediately to the right, cross the 22-foot driveway on the bridge, turn again to the right to avoid the neutral ground on the other side of the bridge, then to the left into the right driveway along Banks street, and proceed on its original course.

The evidence shows, and it is not contradicted, that it was not safe—if in fact it was possible—for a vehicle to negotiate the compound curves necessary to cross the Broad street bridge at Banks street, except at a slow or moderate speed.

At the time of the accident there were no guard rails or barriers on the banks of the canal opposite the ends of the driveway on Banks street, nor was there a red light or other warning of danger there. The only light near the bridge was an electric arc lamp hanging 14 feet above the ground, between the canal and the end of the driveway on which the defendant approached the canal that night. The electric lamp was on the right side of the driveway, only 5 or 6 feet from the line of the sidewalk on Banks street, and the curbing along the bank of the canal was 22 feet beyond the lamp, in the di-

rection in which the defendant was traveling. There were small trees on the sidewalk on the right of the driveway between the lamp and a person approaching on Banks street as the defendant did that night. The other electric lights on Banks street—two nearest to the bridge were about 50 feet away, one on each side of the canal.

The testimony of expert and nonexpert witnesses on the effect of lights shows conclusively—and it is not disputed—that the location of the electric light at the intersection of the driveway on Banks and Broad streets contributed more than any other element to the danger of the situation. In fact we need no expert testimony or other evidence to prove that the glare of an electric arc light has a blinding effect that makes it impossible to see an object beyond it, in or near the line of vision.

A series of photographs taken from the viewpoint of a person in an automobile at different points along the driveway on which the defendant approached the canal on the night of the accident corroborates the testimony of the witnesses on the following facts: At a distance of 520 feet from the canal the trees on the sidewalk did away with the glare of the electric light near the canal, but the banks of the canal could not be seen at that distance. At a distance of 320 feet from the canal a small tree on the sidewalk yet prevented the glare of the electric light near the canal, but nothing could be seen of the canal at that distance, except the 6-inch concrete curbing, which was hardly noticeable. At a distance of 110 feet from the canal the glare of the electric light rendered it impossible to recognize the canal, which had the appearance of a shadow or wet place on the paved street beyond the light. That condition prevailed up to a distance of 25 or 30 feet from the edge of the canal, or until the traveler came under or nearly under the lamp. The expert and nonexpert testimony shows—and it is not contradicted—that the dirt banks of the canal did not reflect, but absorbed, the light, so that to a traveler approaching the canal and coming under the electric lamp it had the appearance of a shadow or wet streak across the paved driveway until he came too close to stop his vehicle or turn aside to avoid an accident.

The description we have given of the situation refers to the time of the accident. Thereafter, on account of that accident and four or five other automobile accidents that occurred there, the municipal authorities placed barriers at the edge of the canal and red lights on the bridge, and they have since covered the canal at the intersection of Banks street.

The plaintiff's automobile was a one-seat runabout. The top was folded back and the wind shield was lowered, out of commission. The weather being very warm, the defendant had removed his hat. He had the full bene-

fit of whatever light was favorable to his view and had all of the blinding effect of that which glared in his face. He had no knowledge or warning of the dangerous situation of the Broad Street canal; nor had his guest Fahs, as far as the record shows.

The plaintiff, testifying in his own behalf, admitted that he had traveled over that route several times before, in other automobiles, and had a general knowledge of the situation of the bridge over the Broad Street canal, but said he had had no experience or knowledge of the operation of an automobile. He did not know the difference between a speedometer and a carburetor, as he expressed it. He said he was not judge of the speed of an automobile, couldn't tell whether a car was going 20 miles or 60 miles an hour; but he afterward said that he could judge the speed between 10 miles and 20 miles an hour. When asked why he blamed the defendant for the accident, he replied that the latter was driving at a rapid rate of speed. He said that his only reason for thinking the speed was excessive was that the defendant's car passed several others, but none passed his, on the road from the park to the place of the accident. He did not deny, but, on the contrary, in effect admitted, that he did not at any time before the accident consider the speed at which the plaintiff was driving dangerous or excessive. He said he had ridden with the plaintiff several times before, had never had cause to complain of his manner of driving, regarded him as a safe and careful driver, and trusted entirely in his skill and judgment on the night of the accident. He admitted that it did not occur to him at any time during the drive that resulted in the accident that there was any danger in the speed or manner of the defendant's driving, or that the defendant was doing anything that he should not do. He did not inform the defendant of the location of the bridge or the open canal, and, in effect, he admitted that he did not think of those conditions before the accident. His explanation as to why he did not warn the defendant of the danger is given in the following excerpt from his testimony on cross-examination, viz.:

"Q. Did you see anything of this canal before you struck it? A. I saw it. That's all I can remember about it. Q. You saw the canal before you struck it? A. I presume I saw it. Q. You didn't tell Mr. Mose Jacobs that you saw anything ahead? A. I never dictate to a driver what I see. I didn't want to disturb Mr. Mose Jacobs or any other driver."

The plaintiff denied having heard the defendant inquire about the condition of Banks street before leaving the park. But the defendant and Fahs testified that the conversation took place while the three men were seated together in the automobile.

The plaintiff was rendered unconscious by the accident and did not regain consciousness until 7:30 the next morning. He testified that a few days after the accident, while he

and the defendant were at the infirmary, he was taken on an invalid chair to the defendant's room or ward, and in their conversation the defendant said he did not know how the accident had happened, but that he saw so many machines ahead of him at the time that he must have got puzzled and lost his wits.

The defendant testified that he did not remember making that admission, and denied that he had got puzzled or rattled when he approached the canal. He said he had traveled at a speed varying from 14 to 18 miles an hour on his return from the park; that he passed one or two or perhaps three automobiles on the road; and that one passed him a short time before he went into the canal. He testified that the accident was due entirely to the fact that he did not know of the dangerous situation, of the bridge being out of the line of the driveway, or of the open canal across the driveway; that the electric light in front of him gave the canal the appearance of a wet place, as if the street had been sprinkled there, and he did not realize the danger until he was within 10 feet from the bank of the canal, when it was too late to avoid the accident.

Mr. Fahs testified that the car was traveling at a rate of about 15 miles an hour at the time of the accident, and that he did not see the canal until the instant when the car plunged into it.

A professional chauffeur, as a witness for the plaintiff, testified that the defendant's automobile passed his a short time before the accident, traveling at such a high rate of speed that the witness said to himself, "That fellow will do some humbug." He said he thought the speed was then about 30 or 35 miles an hour, but that he did not know at what speed the car was traveling when it ran into the canal; that he was then four or five blocks from the canal. From which we assume either that the witness' car was going very slow or that he was very far from the scene of the accident when the defendant's car passed his. He said the dust of the street prevented his seeing the defendant's car after it passed, but that he heard the blow-out or explosion of the tires and the smashing of the wind shield when the car went into the canal. As a matter of fact, the tires did not burst, nor was the wind shield broken. Strange to say, the car was not very badly damaged; it was pulled into town on its own wheels that night.

Two other witnesses who had returned from the prize fight together in an automobile testified that the defendant's car passed their car before the accident. One of them testified that the defendant's car was going at a speed of 25 or 30 miles an hour when it passed. He said, and insisted, that he was 800 or 1,000 feet from the canal when the defendant's car passed, and that he was about 300 feet from the canal when the accident occurred. His traveling companion,

however, said, and insisted, that he was only about 100 feet from the canal when the defendant's car passed, and that he, the witness, was only 40 or 50 feet from the canal when the accident happened. He said he did not know how fast the defendant's car was going when it passed, but that his (the witness') car was traveling at about 20 miles an hour. The conflict in the testimony of the two witnesses last referred to as to the place at which they were when the defendant's car passed them, and as to where they were when the accident occurred, detracts somewhat from the reliability of their estimates of the speed.

We are informed by the testimony in this case that, according to a well-recognized rule of ethics, an automobile driver always speeds up his car after he has signaled his desire to pass a car in front of him and the latter has steered to the right of the road; the object being to avoid dusting the occupants of the other car unnecessarily, and to avoid keeping it crowded to the side of the road any longer than is necessary. Hence the witnesses who testified to the speed at which the defendant's car passed the other two cars on the road saw it perhaps speeding faster than it traveled at other times that night.

Another professional chauffeur, as a witness for the defendant, testified that he passed the defendant's car coming from the prize fight at a point about seven blocks from the scene of the accident, and that the defendant's speed was then only about 12 or 15 miles an hour.

We have given a synopsis of all of the testimony on the subject of the speed at which the defendant was driving before and at the time of the accident. The preponderance of the evidence is, in our opinion, not that the speed was excessive, but to the contrary, that it was moderate. The testimony of the plaintiff on that subject is rather favorable to the defendant, and that of the latter is entitled to as much consideration as is that of any other disinterested witness, because the record discloses that, on account of his indemnity insurance, the defendant has little or no financial interest in the defense of this suit. The fact that the car went into the canal is not a case where *res ipsa loquitur* with regard to the speed at which the car was going, because the evidence shows conclusively that the defendant could not have avoided running into the canal, although he was going at a moderate speed when he discovered the danger.

Our conclusion from the evidence is that the defendant was not at fault for failing to see the canal sooner than he did.

The question of law to be decided is whether the defendant was guilty of negligence in his failure to maintain such a slow speed that he might have avoided the accident when he saw the danger. If the defendant was guilty of negligence in that re-

spect, was the plaintiff's acquiescence in the speed at which the car was going such contributory negligence on his part as to prevent his recovering damages for the injury he suffered?

[1] We agree with the learned counsel for the plaintiff that one who invites another to ride with him as his guest in an automobile is not absolved from responsibility for negligence or imprudence merely because he is performing a gratuitous service or favor to his guest.

[2] Although an invited guest of the driver in an automobile, being a mere licensee, is not entitled to the consideration due by a carrier to a passenger for hire, he is nevertheless entitled to the benefit of the provision of our Civil Code that any act of negligence or imprudence that causes injury or loss to another obliges him who was at fault to pay for the injury or loss. R. C. C. 2315, 2316. That provision of the Code, however, is controlled by the word "fault." If there was no fault in the defendant's driving at the speed he maintained—if that speed was not in itself a matter of negligence or imprudence, under the circumstances and conditions prevailing—he is not responsible for the unfortunate result.

[3] We are referred to the decision of the Supreme Court of Wisconsin in the case of *Lauson v. Town of Fond du Lac*, reported in 141 Wis. 57, 123 N. W. 629, 25 L. R. A. (N. S.) 40, 135 Am. St. Rep. 30, to support the general proposition that it is the duty of the driver of an automobile to maintain a speed sufficiently slow, and maintain such control of his car, that he can stop within the distance in which he can plainly see an object or obstruction ahead of him. That rule is subject to certain modifications. It cannot apply to a case where an object or obstruction which the driver of an automobile has no reason to expect appears suddenly immediately in front of his automobile. In the case cited the plaintiff was denied the right to recover damages from the municipality for injuries sustained by his running into an excavation in the highway, because he was guilty of contributory negligence. He was driving over a strange road on a dark, rainy night. He had only one lamp on his automobile, and it was tilted downward so as to throw the light into the wheel tracks in the road. He could not see an object more than 10 or 12 feet ahead of him, and his speed was such that he could not stop his machine within a distance less than 15 or 20 feet. It was held that, although the speed at which the plaintiff was traveling when the accident occurred would have been a safe and moderate speed under other circumstances, it was a dangerous speed under the conditions prevailing. The sound principle of law invoked and applied in that case has no application to the facts of the case before us.



[4] The rule is well established in the jurisprudence of this state that a person using a public highway, especially in an incorporated city, has a right to presume and to act upon the presumption, that the way is safe for ordinary travel, even at night, and he is not required to be on the lookout for extraordinary dangers or obstructions to which his attention has not been called. *Nessen v. City of New Orleans*, 134 La. 455, 64 South. 286, 51 L. R. A. (N. S.) 324; *Stern v. Davies*, 128 La. 182, 54 South. 712; *McCormack v. Robin*, 126 La. 594, 52 South. 779, 139 Am. St. Rep. 549; *Rock v. American Construction Co.*, 120 La. 831, 45 South. 741, 14 L. R. A. (N. S.) 653; *Weber v. Union Development & Construction Co.*, 118 La. 77, 42 South. 652, 12 Ann. Cas. 1012; *Mahnke v. N. O. C. & L. R. Co.*, 104 La. 412, 29 South. 52, quoting 2 *Thompson on Negligence*, 1197, and many decisions; *Shidet v. Dreyfuss Co.* 50 La. Ann. 284, 23 South. 837.

As far as the defendant knew, or ordinary caution required him to know, the road ahead of him was safe. The plaintiff knew, but perhaps forgot, that there was danger ahead. His failure to remember that the bridge was out of line with the driveway and that there was an open canal ahead, and his failure to warn the defendant when he saw that the latter did not know of the danger, was the only neglect on the part of any occupant of the car that caused or contributed to the accident.

[5] We do not hold that, if the defendant's ignorance of the condition of the road ahead of him was in itself negligence, that negligence would be imputable to the plaintiff, who was only a guest in the car; nor do we hold that the plaintiff, by accepting the defendant's invitation to ride in the car, thereby engaged in a common enterprise or joint venture with him in which neither would be liable to the other for an act of negligence.

[6, 7] What we maintain in this case is that a man who, possessed of all his faculties and knowing that there is always some danger in traveling in an automobile, accepts an invitation to ride as the guest of the driver, assumes the risk of the ordinary dangers of which he is aware, and cannot hold the driver of the car responsible in damages for an accident, if there was no fault or negligence or imprudence on the driver's part. The driver's duty and responsibility is merely to be careful and avoid committing any act of negligence or imprudence that might add to or increase the ordinary danger of the occupation. With regard to the care due by the driver of an automobile for the safety of a passenger riding as his guest, we do not recognize the distinction referred to in some jurisdictions between gross or willful negligence and the ordinary negligence or imprudence referred to in the provisions of our Civil Code, arts. 2315 and 2316. We agree with the doctrine recognized by the

Court of Appeals of Kentucky in *Beard v. Klusmeyer*, 158 Ky. 153, 164 S. W. 819, 50 L. R. A. (N. S.) 1100, Ann. Cas. 1915D, 342, and approved by the Court of Appeals of Maryland in *Fitzjarrell v. Boyd*, 123 Md. 497, 91 Atl. 547, that a guest in an automobile is entitled to demand that his host shall exercise ordinary care for safety in driving the car, and that the latter's liability is not confined to acts of gross negligence or willful recklessness.

[8] Our review of the decisions cited by the learned counsel for the plaintiff discloses that in every case referred to in which the driver of a vehicle was held liable in damages for an accident resulting in injury to his guest in the vehicle the accident was the result of negligence on the part of the driver, and the guest was not guilty of contributory negligence. For example, in *Pigeon v. Lane* (decided by the Supreme Court of Errors of Connecticut) 80 Conn. 237, 67 Atl. 886, 11 Ann. Cas. 371, the defendant undertook to convey in a sleigh a boy 14 years of age, an employé of the defendant, to the place where he was to work for the defendant. The driver who was put in charge of the sleigh by the defendant was guilty of negligence in overloading the sleigh and recklessly and negligently running into a bridge and injuring the boy. In *Beard v. Klusmeyer*, supra, the defendant had invited the plaintiff and another woman and two men to ride with him in his automobile at night. He drove the car at a high rate of speed, and, when another automobile driver attempted to pass him, he raced with the other car at a very dangerous speed. The plaintiff protested and begged him to stop and permit her to get out of the car, but he refused. He ran into a pile of building material stacked in the street, wrecking the car and seriously injuring the plaintiff. In *Mayberry v. Sivey*, 18 Kan. 291, the defendant invited the plaintiff to ride with him in his buggy. The defendant, who was driving the horse, challenged another driver for a race, and whipped up his horse to pass the other. The plaintiff, in great fear, begged the defendant to stop and let him get out, but the defendant continued the race at a reckless speed until he ran into a stone fence, overturning the buggy and injuring the plaintiff. In *Lochhead v. Jensen*, 42 Utah, 99, 129 Pac. 347, the act of negligence complained of was the defendant's running his automobile at a high and dangerous rate of speed, resulting in an accident in which *Lochhead*, who was riding with the defendant as his invited guest, was killed. The trial judge charged the jury that, if the defendant did not use due diligence in driving the car, he was liable in damages for the resulting accident, and that the jury was to consider the manner of the defendant's driving the car and determine whether he had exercised reasonable care. On appeal the charge was condemned, not because the ap-

pellate court did not approve the doctrine requiring the defendant to exercise ordinary care, but because the charge presented a question of negligence far beyond that charged in the complaint, and permitted the jury to base a verdict upon a mere failure to keep a reasonable lookout for obstructions or dangers in the road. We do not understand that the appellate court would have condemned the charge if the complaint on which the suit was founded had charged a lack of ordinary care. In *Patnode v. Foote* (Appellate Division of the Supreme Court of New York) 153 App. Div. 494, 138 N. Y. Supp. 221, the plaintiff, who was traveling as a guest in the defendant's buggy, protested against the reckless speed at which the defendant drove the horse; but the defendant continued the reckless driving until he collided with a wagon, throwing the plaintiff to the ground and injuring him. The only contention of the defendant in that case appears to have been that he owed no duty or care for the plaintiff's safety, because he was rendering him a gratuitous service at the time of the accident. The verdict awarding damages to the plaintiff was affirmed on appeal, on the doctrine of *Pigeon v. Lane*, *supra*. In *Fitzjarrell v. Boyd*, *supra*, the complaint was that the defendant drove his automobile with recklessness, negligence, and want of care, as a result of which it skidded and struck a telegraph pole, overturned, and inflicted personal injuries upon the plaintiff, who was the defendant's invited guest in the car. The plaintiff's declaration contained the allegation that he had at the time protested against the defendant's reckless driving; and we assume that that allegation was borne out by the evidence, from the fact that the court found that the facts of the case were very similar to those in the case of *Beard v. Klusmeyer*. In *Routledge v. Rambler Automobile Co.* (Court of Civil Appeals of Texas) 95 S. W. 749, the plaintiff was the invited guest of a party of men and women who had hired an automobile from the defendant company for a joy ride. The chauffeur was the defendant's employé. In his testimony he virtually admitted that he was entirely at fault for the accident that resulted in injury to the plaintiff. He admitted that he was traveling at such a high rate of speed that he knew he could not negotiate a turn in the road which he knew was ahead; that he did not slow up for the curve because at the time he did not know where he was. The car dashed into a wire fence. The passengers who had hired the car and had invited the plaintiff to ride with them were unacquainted with the road and did not know of the turn or curve ahead of them. They had urged the chauffeur to increase his speed and "burn the air." The plaintiff sat on the front seat with the chauffeur, but did not urge or request the chauffeur to drive fast, nor did he protest against the fast driving. The

court found, however, that the plaintiff had not acquiesced in the orders given to the chauffeur by those who had hired the automobile and whose guest the plaintiff was. On appeal the Texas court said that, if it had appeared that the plaintiff had urged the driver of the automobile to go at a high rate of speed, or if he had acquiesced in the demand of his comrades for a high rate of speed, and if the chauffeur had thereby been induced to go at an unsafe rate of speed, and the accident occurred by reason of such high rate of speed, then the plaintiff's negligence would have contributed to the result, and he could not recover. In that case the plaintiff was not aware of the dangerous condition of the road ahead, but the chauffeur, for whose negligence the defendant was responsible, did know of the danger. In the present case the plaintiff knew of the dangerous condition of the road ahead, but the defendant was unaware of it.

Our conclusion is that the defendant was not guilty of any negligence, and that he is not liable in damages for the injuries which the plaintiff suffered from the accident.

The judgment appealed from is affirmed at the cost of the appellant.

SOMMERVILLE, J., concurs.

(141 La. 290)

No. 20972.

SERIO v. AMERICAN BREWING CO.  
(Supreme Court of Louisiana. March 12, 1917.  
Rehearing Denied April 16, 1917.)

(Syllabus by the Court.)

1. CORPORATIONS §423—TORT OF AGENT—KEEPING DOG—LIABILITY.

It is hardly to be expected that the entire power of a brewing corporation will be invoked, or that even a resolution of its board of directors will be considered necessary to authorize the keeping of a dog in its bottling plant, whether to kill rats, or as a mascot or source of amusement to its employé; but those who are vested with the corporate authority are bound to know that a dog so kept, with the knowledge and approval of the agent whom they place in charge of the plant, is a dangerous animal, which threatens injury to innocent people, and the fact that they choose to close their eyes to that condition is not a good defense to an action in damages by a person who, without fault on his part, has been bitten by the dog.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1692-1695, 1906, 1906.]

2. DAMAGES §87(1)—CIVIL CASES—PUNITIVE DAMAGES.

Our law does not authorize the infliction of punitive damages in civil cases.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 188-190, 192.]

(Additional Syllabus by Editorial Staff.)

3. CORPORATIONS §428(3)—KNOWLEDGE OF AGENT—EFFECT.

Knowledge acquired by an agent in transacting the business of the corporation will be imputed to it.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1750.]

#### 4. CORPORATIONS $\Leftrightarrow$ 423—TORT OF AGENT—LIABILITY.

A corporation, like a natural person, is liable for the torts of its agent when acting within the scope or apparent scope of his authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1692-1695, 1903, 1906.]

#### 5. ANIMALS $\Leftrightarrow$ 66½ — LIABILITY FOR DAMAGES.

One who harbors a dangerous animal on his premises likely to do mischief does so at his peril, and is answerable for all damages resulting from its escape.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 231.]

#### 6. ANIMALS $\Leftrightarrow$ 74(6)—DOG BITE—ADEQUATE DAMAGES.

Plaintiff bitten on the hand by a dog and subjected to physical suffering in the administration of the Pasteur treatment and to mental suffering from the knowledge that he had been bitten by a mad dog, in view of his pecuniary loss not exceeding \$100, would be allowed \$1,000 damages.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 269-271.]

O'Niell, J., dissenting in part.

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Action by John Serio against the American Brewing Company. Judgment for defendant, and plaintiff appeals. Judgment set aside, and judgment ordered in favor of plaintiff against defendant in the sum of \$1,000, with interest from the date of the judgment.

Malcolm J. Taylor and John J. McCloskey, all of New Orleans, for appellant. Lemle & Lemle, of New Orleans, for appellee.

#### Statement of the Case.

MONROE, C. J. This case comes up on appeal from a judgment rejecting plaintiff's demand for damages for injury and suffering resulting from the bite of a dog alleged to have been the property of defendant, and a vicious brute, to the knowledge of defendant's officers. Defendant admits that plaintiff was bitten by the dog, and at the time and place stated in the petition, but denies ownership of the animal, or liability with respect to it; also denies that it was vicious, or, if vicious, that it (defendant) was aware of that fact. It "admits that said dog was born and reared, and stayed, on the premises of your respondent, \* \* \* but denies that it was either born or kept on the said premises with the knowledge and consent of your respondent or of any of its agents who had authority to keep the said dog on its premises."

We find from the evidence that defendant's business is divided into departments, and that a competent man is placed in charge of each department; that the bottling department is situated on Bienville, between Royal and Bourbon streets, and at, and prior to, the occurrence here in question was in charge of Charles Cortie, as foreman,

and Charlie Pelletier as assistant foreman; that probably, early in 1911, a female dog strayed into those premises, and with the knowledge and consent of Mr. Cortie was there harbored, and thereafter gave birth to a litter of puppies, one of which was retained by Mr. Cortie, or with his knowledge and consent, and on February 23, 1913, having followed Mr. Pelletier into an adjoining barroom, there inflicted the bite upon plaintiff of which he here complains. There are several witnesses who give their opinions as to the age of the animal at that time—their estimates ranging from 3 or 4 to 18 months—but as Mr. Pelletier's relations with it appear to have been rather closer than those of the others, we accept his statement that it was about a year old. It appears to have been a mongrel with a predominating dachshund strain, and the fact that it was small probably accounts for the impression, created in the minds of some of the witnesses, that it was younger than it was said to be by Pelletier, whom, with its mother, it was in the habit of following every morning from the bottling plant into the barroom. Cortie testifies that he made daily reports of matters in the bottling plant, but did not report the dogs; that the officers of the company came there about once in 6 months on inspections, but did not inspect; that the secretary and treasurer had an office there in which he spent 10 or 15 minutes every day, but never went into the bottling works; that the mother of the dog in question was a good little thing, full of play, and a pretty good ratter, and that "the boys used to give it their scraps of food from their lunches," a benevolence which was extended to her offspring. Mr. Cortie also gives some testimony, as do other witnesses, to the effect that both animals were in the habit of visiting other places, such as the Cosmopolitan Hotel and Fabacher's restaurant, where food was to be obtained, which was natural enough, in view of the fact that they could, apparently, depend upon the bottling plant for but one meal a day, and found it necessary to breakfast and dine elsewhere, and may also account for their early visits to the barroom. Mr. Cortie further testifies that he never heard that the dog in question had bitten any one before it bit plaintiff, but he does not say, as he said of the mother, that it was "a good little thing, full of play," nor was any attempt made by defendant to show that it was gentle or amiable. Mr. Cortie accompanied the dog to a veterinary hospital after it had bitten plaintiff, and testifies that it died two days later, and, although the plain inference is that it died of hydrophobia, or was put to death because found suffering with that disease, plaintiff's testimony as to what Pelletier and the "fellow" at the hospital told him on that subject, and which inspired him to go at

once to the Charity Hospital and take the Pasteur treatment, was excluded on defendant's objection as hearsay. Concerning his position and authority, Mr. Cortie gives the following testimony:

"I was foreman of the mechanical equipment. Q. Was anybody above you on the premises? A. No, sir. Q. You had charge of the premises? A. I had charge of the mechanical equipment, part of it; yes, sir. Q. Was there anybody on the premises who could tell you what to do? A. No, sir. Q. Who did you report to, if anybody? A. I reported daily to the main office."

Mr. Schlieder, the president of the company, being asked how often he inspected the bottling department, replied: "Sometimes I don't go there for a long while; two or three months, at intervals"—to which he adds that he goes in, or looks in, more frequently, "in passing"; that Mr. Cortie had charge of that department, under his supervision; that Mr. Owen could have given him orders, also Mr. Boulet. Mr. Schlieder differs from the other witnesses called by defendant in that they speak of a multiplicity of dogs that frequented the brewery, while he was unable to remember that he had seen any. Mr. Owen's name is not elsewhere mentioned, and we are not informed whether he ever visited the bottling department, or whether the orders that he could give were those which related to the bottling of the beer, its shipment, or what not. Mr. Boulet was the secretary and treasurer (to whom we have already referred), who never went into the bottling works, though he had an office on the premises, and he testifies that he saw various dogs about the place, and was able to recall the dog here in question and the mother, but that he had paid no attention to any of them; that defendant never owned a dog, and that none were kept at the brewery with his knowledge and consent.

Plaintiff is a barber, whose shop is next door (on Bourbon street) to the barroom, known as the "Old Absinthe House," which stands on the corner of Bourbon and Bienville streets, and is next, on the Bienville street side, to defendant's bottling plant. Another barber was also working in the shop, and as he and plaintiff did not always arrive at the same moment in the morning it was the custom to leave the key of the shop in the barroom. On the morning of February 23, 1913, plaintiff, being the first to arrive, went into the barroom to get the key, and found there Jacynthe Ferrer, the bartender, Mr. Pelletier, defendant's assistant foreman, and the dog here in question, and he tells what then happened (not having entire command of the English language) as follows:

"I opened the door of the Old Absinthe House to get the key. \* \* \* and as soon as I opened the door \* \* \* the dog make a jump at me, as if to bite my legs, and as soon as I turn around to skiddoo him with my hands he bite me on the hand. \* \* \* Well he tried to bite me then when I rushed in, and I told him to skiddoo, and then he jumped up and bit me

on the hand. He got my pants first, but he didn't get the skin; just bit in the pants. \* \* \* I never played with the dog. Q. You never did play with this dog? A. No, sir; never played with him."

Jacynthe Ferrer testifies that the dog lived in the bottling department of defendant's brewery, and further as follows:

"Well, one morning, Mr. Serio came there [to the Old Absinthe House] between a quarter to 7 and 7 o'clock, and entered the bar, and as he entered the bar Mr. Pelletier was in there with a couple of dogs, and the dogs started for Mr. Serio, and he started to drive them off, and one of them jumped up and bit him on the hand. Q. Who did those dogs come in that place with? A. They used to come there with the assistant foreman of the American Brewing Company. Q. Did they come in there with him that morning? A. Yes, sir; and most every morning they used to come there."

Pelletier's account of the bite is about the same; he says:

"Well, like I said before, when I went down then the dog followed me and went behind the counter, and then he came out again, and Mr. Serio was coming in the place, and he grabbed him and bit him on the hand. Q. Did Mr. Serio do anything to the dog to make him bite him? A. No, sir; he did not. Q. Not a thing? A. Not a thing; no, sir."

Felix Ferrier, manager of the saloon, says, in his testimony, that he always considered the dog vicious; that he saw him snap at many persons, and had to take his walking stick (to him) when Pelletier would bring him in; that everybody seemed to fear him.

Joseph Warner, a manufacturing jeweler, with a place of business on Bourbon street, around the corner from the bottling works, testifies that he had occasion to pass those works every day, and several times a day; that every time he passed, "pretty much," the dog would run out at him, and on one occasion caught him "by the pants"; that he was in such dread of him that before he reached the place he would think of him and be very careful, because he considered him dangerous; that he became familiar with him by seeing him from the time he was a puppy in the entrance on the inside of the brewery, and judged that he was about a year and a half old when he bit plaintiff.

William Wagner, who has been working on Bourbon street, also around the corner from the bottling plant, testifies that he was in the habit of passing the plant between two and seven times a day; that the dog would occasionally run after and bark at him; and that he would go out into the street, cross to the opposite banquette, in order to avoid him, not caring to wait and find out whether he would bite.

Plaintiff continued at work until Sunday morning (following the preceding Friday, when he was bitten), and then upon the information furnished him by Pelletier and the veterinarian to the effect, we assume, that the dog was dead (though he was not allowed to say what had been told him), he went to the Charity Hospital, where he was subjected to the Pasteur treatment for the

prevention of hydrophobia, consisting of daily hypodermic injections, about the abdomen, during a period of 21 days, a treatment which is shown to have been exceedingly painful, and from the after effects of which upon his nervous system he was very slow in recovering. His pecuniary loss was perhaps less than \$100.

#### Opinion.

As we have stated, defendant "admits that the said dog was born and reared on the premises of your respondent, \* \* \* but \* \* \* denies that the said dog was either born or kept on said premises with the knowledge of your respondent or any of its agents who had authority to keep the said dog on its premises."

[1] It is hardly to have been expected that defendant's entire corporate authority would have been invoked, or even that a resolution of its board of directors would have been considered necessary to authorize the keeping of a dog in its bottling plant, whether to kill rats, or as a mascot, or source of amusement to the employes, but those vested with the corporate authority were bound to know that a dog so kept, with the knowledge and approval of the agent whom they had placed in charge of the plant, was a dangerous animal, which threatened injury to innocent people, and the fact that they chose to close their eyes to that condition is not a good defense to an action in damages by a person who without fault on his part was bitten by the dog. A person is responsible not only for the damage occasioned by his own act, but for that which is caused by the acts of those for whom he is answerable, and for the things which he has in his custody. C. C. 2317, 2321. In the matter of the liability of corporations for the acts of their agents, whether of omission or commission, which inflict injury upon others:

[3-5] Knowledge acquired by the agent in transacting the business of the corporation will be imputed to the corporation. *Antrim Lumber Co. v. Bolinger & Co.*, 121 La. 312, 46 South. 337; *Hall & Brown Co. v. Haley Furniture & M. Co.*, 174 Ala. 190, 56 South. 726. A corporation, like a natural person, is liable for the tort of its agent, when acting within the scope, or apparent scope, of the authority conferred on him. *Gann v. Great Southern Lumber Co.*, 131 La. 400, 59 South. 830. One who harbors a dangerous animal on his premises, or keeps there anything likely to do mischief, does so at his peril, and is answerable for all damages which result from its escape. *Vredenburg v. Behan*, 35 La. Ann. 639. The owner is bound to know the condition of his property. *Tucker v. Railroad Co.*, 42 La. Ann. 114, 7 South.

124. Negligent ignorance is equivalent to actual knowledge. *Lorenz v. City of New Orleans*, 114 La. 804, 805, 38 South. 566. In *Bentz v. Page*, 115 La. 560, 39 South. 599, being an action in damages resulting from the bite of a dog, inflicted while plaintiff was passing on a public thoroughfare, it was held, quoting from the syllabus:

"It was necessary for defendant to show that the animal had always been of a kind temper, had never attempted to bite any one, and had never given occasion to suspect that he would bite; and, failing to do so, the law presumes that the defendant was in fault in not confining the animal, which was a strange dog, to the premises."

Other decisions, to the effect that a corporation which permits a dog to remain upon its premises and be fed by its employes is liable as a harbinger, are cited in the note to *Holmes v. Murray* (Mo.) 17 L. R. A. (N. S.) 431, and include *Barrett v. Malden & Melrose R. Co.*, 3 Allen (Mass.) 101, *Chicago & Alton R. Co. v. Kuckkuck*, 197 Ill. 308, 64 N. E. 358, and *Keenan v. Gutta Percha & Rubber Mfg. Co.*, 46 Hun (N. Y.) 544, affirmed in 120 N. Y. 627, 24 N. E. 1096.

[2, 6] In considering the question of the damages to be allowed we leave out of view the claim for punitive damages, as we have recently held that such damages are not authorized in civil actions. See *Vincent v. Morgan & Co.* (lately decided) 74 South. 541. Included, however, in the actual damages that plaintiff is entitled to recover, and which, under C. C. 1934, No. 5, the court is authorized to assess, are not only those required to compensate the physical suffering to which he was subjected in the administration of the Pasteur treatment, but also those required to compensate the mental suffering resulting from the knowledge that he had been bitten by a mad dog, and that (as shown by the evidence) until after the expiration of 100 days he could not be sure that he was safe from hydrophobia; and there are likewise included such damages as will compensate his suffering from the protracted effect of the Pasteur treatment upon his nervous system. Taking those different factors into account, with his pecuniary loss and with the diminished purchasing power of money, we assess the damages at \$1,000.

It is therefore ordered that the judgment appealed from be set aside, and that there be judgment in favor of the plaintiff, John Serio, and against the defendant, the American Brewing Company, in the sum of \$1,000, with legal interest thereon from the date at which this judgment shall become final, and all costs.

SOMMERVILLE, J., concurs. O'NIELL, J., considers the amount of the judgment excessive, but otherwise concurs.

(141 La. 300)

No. 21695.

**ANDREWS v. ANDREWS.**

(Supreme Court of Louisiana. April 16, 1917.)

*(Syllabus by the Court.)***SEPARATION FROM BED AND BOARD.**

Affirming judgment of separation from bed and board between persons who, having married in this state, moved to another state, where husband committed acts complained of and wife returned to her former home and brought the suit.

Appeal from Third Judicial District Court, Parish of Bienville; William C. Barnette, Judge.

Suit by Mrs. Bessie L. Andrews against L. E. Andrews for separation from bed and board, and for divorce. Judgment of separation from bed and board, and defendant appeals. Affirmed.

Wimberly, Reeves & Dormon, of Shreveport, and S. O. McGarrity, of Leesville, for appellant. R. L. Williams, of Arcadia, for appellee.

MONROE, C. J. Defendant prosecutes this appeal from a judgment of separation from bed and board, but has put in no appearance in this court. The evidence in the record shows that he and plaintiff were married in this state, and subsequently moved to Oklahoma, where his conduct was such as to compel his wife to leave him and to render their living together insupportable. She accordingly returned to the home of her father, in the parish of Bienville, where she instituted this suit. The judge a quo appointed a curator ad hoc to represent defendant, who, however, appeared by counsel of his own selection, and, after a plea to the jurisdiction, filed an answer, and the case was tried upon the issues thus joined. We find no error in the judgment appealed from, and it is

Affirmed.

SOMMERVILLE, J., takes no part.

(141 La. 301)

No. 21097.

**PRIOR et al. v. BOARD OF SCHOOL DIRECTORS OF CLAIBORNE PARISH.**

(Supreme Court of Louisiana. April 16, 1917.)

*(Syllabus by the Court.)***SCHOOLS AND SCHOOL DISTRICTS §103(2) — SPECIAL ELECTION AND TAX—VALIDITY.**

A resolution adopted at a special meeting of a board of school directors, calling a special election for the property taxpayers of the school district to vote upon a proposition to levy a special school tax, was adopted under the following circumstances and conditions, viz.: Four of the ten members composing the board were not notified that the special meeting would be held. The other six members, constituting a quorum, were the only members present at the meeting. Four of them voted in favor of the resolution, calling the election, and the other two

voted against it. *Held*, the proceedings were invalid, and the special election held in pursuance thereof, and the tax levied under authority of the election, are null and void, notwithstanding one-fourth of the property taxpayers had petitioned the board of school directors to call the election, and the law required the board to call it on such a petition.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 114, 241.]

Appeal from Third Judicial District Court, Parish of Claiborne; William C. Barnette, Judge.

Suit by Wade K. Pryor and others against the Parish Board of School Directors of Claiborne Parish, to annul a special election and a special school tax. From a judgment rejecting their demand and decreeing the special election and school tax valid, plaintiffs appeal. Judgment annulled, and adjudged that special election and special tax are void.

McClendon & McClendon, of Homer, for appellants. T. T. Land, Dist. Atty., of Homer, for appellee.

O'NIELL, J. The plaintiffs, property taxpayers in the school district No. 17 of the parish of Claiborne, brought this suit to annul a special election, and a special school tax of 10 mills on the dollar levied in pursuance thereof for the term of five years. They prosecute this appeal from a judgment rejecting their demand and decreeing the special election and school tax valid.

Several grounds are urged for demanding that the election and school tax be decreed null; the most serious of which is that four of the ten members composing the parish board of school directors were not notified of the calling of the special meeting at which the election was called, and that of the six members who attended the meeting only four voted in favor of the resolution calling the election.

It appears that a special election had been held in the school district No. 17 in June, 1914, at which a majority in number and amount of the property tax payers voted to levy the special tax of 10 mills on the dollar for a period of five years. A suit was brought by certain property tax payers to annul that election on account of certain alleged irregularities in the proceedings. The members of the board of school directors residing in Homer, the parish seat, fearing that the suit would result in a decree of nullity of the election, decided, on Saturday, the 22d of August, 1914, to request the president of the board, who resided several miles out in the country, to call a special meeting of the board for the purpose of ordering another election. On Monday morning, the 24th of August, 1914, the secretary of the board received instructions from the president to notify the members of the board that a special meeting would be held in Homer on Tuesday, the 25th. The secretary notified

as many members as he could by telephone, and mailed post cards to others, advising them that a special meeting of the board would be held in Homer on the next day, for the purpose of calling a special election to be held on the 2d of October, 1914. One member was not notified at all, the secretary having depended upon a messenger to notify him verbally. Three other members, residing in remote parts of the parish, received their notices by mail the day after the election was held. The only train by which the notices could have reached them before the hour of the meeting had left the town of Homer when the secretary mailed the notices. The meeting was therefore held by six members, who constituted a quorum. Four of the members present voted in favor of the resolution calling the special election, and two voted against it.

The district court held that the fact that, of the ten members composing the parish board of school directors, two voted against the resolution and four were not allowed an opportunity to vote upon it at all, did not render the election null, because, under section 2 of Act No. 256 of 1910, the board of school directors was required to call the election when requested to do so by the petition of one-fourth of the property tax payers eligible to vote in the election. It is not denied by the plaintiffs in this suit that the petition to the board of school directors, requesting that body to call the election, was signed by one-fourth of the property tax payers eligible to vote in the election.

Section 2 of Act No. 256 of 1910 authorizes the parish board of school directors to call a special election for the purpose of submitting to the property tax payers a proposition to levy a special tax in aid of public schools, without any request from the property tax payers. And that section of the law further provides that the parish board of school directors shall be required to call an election for that purpose when requested to do so by the written petition of one-fourth of the property tax payers eligible to vote in the election. But we cannot agree with the learned district judge that, because the parish board of school directors was required, as a mandatory duty, to call the election, therefore the call for the election need not be regular or valid, or might be dispensed with altogether. An orderly administration of affairs requires that a special election for the purpose of levying a tax under the provisions of Act No. 256 of 1910 must be called by the governing authority of the district in which the election is to be held, whether it be called in response to a petition of the property tax payers or without such petition. An election held for that purpose without the authority of the governing body of the district in which the tax is to be levied is not a legal election.

The calling of the special meeting of the

board of school directors to be held within a time too short to permit all of the members to be notified was not done with any improper motive in this instance. The purpose in hurrying the proceedings was to hold the election at the earliest date possible, in order to have the special tax extended upon the assessment rolls before they would be closed. But we have to deal only with the deed, not the motive. It will not do to sanction proceedings whereby a minority of the members of an executive board controlled its affairs by voting at a special meeting of which the members who did not vote against the proceedings were not allowed an opportunity to vote at all.

Our conclusion being that the special election and the tax levied in pursuance thereof are null, for the reasons stated above, it is unnecessary to consider the other complaints made in the plaintiff's petition.

The judgment appealed from is annulled, and it is now ordered, adjudged, and decreed that the special election held in school district No. 17 of the parish of Claiborne on the 2d of October, 1914, and the special tax levied in pursuance thereof are null and void and of no effect. The defendant is to pay all costs of this suit.

(141 La. 305)

No. 22128.

PALMER CO., Inc., v. COTTON QUEEN OIL CO. (STATE, Intervener).

(Supreme Court of Louisiana. April 16, 1917.)

Appeal from First Judicial District Court, Parish of Caddo; R. D. Webb, Judge.

Action by the Palmer Company, Incorporated, against the Cotton Queen Oil Company, in which the State of Louisiana intervened. From an adverse judgment, plaintiff appeals. Judgment set aside, and judgment rendered for plaintiff.

Alexander & Wilkinson, of Shreveport, for appellant. J. G. Palmer and Clem V. Ratcliff, both of Shreveport, for appellee. A. V. Coco, Atty. Gen., and Harry Gamble, Asst. Atty. Gen., for the State. W. A. Mabry, of Shreveport, for Louisiana Oil Refining Co.

PROVOSTY, J. The property in dispute in this case is the alluvion which has formed in the bed of Red river opposite the property of plaintiff, fronting on said river and described as follows:

"All that part of the fractional N.  $\frac{1}{2}$  of section 13, township 13, range 11 W., in the parish of Red river, excepting N. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of said section 13 lying east of Red river."

Plaintiff claims title by right of accretion under article 509 of the Civil Code; whereas the state claims ownership by virtue of her sovereignty, which gives her title to the beds of navigable rivers. The defendant is lessee of the state, and claims under the lease.

The case has been submitted without argu-

ment, oral or written, with the statement that the issues involved are the same as in the case of *State v. Richardson*, 72 South. 984, No. 21880 of the docket of this court, recently decided, and with the understanding, as we gather, that the conclusion reached in that case is decisive of the present.

It is therefore ordered, adjudged, and decreed that there be judgment setting aside the judgment appealed from, dismissing the intervention of the state, and quieting the plaintiff in the possession of the said property, and particularly the alluvion in front thereof, and that an injunction issue restraining and prohibiting the defendant, the Cotton Queen Oil Company, from interfering with plaintiff's said possession, and that the defendant pay all costs.

SOMMERVILLE, J., takes no part.

(141 La. 306)

No. 22339.

STATE v. LEMOND.

(Supreme Court of Louisiana. April 16, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW § 670—TRIAL—EXAMINATION OF WITNESSES—OFFER TO IMPEACH.

An attorney representing a defendant in a criminal prosecution, having cross-examined a state's witness as fully as he deemed proper to lay a foundation for the impeachment of the testimony of the witness, has no right to demand that the trial judge decide whether a sufficient foundation or basis has been established for the impeachment, until an offer is made to impeach the testimony of the witness and an objection is made thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 757, 1593-1596.]

2. CRIMINAL LAW § 670—TRIAL—EXAMINATION OF WITNESSES—OFFER TO IMPEACH.

An exception taken to the ruling of the trial judge, in a criminal prosecution, denying the defendant's request that a state's witness be recalled for further cross-examination, to lay the foundation for the impeachment of the testimony already given by the witness, is without merit, if the defendant has made no attempt or offer to impeach the testimony of the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 757, 1593-1596.]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Alfred M. Barbe, Judge.

D. E. Lemond was convicted of obtaining or attempting to obtain money or property from another by the confidence game, and he appeals. Verdict and sentence affirmed.

Perrin & Perrin, of Jena, for appellant. A. V. Coco, Atty. Gen., T. Arthur Edwards, Dist. Atty., and J. H. Jackson, Asst. Dist. Atty., both of Lake Charles (Vernon A. Coco, of Marksville, of counsel), for the State.

O'NIELL, J. The defendant was convicted of the crime denounced by Act No. 43 of 1912, that of obtaining or attempting to obtain money or property from another by means of a false or bogus check or by a confidence game. On appeal, he relies upon a bill of exception reserved to a ruling of the trial judge, denying his request to have a witness who had testified on behalf of the state recalled for further cross-examination to lay the foundation to impeach her testimony.

[1, 2] The statement per curiam discloses that, after the witness had been cross-examined by the attorney for the defendant, the attorney requested the judge to say whether a basis had been laid to impeach her. The judge declined to decide the question unless and until an offer should be made to impeach her. After the district attorney announced that the state's case was closed, except for rebuttal, the defendant's attorney requested that the state's witness, whose testimony he desired to impeach, be recalled for further cross-examination to lay a foundation for the impeachment. The district attorney objected to the recalling of the witness, on the ground that the defendant's counsel had had ample opportunity to cross-examine her as far as he saw fit. It is recited in the statement per curiam that the defendant's attorney had cross-examined the witness at length; and, for all we know, the defendant's counsel had laid a sufficient foundation for the impeachment of her testimony. No reason is assigned by the learned counsel for the defendant for his failure to attempt to impeach the state's witness. He admits that he believed he had laid a sufficient foundation for the impeachment, when he requested the trial judge to rule on that question. The proper proceeding would have been to offer to impeach the state's witness, before demanding that the latter be recalled for further cross-examination. The defendant cannot complain that he was denied the right to impeach a state's witness whom he made no attempt or offer to impeach.

The verdict and sentence appealed from are affirmed.

⚡ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes



## MEMORANDUM DECISIONS

**ALEXANDER v. CHAMBERS et al. CHAMBERS et al. v. ALEXANDER.** (7 Div. 805, 805a.) (Supreme Court of Alabama. April 5, 1917.) Appeal from Clay County Court; E. J. Garrison, Judge. Hugh Walker, of Anniston, for appellant. Knox, Acker, Dixon & Stewart, of Talladega, for appellees.

**PER CURIAM.** Reversed and rendered on original appeal, and affirmed on cross-appeal, upon written agreement of the parties.

**BLACK v. BLACK.** (6 Div. 587.) (Supreme Court of Alabama. April 17, 1917.) Appeal from Probate Court, Jefferson County; J. P. Stiles, Judge. Burgin & Brown, of Birmingham, for appellant.

**PER CURIAM.** Appeal dismissed for want of prosecution.

**BRIDGEFORTH v. STATE.** (8 Div. 961.) (Supreme Court of Alabama. Dec. 21, 1916.) Certiorari to Court of Appeals. Osceola Kyle, of Decatur, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

**McCLELLAN, J.** Petition of Robert Bridgeforth, Jr., for certiorari to Court of Appeals to review and revise the judgment of the said court affirming the case of Bridgeforth v. State of Alabama, 74 South. 402. Writ denied.

**BURT v. STATE.** (8 Div. 994.) (Supreme Court of Alabama. Feb. 8, 1917.) Certiorari to Court of Appeals. W. H. Long, Jr., of Decatur, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

**GARDNER, J.** Petition of Son Burt for certiorari to the Court of Appeals to review and revise the judgment of that court in the case of Son Burt v. State, 72 South. 268. Writ denied.

**COPLON v. STATE.** (6 Div. 493.) (Supreme Court of Alabama. Feb. 15, 1917.) Certiorari to Court of Appeals. Beddow & Oberdorfer, of Birmingham, for appellant. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

**PER CURIAM.** Petition by Dave Coplon for certiorari to the Court of Appeals to review and revise the judgment of said court in the case of Dave Coplon v. State of Alabama, 73 South. 225. Writ denied.

**MAYFIELD, J.,** dissents.

**Ex parte DAVENPORT.** (6 Div. 423.) (Supreme Court of Alabama. Jan. 11, 1917.) Certiorari to Court of Appeals. Harsh, Harsh & Harsh, of Birmingham, for appellant. Stokely, Scrivner & Dominick and I. M. Engel, all of Birmingham, for appellee.

**PER CURIAM.** Petition of Hattie Davenport for certiorari to review and revise the judgment and decision of the Court of Appeals in the case of J. T. Camp Transfer Co. v. Hattie Davenport, 74 South. 158. Writ denied.

**EVANS BROS. CONST. CO. v. ADAMS.** (6 Div. 514.) (Supreme Court of Alabama. Feb. 8, 1917.) Appeal from Circuit Court, Jefferson County; F. O. Crow, Judge. Leader & Ewing, of Birmingham, for appellee.

**PER CURIAM.** Appeal dismissed by agreement.

**HENLEY v. RUCKER.** (6 Div. 352.) (Supreme Court of Alabama. April 17, 1917.) Appeal from Circuit Court, Walker County; J. J. Curtis, Judge. W. T. Murphree, of Gadsden, and Chas. R. Wiggins, of Jasper, for appellant. Bankhead & Bankhead, of Jasper, for appellee.

**PER CURIAM.** Appeal dismissed for want of prosecution.

**LOUISVILLE & N. R. CO. v. DICKSON et al.** (3 Div. 281.) (Supreme Court of Alabama. Feb. 8, 1917.) Certiorari to Court of Appeals. Powell & Hamilton of Greenville, for appellant. Leader & Ewing, of Birmingham, for appellees.

**PER CURIAM.** Petition on behalf of the Louisville & Nashville Railroad Company for certiorari to Court of Appeals to revise and review the judgment of said court in the case of L. & N. R. Co. v. R. S. Dickson and Ed McCurdy, 73 South. 750. Writ denied.

**McCRORY et al. v. DONALD.** (2 Div. 643.) (Supreme Court of Alabama. Feb. 5, 1917.) Appeal from Chancery Court, Choctaw County; Thomas H. Smith, Chancellor. Thomas F. Seale, of Livingston, for appellee.

**PER CURIAM.** Appeal dismissed.

**McLEOD et al. v. J. F. BALDWIN BUILDERS' SUPPLY CO.** (6 Div. 373.) (Supreme Court of Alabama. April 17, 1917.) Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

**PER CURIAM.** Appeal dismissed for want of prosecution.

**MACENA et al. v. STATE.** (6 Div. 325.) (Supreme Court of Alabama. April 5, 1917.) Appeal from Criminal Court, Jefferson County; William E. Fort, Judge. Silberman & Hoskins and Gibson & Davis, all of Birmingham, for appellants. W. L. Martin, Atty. Gen., and Harwell G. Davis, Asst. Atty. Gen., for the State.

**PER CURIAM.** Appeal abated as to Tona Malona on account of his death. Appeal dismissed as to Sam Macena, because a fugitive from justice.

**OVERTON v. STATE.** (8 Div. 982.) (Supreme Court of Alabama. April 5, 1917.) Appeal from Circuit Court, Madison County; B. M. Miller, Judge. Allen & Bell, of Birmingham, for appellant. W. L. Martin, Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

**PER CURIAM.** Appeal abated by death of appellant.

**PHILLIPS v. PRATT CONSOL. COAL CO.** (6 Div. 179.) (Supreme Court of Alabama. April 17, 1917.) Appeal from Circuit Court, Walker County; J. J. Curtis, Judge. F. A. Gamble, of Jasper, for appellant. Bankhead & Bankhead, of Jasper, for appellee.

**PER CURIAM.** Appeal dismissed for want of prosecution.

**PORTER et al. v. STATE.** (5 Div. 661.) (Supreme Court of Alabama. April 12, 1917.) Appeal from Circuit Court, Russell County; J. S. Williams, Judge. Glenn & De Graffenried, of Seale, for appellants. W. L. Martin,

Atty. Gen., and P. W. Turner, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed on certificate.

PRIM v. M. C. KISER CO. (1 Div. 955, 956.) (Supreme Court of Alabama. March 16, 1917.) Appeal from Circuit Court, Clarke County; Ben D. Turner, Judge. T. J. Bedsole, of Grove Hill, for appellant. William D. Dunn, of Grove Hill, Ervin & McAleer, of Mobile, and Pettus, Fuller & Lapsley, of Selma, for appellee.

PER CURIAM. Appeals dismissed by appellant.

SHORT et al. v. PRATT CONSOL. COAL CO. (6 Div. 426.) (Supreme Court of Alabama. April 17, 1917.) Appeal from Circuit Court, Jefferson County; E. C. Crow, Judge. Frank S. White & Sons, of Birmingham, for appellants. Lamkin & Watts, of Birmingham, and Bankhead & Bankhead, of Jasper, for appellee.

PER CURIAM. Dismissed by agreement.

SLOSS-SHEFFIELD STEEL & IRON CO. v. ROACH. (6 Div. 491.) (Supreme Court of Alabama. April 17, 1917.) Appeal from City Court of Bessemer; J. C. B. Gwin, Judge. Tillman, Bradley & Morrow and T. A. McFarland, all of Birmingham, for appellant. Ben G. Perry, of Bessemer, for appellee.

PER CURIAM. Appeal dismissed by appellant.

WEST v. CLARK. (6 Div. 451.) (Supreme Court of Alabama. April 17, 1917.) Appeal from Circuit Court, Jefferson County; C. B. Smith, Judge. John London, of Birmingham, for appellee.

PER CURIAM. Appeal dismissed for want of prosecution.

WESTERN UNION TELEGRAPH CO. v. LOUISVILLE & N. R. CO. (7 Div. 804.) (Supreme Court of Alabama. June 30, 1916. Rehearing Denied Feb. 15, 1917.) Appeal from City Court of Gadsden; John H. Disque, Judge. Albert T. Benedict and Francis R. Stark, both of New York City, Rushton, Williams & Crenshaw, of Montgomery, and Forney Johnston, of Birmingham, for appellant. Dortch, Martin & Allen, of Gadsden, for appellee.

PER CURIAM. Affirmed on authority of L. & N. R. Co. v. Western U. T. Co., 195 Ala. 124, 71 South. 118.

WESTERN UNION TELEGRAPH CO. v. LOUISVILLE & N. R. CO. (3 Div. 274.) (Supreme Court of Alabama. Feb. 15, 1917.) Appeal from City Court of Montgomery; Gaston Gunter, Judge. Rushton, Williams & Crenshaw, of Montgomery, Forney Johnston, of Birmingham, and Albert T. Benedict and Francis R. Stark, both of New York City, for appellant. Goodwyn & McIntyre and Jones, Thomas & Field, all of Montgomery, for appellee.

PER CURIAM. Affirmed upon authority of L. & N. R. Co. v. W. U. T. Co., 195 Ala. 124, 71 South. 118.

WESTERN UNION TELEGRAPH CO. v. LOUISVILLE & N. R. CO. et al. (8 Div. 976.) (Supreme Court of Alabama. Feb. 15, 1917.) Appeal from Circuit Court, Limestone County; R. C. Brickell, Judge. Rushton, Williams & Crenshaw, of Montgomery, and Forney Johnston, of Birmingham, for appellant. W.

T. Sanders, of Athens, and Jones, Thomas & Field, of Montgomery, for appellee.

PER CURIAM. Affirmed on authority of L. & N. R. Co. v. W. U. T. Co., 195 Ala. 124, 71 South. 118.

WESTERN UNION TELEGRAPH CO. v. ROYAL. (3 Div. 282.) (Supreme Court of Alabama. Feb. 8, 1917.) Certiorari to Court of Appeals. Albert T. Benedict, of New York City, and Rushton, Williams & Crenshaw, of Montgomery, for appellant. Hill, Hill, Whiting & Stern, of Montgomery, for appellee.

GARDNER, J. Petition on behalf of the Western Union Telegraph Company for certiorari to the Court of Appeals, to review and revise the judgment of that court in the case of W. U. Tel. Co. v. J. O. Royal, 74 South. 94. Writ denied.

W. G. PATTERSON CIGAR CO. v. R. D. BURNETT CIGAR CO. (6 Div. 485.) (Supreme Court of Alabama. April 5, 1917.) Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor. Vassar L. Allen and Stallings & Judge, all of Birmingham, for appellant. A. G. & E. D. Smith, of Birmingham, for appellee.

PER CURIAM. Dismissed on motion of appellee for want of prosecution.

WOODWARD IRON CO. v. HART. (6 Div. 454.) (Supreme Court of Alabama. April 17, 1917.) Appeal from Circuit Court, Jefferson County; C. B. Smith, Judge. Whitaker & Nesbitt, of Birmingham, for appellant. W. A. Denson, of Canton, for appellee.

PER CURIAM. Appeal dismissed for want of prosecution.

BATES v. STATE. (6 Div. 241.) (Court of Appeals of Alabama. March 23, 1917.) Appeal from Criminal Court, Jefferson County; H. P. Heflin, Judge. Mattie Bates was convicted of manslaughter, and she appeals. Affirmed. W. L. Martin, Atty. Gen., for the State.

BROWN, P. J. The defendant was indicted for murder, and was convicted of manslaughter. The indictment follows the form prescribed by the statute, and the proceedings of the court shown by the record appear to be regular. Further than this, nothing is presented for review, and the judgment will be affirmed. Affirmed.

BERRY v. FAIRBANKS CO. (2 Div. 165.) (Court of Appeals of Alabama. Feb. 6, 1917.) Appeal from City Court of Selma; J. B. Evans, Judge. Robert A. Mangum, of Selma, for appellant. W. K. Campbell, of Selma, for appellee.

PER CURIAM. Appeal dismissed on motion of appellant.

BRANNON v. STATE. (6 Div. 154.) (Court of Appeals of Alabama. March 23, 1917.) Appeal from Criminal Court, Jefferson County; Wm. E. Fort, Judge. John P. Abbott, of Birmingham, for appellant. W. L. Martin, Atty. Gen., for the State.

BROWN, P. J. We have examined the record, and it appears therefrom that the proceedings in the trial court were regular and free from error. Affirmed.

CHRISTOPHER v. STATE. (7 Div. 438.) (Court of Appeals of Alabama. Feb. 10, 1917.) Appeal from Circuit Court, Etowah County;

J. E. Blackwood, Judge. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed on motion of Attorney General.

ESHMAN v. STATE. (6 Div. 166.) (Court of Appeals of Alabama. March 23, 1917.) Appeal from Criminal Court, Jefferson County; William E. Fort, Judge. John P. Abbott, of Birmingham, for appellant. W. L. Martin, Atty. Gen., for the State.

BROWN, P. J. The defendant was convicted of gaming, and appeals, without a bill of exceptions. We find nothing in the record that justifies a reversal of the judgment, or warrants discussion. Affirmed.

FORD v. STATE. (7 Div. 422.) (Court of Appeals of Alabama. Feb. 10, 1917.) Appeal from Circuit Court, Cleburne County; Hugh D. Merrill, Judge. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed on motion of Attorney General.

FRANKLIN v. STATE. (6 Div. 232.) (Court of Appeals of Alabama. March 23, 1917.) Appeal from Criminal Court, Jefferson County; Wm. E. Fort, Judge. Frank Andress and E. G. Hewitt, both of Birmingham, for appellant. W. L. Martin, Atty. Gen., for the State.

BROWN, P. J. We have examined the record in this case, and find nothing in the proceedings of the trial court of which the appellant can complain, or that warrants discussion. Affirmed.

McCOMBS v. STATE. (6 Div. 219.) (Court of Appeals of Alabama. March 23, 1917.) Appeal from Criminal Court, Jefferson County; Wm. E. Fort, Judge. Dan A. Greene, of Birmingham, for appellant. W. L. Martin, Atty. Gen., for the State.

BROWN, P. J. On examination of the record in this case we find nothing therein to cause a reversal of the judgment of conviction, or that warrants discussion. Affirmed.

McGRADY v. STATE. (6 Div. 97.) (Court of Appeals of Alabama. March 23, 1917.) Appeal from Criminal Court, Jefferson County; H. P. Heflin, Judge. McQueen & Ellis, of Birmingham, for appellant. W. L. Martin, Atty. Gen., for the State.

BROWN, P. J. The defendant was convicted of an assault with a weapon, and appeals, without reserving a bill of exceptions. We have examined the record, and find it free from error. Affirmed.

MALONE v. STATE. (8 Div. 451.) (Court of Appeals of Alabama. Feb. 6, 1917.) Appeal from Circuit Court, Colbert County; C. P. Almon, Judge. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed.

MITCHELL v. McMAHON. (1 Div. 250.) (Court of Appeals of Alabama. April 3, 1917.) Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge. John E. Mitchell, of Mobile, pro se. W. O. McMahon, of Mobile, pro se.

PER CURIAM. Appeal dismissed by appellant.

PARSONS v. STATE. (6 Div. 117.) (Court of Appeals of Alabama. March 23, 1917.) Appeal from City Court of Bessemer, J. C. B. Gwin, Judge. Lee Cowart, of Birmingham, for appellant. W. L. Martin, Atty. Gen., for the State.

BROWN, J. The record has been carefully examined, and no error appears. Affirmed.

ROSE v. STATE. (4 Div. 455.) (Court of Appeals of Alabama. Feb. 10, 1917.) Appeal from Circuit Court, Covington County; A. B. Foster, Judge. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed on motion of Attorney General.

SOUTHERN RY. CO. v. FAULK BROS. (2 Div. 149.) (Court of Appeals of Alabama. Feb. 8, 1917.) Appeal from City Court of Selma; J. B. Evans, Judge. Pettus, Fuller & Lapsley, of Selma, for appellant. S. F. Hobbs and Craig & Craig, all of Selma, for appellee.

PER CURIAM. Appeal dismissed for want of prosecution.

TURNER v. STATE. (6 Div. 104.) (Court of Appeals of Alabama. March 23, 1917.) Appeal from Criminal Court, Jefferson County; Wm. E. Fort, Judge. Gibson & Davis, of Birmingham, for appellant. W. L. Martin, Atty. Gen., for the State.

BROWN, P. J. The defendant was convicted of violating the prohibition law, and appeals on the record, without a bill of exceptions. The record and proceedings of the trial appearing in all things regular, the judgment is affirmed. Affirmed.

WAITS v. STATE. (6 Div. 223.) (Court of Appeals of Alabama. March 23, 1917.) Appeal from Criminal Court, Jefferson County; Wm. E. Fort, Judge. W. L. Martin, Atty. Gen., for the State.

BROWN, P. J. After a careful examination of the record, we find nothing of which the defendant can complain, or that warrants discussion. Affirmed.

WILSON v. BRIGDEN. (2 Div. 169.) (Court of Appeals of Alabama. Feb. 10, 1917.) Appeal from Law and Equity Court, Hale County; C. B. Waller, Judge. Suit between Sallie Wilson and George Brigden. From a judgment for Brigden, Wilson appeals, and Brigden moves to dismiss. Appeal dismissed. Lee M. Otts, of Greensboro, for appellant. R. B. Evans, of Greensboro, for appellee.

PER CURIAM. Appeal dismissed on motion of appellee.









